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OPINION OF THE SUPREME COURT OF CALIFORNIA (AUGUST 2, 2018)

IN THE SUPREME COURT OF CALIFORNIA

CATHERINE A. BOLING ET AL.,

Petitioners,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,

Respondent,

CITY OF SAN DIEGO ET AL.,

Real Parties in Interest.

S242034

Ct. App. 4/1 D069626

PERB Dec. No. 2464-M

CITY OF SAN DIEGO ET AL.,

Petitioners,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,

Respondent,

SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION ET AL.,

Real Parties in Interest.

Ct. App. 4/1 D069630

PERB Dec. No. 2464-M

Before: CORRIGAN, Judge.,
CANTIL-SAKAUYE, Chief Justice.,
CHIN, Judge., LIU, Judge., CUÉLLAR, Judge.,
KRUGER, Judge., MILLER, Judge*.

This case arises from unfair practice claims filed by unions after San Diego's mayor sponsored a citizens' initiative to eliminate pensions for new municipal employees and rebuffed union demands to meet and confer over the measure. The Court of Appeal annulled a finding by respondent, the Public Employment Relations Board (PERB), that the failure to meet and confer constituted an unfair labor practice. We granted review to settle two questions: (1) When a final decision by PERB under the Meyers-Milias-Brown Act (the MMBA; Gov. Code, § 3500 et seq.)[1] is appealed, what standards of review apply to PERB's legal interpretations and findings of fact?; (2) When a public agency itself does not propose a policy change affecting the terms and conditions of employment, but its

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* Associate Justice of the Court of Appeal, First Appellate District, Division Two, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

1 Further undesignated statutory references are to the Government Code.

designated bargaining agent lends official support to a citizens' initiative to create such a change, is the agency obligated to meet and confer with employee representatives?

These questions are resolved by settled law and the relevant statutory language. First, we have long held that PERB's legal findings are entitled to deferential review. They will not be set aside unless clearly erroneous, though the courts as always retain ultimate authority over questions of statutory interpretation. The MMBA specifies that PERB's factual findings are "conclusive" "if supported by substantial evidence." (§ 3509.5, subd. (b).) Second, the duty to meet and confer is a central feature of the MMBA. Governing bodies "or other representatives as may be properly designated" are required to engage with unions on matters within the scope of representation "prior to arriving at a determination of policy or course of action." (§ 3505.) This broad formulation encompasses more than formal actions taken by the governing body itself. Under the circumstances here, the MMBA applies to the mayor's official pursuit of pension reform as a matter of policy.[2] The Court of Appeal erred, first by reviewing PERB's interpretation of the governing statutes de novo, and second by taking an unduly constricted view of the duty to meet and confer.

I. BACKGROUND

In November 2010, two San Diego city officials proposed public employee pension reforms. First, Councilmember Carl DeMaio recommended that

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[2] We are not called upon to decide, and express no opinion on, the merits of pension reform or any particular pension reform policy.

defined benefit pensions be replaced with 401(k)-style plans for all newly hired city employees. Then, Mayor Jerry Sanders declared that he would develop a citizens' initiative to eliminate traditional pensions for new hires, except in the police and fire departments, and replace them with a 401(k)-style plan. San Diego's charter establishes a "strong mayor" form of government, under which Sanders acted as the city's chief executive officer. His responsibilities included recommending measures and ordinances to the city council, conducting collective bargaining with city employee unions, and complying with the MMBA's meet-and-confer requirements.

As relevant here, proposals to amend a city's charter can be submitted to voters in two ways. First, a charter amendment can be proposed by the city's governing body on its own motion. (Elec. Code, § 9255, former subd. (a)(2).) Second, an amendment can be proposed in an initiative petition signed by 15 percent of the city's registered voters or, for amendments to a combined city and county charter, by 10 percent of registered city and county voters. (Elec. Code, § 9255, former subd. (a)(3)-(4).)

In 2006 and 2008, Sanders had pursued two ballot measures affecting employee pensions. These measures were intended to be presented to voters as the city's proposals. (*See* Elec. Code, § 9255, former subd. (a)(2).) In the course of developing them, Sanders met and conferred with union representatives, as required by *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 601. The 2006 proposal was approved by the voters. In 2008, the proposal never went to the voters because Sanders and the unions reached an agreement. In 2010, how-

ever, Sanders chose to pursue further pension reform through a citizens' initiative instead of a measure proposed by the city. He reached this decision after consulting with staff and concluding that the city council was unlikely to put his proposal on the ballot. He was also concerned that compromises might result from the meet-and-confer process. In a local magazine interview, he explained that "when you go out and signature gather . . . it costs a tremendous amount of money, it takes a tremendous amount of time and effort. . . . But you do that so that you get the ballot initiative on that you actually want. [A]nd that's what we did. Otherwise, we'd have gone through the meet and confer and you don't know what's going to go on at that point."

Sanders held a press conference at city hall to announce his plans. The event was attended by City Attorney Jan Goldsmith, City Councilmember Kevin Faulconer, and City Chief Operating Officer Jay Goldstone. A statement informed the public that "San Diego voters will soon be seeing signature-gatherers for a ballot measure that would end guaranteed pensions for new [c]ity employees." A photograph showed Sanders making the announcement in front of the city seal. The mayor's office issued a news release that explained the decision and bore his title and the city seal.[3] Faulconer disseminated the press release by

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[3] The release stated in part: "As part of his aggressive agenda to streamline city operations, increase accountability and reduce pension costs, Mayor Jerry Sanders today outlined his strategy for eliminating the city's $73 million structural deficit by the time he leaves office in 2012.

"The mayor also announced he will place an initiative on the ballot that would eliminate defined benefit pensions for new

hires, instead offering them a 401(K)-style, defined contribution plan similar to those in the private sector.

"The bold move is part of a major re-thinking of city government Sanders said must occur if San Diego is to provide citizens adequate services, end its structural deficit and be financially sound for future generations.

"'Eliminating traditional pensions is a radical idea in municipal government, but we must acknowledge that we cannot sustain the current defined-benefit system, which was designed in another era for completely different circumstances,' Sanders said. 'Public employees are now paid salaries comparable to those in the private sector, and there's simply no reason they should enjoy a far richer retirement benefit than everyone else.'

"Sanders and Councilmember Kevin Faulconer will craft the ballot initiative language and lead the signature-gathering effort to place the initiative on the ballot.

"'This move is in the best interest of both the public and our employees. An unaffordable pension system is not a benefit to anyone,' Faulconer said. 'A 401(K) system makes sense for employers everywhere, and city government should be no different.' [¶] . . . [¶]

"Items that require meet-and-confer, such as reducing the city's retiree health care liability, are currently in negotiations and on track to have a deal by April, in time to implement changes in the next budget. [¶] . . . [¶]

"[']Over the next few months, we'll dedicate ourselves to pursuing any and all ideas in order to permanently solve San Diego's structural budget deficit by the time I leave office,' Sanders said. 'I've never stopped moving toward that goal, and when obstacles rise in my path, I'll seek a way to go around, over or through them.'

"Since taking office in 2005, Mayor Sanders has taken aggressive action to reform city government. He instituted a top-down restructuring of every city department, eliminated more than 1,400 positions, implemented compensation reductions for city employees and created a less costly pension system. To date,

e-mail, stating that he and Sanders "would craft a groundbreaking [pension] reform ballot measure and lead the signature-gathering effort to place the measure before voters." Sanders sent a similar e-mail declaring that he would work with Faulconer to "craft language and gather signatures" for a ballot initiative to reform public pensions.

Subsequently, Sanders developed and publicized his pension reform proposal. In January 2011, allies of the mayor formed a campaign committee to raise money for the proposed initiative. The mayor's chief of staff monitored the committee's activities, keeping track of its fundraising and expenditures.

In his January 2011 state of the city address, Sanders vowed to "complete our financial reforms and eliminate our structural budget deficit." He said he was "proposing a bold step" of "creating a 401(k)-style plan for future employees . . . [to] contain pension costs and restore sanity to a situation confronting every big city." He declared that he, along with Faulconer and the city attorney, "will soon bring to voters an initiative to enact a 401(k)-style plan. [¶] We are acting in the public interest, but as private citizens. And we welcome to our effort anyone who shares our goals." On the same day, the mayor's office issued another press release publicizing his vow "to push forward his ballot initiative" for pension reform. The mayor and his staff continued their publicity efforts in the following weeks. The campaign committee hired an attorney and retained the consulting firm that was serving as the city's actuary for its ex-

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Sanders' reform measures have produced a taxpayer savings of more than $180 million a year."

isting pension plan. The firm used its access to the pension system database to provide a fiscal analysis of the impacts of 401(k) plans for new employees.

The pension reform plan announced by DeMaio the previous November differed in some respects from the Sanders proposal. DeMaio's plan did not exempt police and firefighters, and it included a cap on pensionable pay. Two local organizations, the Lincoln Club and the San Diego County Taxpayers Association (Taxpayers Association), supported DeMaio's plan because they considered it stronger than the mayor's. After the state of the city address, members of the business and development community told Sanders that competing measures would confuse the voters, and there would be insufficient funding for two citizens' initiatives. Shortly after a March 2011 press conference at which Sanders presented his latest proposal, some of these individuals told him they were backing DeMaio's plan because it had enough funding to appear on the ballot. They said Sanders could either join them or proceed on his own. A series of meetings between supporters of the competing proposals followed. Sanders, his chief of staff, and Goldstone, the city's chief operating officer, participated in the negotiations. Ultimately, the two sides reached an accord that melded elements of both plans. Newly hired police officers would continue to have a defined benefit pension plan, but newly hired firefighters would receive a 401(k)-style plan like other new employees. A freeze on pensionable pay would be subject to the meet-and-confer process and could be overridden by a two-thirds majority of the city council, but there would be no payroll cap. Sanders called the negotiations "difficult" and testified that he did not like every part of the

new proposal, but supported it because it was "important for the City in the long run." Taxpayers Association hired a law firm to draft the initiative measure, using the DeMaio proposal as a starting point. Goldstone and the mayor's chief of staff reviewed drafts and provided comments. City Attorney Goldsmith also reviewed and weighed in on the proposal. After relatively few revisions, the resulting measure was titled the "Citizens' Pension Reform Initiative" (the Initiative).

In April 2011, a notice of intent to circulate the Initiative petition was filed. The proponents were petitioners Catherine A. Boling, T.J. Zane, and Stephen Williams. Zane and Williams were leaders of the Lincoln Club. Boling was treasurer of the San Diegans for Pension Reform. The next day, Sanders, DeMaio, Goldsmith, Faulconer, Boling, and Zane held a press conference to announce the filing. Sanders supported the signature-gathering campaign. He touted its importance in interviews, in media statements, and at speaking appearances. The Initiative appeared in "bullet points" prepared for the mayor's engagements with various groups. He approved a "message from Mayor Jerry Sanders" for circulation to the San Diego Regional Chamber of Commerce, soliciting their assistance in gathering signatures. Members of his staff provided services in support of the Initiative, such as responding to media requests.

The committee formed to promote the original Sanders proposal contributed $89,000 and other nonmonetary support to the Initiative effort. The proponents gathered sufficient signatures, and the registrar of voters certified the measure in November 2011.

The city council then passed a resolution of intent to place the Initiative on the June 2012 election ballot.

Meanwhile, in July 2011 the San Diego Municipal Employees Association (Union) wrote to Sanders, claiming the city had an obligation under the MMBA to meet and confer over the Initiative. When Sanders did not respond, the Union wrote a second letter demanding that the city satisfy its meet-and-confer obligations. City Attorney Goldsmith responded that state election law required the city council to place the Initiative on the ballot without modification, so long as the proponents met the procedural requirements for a citizens' initiative. Goldsmith explained that, "[a]ssuming the proponents . . . obtain the requisite number of signatures on their petition and meet all other legal requirements, there will be no determination of policy or course of action by the City Council, within the meaning of the MMBA, triggering a duty to meet and confer in the act of placing the citizen initiative on the ballot."

The Union responded that the city was required to meet and confer because Sanders was acting in his capacity as mayor to promote the Initiative, and thus "has clearly made a determination of policy for this City related to mandatory subjects of bargaining. . . . " The Union claimed Sanders was using the pretense of a "'citizens' initiative'" as a deliberate tactic to "dodge the City's obligations under the MMBA." Goldsmith's office replied that the city had no meet-and-confer obligations "at this point in the process" because "there is no legal basis upon which the City Council can modify the [Initiative], if it qualifies for the ballot." Instead, the council had to place the Initiative on the ballot if it met the Elections Code requirements.

The city accordingly declined to meet and confer. Subsequent demands by the Union and other employee groups were rejected for similar reasons.

The Union filed an unfair practice charge in January 2012 based on the city's refusal to meet and confer, calling the Initiative "a sham device which City's 'Strong Mayor' has used for the express purpose of avoiding City's MMBA obligations." Other unions filed charges as well. The city council voted to place the Initiative on the June 2012 ballot. In February 2012, PERB issued a complaint against the city, alleging that its failure to meet and confer violated the MMBA and constituted an unfair practice. PERB consolidated the various unfair practice claims and appointed an administrative law judge (ALJ) to hold a hearing. It also filed a superior court action to enjoin presentation of the Initiative on the June 2012 ballot.

The trial court declined to issue a preliminary injunction. When the ALJ scheduled a hearing in April 2012, the city sought a stay of the administrative proceedings. The trial court granted the request, and the Union pursued writ relief. In granting relief, the Court of Appeal acknowledged that, "[a]s the expert administrative agency established by the Legislature to administer collective bargaining for covered governmental employees, PERB has exclusive initial jurisdiction over conduct that arguably violates the MMBA." (*San Diego Municipal Employees Assn. v. Superior Court* (2012) 206 Cal.App.4th 1447, 1458, italics added.) The court observed that, had the city itself had put the Initiative on the ballot without meeting and conferring with employee unions, its action would have violated the MMBA. The court noted that

the Union had alleged, with supporting evidence, that the city had avoided its meet-and-confer obligations by using straw men to place the Initiative on the ballot. This activity arguably violated public employment labor law. (*Id.* at p. 1460.) Accordingly, the court vacated the stay of the administrative proceedings. (*Id.* at p. 1466.)

The Initiative appeared on the June 2012 ballot, with arguments in favor by "Mayor Jerry Sanders" and councilmembers Faulconer and DeMaio. The voters approved it. Sanders spoke at an election night celebration, praising the measure as the latest in a series of fiscal reforms, including his pension reform efforts in 2006 and 2008.

In July 2012 the ALJ held a hearing. The ALJ's proposed decision found that Sanders had chosen to pursue a citizens' initiative measure because he doubted the city council's support and wanted to avoid concessions to the unions. The decision observed that Sanders was a "strong mayor" with collective bargaining responsibilities. It concluded he acted "under the color of his elected office" to pursue the initiative campaign, with support from two city councilmembers and the city attorney. Because this conduct amounted to a policy determination on a negotiable matter, Sanders had a duty to meet and confer with the unions. Furthermore, under common law agency principles, the city had the same meet-and-confer obligation because the mayor was the city's "statutorily defined agent" and the city had had ratified his policy decision.

PERB largely affirmed the ALJ's decision, agreeing that the city was charged with the mayor's conduct under principles of statutory and common law agency. PERB determined that the city had violated the MMBA

by deciding, through its agent Sanders, to place the Initiative on the ballot and by acquiescing in Sanders' rejection of meet-and-confer demands. It agreed with the ALJ's finding that the unions "did not demand to bargain over [the Initiative] per se but over the Mayor's policy decision to alter employee pension benefits, including the contents of his proposed ballot measure to reform employee pensions. [Citation.] . . . [E]ven accepting the City's characterization of [the Initiative] as a purely citizens' initiative, the Unions' demands also contemplated the possibility of bargaining over an alternative or competing measure on the subject. [Citation.]"[4] PERB concluded that "[i]n any event, the City's steadfast refusal to respond to the Unions' requests consummated the Mayor's policy decision to reform pension benefits and thereby alter terms and conditions of employment."

PERB modified the ALJ's proposed remedy to vacate the results of the election. Invoking its "make-whole" and "restoration" powers for remedying MMBA violations, PERB directed the city to pay its employees "for all lost compensation, including but not limited to the value of lost pension benefits . . . offset by the value of new benefits required from the City under [the Initiative]." These payments were to continue for as long as the Initiative was in effect, or until the parties mutually agreed otherwise.

The city challenged PERB's decision by writ petition, as authorized by section 3509.5. It named as

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[4] PERB noted that in *Howard Jarvis Taxpayers Assn. v. City of San Diego* (2004) 120 Cal.App.4th 374, the city council had responded to a citizens' initiative proposal by placing a competing measure on the ballot.

additional real parties in interest the Initiative's proponents, who filed briefs and a writ petition of their own. The petitions were consolidated. The Court of Appeal ruled that the city was not required to meet and confer before placing the Initiative on the ballot. First, relying on *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1 (*Yamaha*), the court stated that while PERB's interpretation of the law governing the duty to bargain "will generally be followed unless it is clearly erroneous," "the judiciary accords no deference to agency determinations on legal questions falling outside the parameters of the agency's peculiar expertise." (*Boling v. Public Employment Relations Bd.* (2017) 10 Cal.App.5th 853, 868, 870.) It then held that a city's decision to place a citizens' initiative measure on the ballot is purely ministerial and does not trigger the obligation to meet and confer. (*Id.* at pp. 872-873, 875.)

The court reasoned that under sections 3504.5, subdivision (a) and 3505, the MMBA's meet-and-confer requirements apply only to proposals by the governing body of an agency. Because citizen-sponsored initiatives are not from an agency's governing body, they are not subject to bargaining requirements. (*Boling v. Public Employment Relations Bd.*, *supra*, 10 Cal.App.5th at pp. 875, 882, fn. 37.) This statutory interpretation appears to undergird, in part, the court's rejection of PERB's findings that the mayor acted as the city's agent when he developed and promoted the Initiative. (*Id.* at pp. 883, 891, 893.) We need not reach the agency issues to resolve this appeal.

II. DISCUSSION

A. Standard of Review

We addressed the standard of review for an agency's legal determinations in *American Coatings Assn. v. South Coast Air Quality Management Dist.* (2012) 54 Cal.4th 446. "When an agency is not exercising a discretionary rulemaking power but merely construing a controlling statute, '"[t]he appropriate mode of review . . . is one in which the judiciary, although taking ultimate responsibility for the construction of the statute, accords great weight and respect to the administrative construction. [Citation.]" [Citations.]' (*Yamaha*, *supra*, 19 Cal.4th at p. 12.) How much weight to accord an agency's construction is 'situational,' and greater weight may be appropriate when an agency has a '"comparative interpretive advantage over the courts,"' as when '"the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion."' (*Ibid.*, italics omitted.) Moreover, a court may find that 'the Legislature has *delegated* the task of interpreting or elaborating on a statute to an administrative agency,' for example, when the Legislature 'employs open-ended statutory language that an agency is authorized to apply or "when an issue of interpretation is heavily freighted with policy choices which the agency is empowered to make."' [Citations.] In other words, the delegation of legislative authority to an administrative agency sometimes 'includes the power to elaborate the meaning of key statutory terms.' [Citation.] Nevertheless, the proper interpretation of a statute is ultimately the court's responsibility." (*American Coatings*, at pp. 461-462.)

PERB is the agency empowered by the Legislature to adjudicate unfair labor practice claims under the MMBA and six other public employment relations statutes. (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1077, 1090.) It is settled that "[c]ourts generally defer to PERB's construction of labor law provisions within its jurisdiction. (*See San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 856 [EERA]; *Paulsen v. Local No. 856 of Internat. Brotherhood of Teamsters* (2011) 193 Cal.App.4th 823, 830 [MMBA].) ' . . . PERB is "one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." [Citation.]' (*Banning Teachers Assn. v. Public Employment Relations Bd.* (1988) 44 Cal.3d 799, 804.) We follow PERB's interpretation unless it is clearly erroneous. (*Ibid.*)" (*County of Los Angeles v. Los Angeles County Employee Relations Com.* (2013) 56 Cal.4th 905, 922.) As noted in *Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 586, interpretation of a public employee labor relations statute "'falls squarely within PERB's legislatively designated field of expertise,'" dealing with public agency labor relations. Even so, courts retain final authority to "'state the true meaning of the statute.'" (*Id.* at p. 587.) A hybrid approach to review in this narrow area maintains the court's ultimate interpretive authority while acknowledging the agency's administrative expertise.

The standard of review for PERB's factual findings is established by statute. "The findings of the board

with respect to questions of fact, including ultimate facts, if supported by substantial evidence on the record considered as a whole, shall be conclusive."[5] (§ 3509.5, subd. (b).) As we have long recognized, the Legislature is free to specify that certain administrative determinations are subject to substantial evidence review instead of independent review. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 824, fn. 17.) Accordingly, in reviewing PERB's findings "'we do not reweigh the evidence. If there is a plausible basis for the Board's factual decisions, we are not concerned that contrary findings may seem to us equally reasonable, or even more so. [Citations.] We will uphold the Board's decision if it is supported by substantial evidence on the whole record.'" (*Regents of University of California v. Public Employment Relations Bd.* (1986) 41 Cal.3d 601, 617 [applying § 3564, subd. (c), an identical provision of the Higher Education Employer-Employee Relations Act]; *see City of Palo Alto v. Public Employment Relations Bd.* (2016) 5 Cal.App.5th 1271, 1288.)

Here, the Court of Appeal decided that PERB's determinations were subject to independent review because the facts were undisputed. (*Boling v. Public Employment Relations Bd.*, *supra*, 10 Cal.App.5th at pp. 879-881.) It is true that the application of law to undisputed facts ordinarily presents a legal question that is reviewed de novo. (*See Haworth v. Superior Court*, *supra*, 50 Cal.4th at p. 385; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 378, pp. 436-437;

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[5] "[A] determination is one of ultimate fact if it can be reached by logical reasoning from the evidence, but one of law if it can be reached only by the application of legal principles." (*Board of Education v. Jack M.* (1977) 19 Cal.3d 691, 698, fn. 3; *see Haworth v. Superior Court* (2010) 50 Cal.4th 372, 384-385.)

Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2016) ¶ 8:114, p. 8-81.) However, when the matter falls within PERB's area of expertise, the deferential standard outlined above applies to its legal determinations even if based on undisputed facts. Moreover, it is settled that when conflicting inferences may be drawn from undisputed facts, the reviewing court must accept the inference drawn by the trier of fact so long as it is reasonable. (*Hamilton v. Pacific Elec. Ry. Co.* (1939) 12 Cal.2d 598, 602-603; *Mah See v. North American Acc. Ins. Co.* (1923) 190 Cal. 421, 426; *see* 9 Witkin, Cal. Procedure, *supra*, Appeal § 376, pp. 434-435; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶ 8:60, p. 8-29.)

B. Scope of the Duty to Meet and Confer

On these facts, Mayor Sanders had an obligation to meet and confer with the unions.

"The centerpiece of the MMBA is section 3505, which requires the governing body of a local public agency, or its designated representative, to 'meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of . . . recognized employee organizations.' As we recounted in . . . *Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 335, the MMBA represented an evolution from the earlier George Brown Act, which 'provided only that management representatives should listen to and discuss the demands of the unions.' In its present form, the MMBA mandates that the governing body undertake negotiations with employee representatives not merely to listen to their grievances, but also 'with the objective

of reaching "agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year.'" (*Id.* at p. 336, quoting § 3505, italics omitted.)"[6] (*Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 780-781, italics omitted.)

"The duty to meet and confer in good faith has been construed as a duty to bargain with the objective of reaching binding agreements between agencies and employee organizations. . . . The duty to bargain requires the public agency to refrain from making unilateral changes in employees' wages and working conditions until the employer and employee association

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[6] Section 3505 provides in full: "The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

"'Meet and confer in good faith' means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent."

have bargained to impasse. . . . " (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 537.) "The duty to meet and confer in good faith is limited to matters within the 'scope of representation'. . . . Even if the parties meet and confer, they are not required to reach an agreement because the employer has 'the ultimate power to refuse to agree on any particular issue. [Citation.]' [Citation.] However, good faith under section 3505 'requires a genuine desire to reach agreement.'" (*Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 630; *see International Assn. of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259, 271.) Here, it is undisputed that these pension benefits fell within the scope of the unions' representation. The question is whether the mayor's pursuit of pension reform by drafting and promoting a citizens' initiative required him to meet and confer with the unions.

People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach, *supra*, 36 Cal.3d 591 (*Seal Beach*) involved a related but distinct issue: whether the meet-and-confer provisions of section 3505 applied when a city exercised its *own* constitutional power to propose charter amendments to its voters. (Cal. Const., art. XI, § 3, subd. (b).)[7] We noted that "[t]he MMBA has two stated purposes: (1) to promote full communication between public employers and employees; and (2) to improve personnel management and employe r-employee relations within the various public agencies.

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[7] "Needless to say," we observed, "this case does not involve the question whether the meet-and-confer requirement was intended to apply to charter amendments proposed by initiative." (*Seal Beach*, *supra*, 36 Cal.3d at p. 599, fn. 8.)

These purposes are to be accomplished by establishing methods for resolving disputes over employment conditions and by recognizing the right of public employees to organize and be represented by employee organizations. (§ 3500.) While the Legislature established a procedure for resolving disputes regarding wages, hours and other conditions of employment, it did not attempt to establish standards for the wages, hours and other terms and conditions themselves. Rather, it 'set forth reasonable, proper and necessary principles which public agencies must follow in their rules and regulations for administering their employer-employee relations. . . . '" (*Seal Beach*, at p. 597.)

The City of Seal Beach claimed its constitutional right to propose charter amendments to the electorate could not be abridged by the Legislature. We disagreed, stating the "truism that few legal rights are so 'absolute and untrammeled' that they can never be subjected to peaceful coexistence with other rules." (*Seal Beach*, *supra*, 36 Cal.3d at p. 598.) Case law had established that "a city's power to amend its charter can be subject to legislative regulation." (*Ibid.*, citing *District Election etc. Committee v. O'Connor* (1978) 78 Cal.App.3d 261, 267.) We approved that precedent and pointed out that section 3505 is "far less intrusive" than the statute at issue in *District Election*, which posed a direct conflict with a charter provision. (*Seal Beach*, at p. 599.) "Cities function both as employers and as democratic organs of government. The meet-and-confer requirement is an essential component of the state's legislative scheme for regulating the city's employment practices. By contrast, the burden on the city's democratic functions is minimal." (*Ibid.*)

We further reasoned that "'general law prevails over local enactments of a chartered city, even in regard to matters which would otherwise be deemed to be strictly municipal affairs, where the subject matter of the general law is of statewide concern.' [Citation, fn. omitted.] Fair labor practices, uniform throughout the state, are a matter 'of the same statewide concern as workmen's compensation, liability of municipalities for tort, perfecting and filing of claims, and the requirement to subscribe to loyalty oaths.'" (*Seal Beach*, *supra*, 36 Cal.3d at p. 600, quoting *Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, 292, 294-295.) Again we noted the absence of any actual conflict "between the city council's power to propose charter amendments and section 3505. Although that section encourages binding agreements resulting from the parties' bargaining, the governing body of the agency—here the city council—retains the ultimate power to refuse an agreement and to make its own decision. [Citation, fn. omitted.] This power preserves the council's rights under article XI, section 3, subdivision (b)—it may still propose a charter amendment if the meet-and-confer process does not persuade it otherwise." (*Seal Beach*, at p. 601.)

Seal Beach involved a city council's own decision to place a proposal on the ballot, rather than a citizen-sponsored initiative. Nevertheless, *Seal Beach* sets out useful principles. The meet-and-confer requirement of section 3505 is an important feature of state public employee labor relations law, and one that places a relatively "minimal" burden on a local agency's governing functions. (*Seal Beach*, *supra*, 36 Cal.3d at p. 599.) Further, the MMBA aims to foster full commu-

nication between public employers and employees and improve employer-employee relations. These purposes require compliance with section 3505, even when an agency decides to take a proposal directly to the voters. (*See Seal Beach*, at pp. 597-601.)

Here, Mayor Sanders conceived the idea of a citizens' initiative pension reform measure, developed its terms, and negotiated with other interested parties before any citizen proponents stepped forward. He relied on his position of authority and employed his staff throughout the process. He continued using his powers of office to promote the Initiative after the proponents emerged. Yet the Court of Appeal determined that the city was not required to meet and confer with its unions at any point. To reach this conclusion, the court distinguished *Seal Beach* based not on section 3505 but on a novel interpretation of section 3504.5, subdivision (a). That provision relates to measures proposed by a governing body or its boards or commissions.[8] It is primarily concerned with an entity's obligation to give notice so that bargaining can take place with sufficient time for a resolution to be reached, if possible.

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[8] Section 3504.5, subdivision (a) provides: "Except in cases of emergency as provided in this section, the governing body of a public agency, and boards and commissions designated by law or by the governing body of a public agency, shall give reasonable written notice to each recognized employee organization affected of any ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the governing body or the designated boards and commissions and shall give the recognized employee organization the opportunity to meet with the governing body or the boards and commissions."

The Court of Appeal concluded that "the meet-and-confer requirements of the MMBA by its express terms constrain only *proposals* by the '*governing body.*'" (*Boling v. Public Employment Relations Bd.*, *supra*, 10 Cal.App.5th at p. 875.) It quoted section 3504.5, subdivision (a), to the effect that "'the governing body . . . shall give reasonable written notice . . . of any ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the governing body.'" (*Boling*, at p. 875.) The court acknowledged that section 3505 requires that "'[t]he governing body . . . shall meet and confer . . . prior to arriving at a determination of policy or course of action.'" (*Boling*, at p. 875.) Yet, "[b]ecause a citizen-sponsored initiative does not involve a proposal by the 'governing body,'" the court concluded "there are no analogous meet-and-confer requirements for citizen-sponsored initiatives." (*Ibid.*)

PERB pointed out that section 3505 reaches more broadly. It requires not only the governing body, but also its "other representatives as may be properly designated" to meet and confer with regard to policy decisions made on the agency's behalf. (§ 3505.) The court was not persuaded. "We reject this reading of the statutory scheme. Section 3504.5, subdivision (a) describes when meet-and-confer obligations are triggered (*i.e.*, when there is an 'ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the governing body'), and section 3505 describes how that process should be accomplished, including who (*i.e.*, the 'governing body . . . or other representatives as may be properly designated by law or by such governing body') shall participate on behalf of the

governing body. The designation in section 3505 of who shall conduct the meet-and-confer process does not expand who owes the meet-and-confer obligations imposed by section 3504.5." (*Boling v. Public Employment Relations Bd.*, *supra*, 10 Cal.App.5th at pp. 882-883, fn. 37.)

The court failed to give PERB's statutory interpretation the deference to which it was due. Sections 3504.5 and 3505 "'fall[] squarely within PERB's legislatively designated field of expertise.'" (*Cumero v. Public Employment Relations Bd.*, *supra*, 49 Cal.3d at p. 586.) Thus, the court should have "follow[ed] PERB's interpretation unless it is clearly erroneous." (*County of Los Angeles v. Los Angeles County Employee Relations Com.*, *supra*, 56 Cal.4th at p. 922.) PERB's reading is not clearly erroneous. To the contrary, it is clearly correct.

The court's attempt to derive the duty to meet and confer from the notice provision of section 3504.5, subdivision (a) finds no support in precedent or statutory language. We have consistently located the source of the actual duty to meet and confer in section 3505, where the term "meet and confer" appears and is defined. (*E.g.*, *County of Los Angeles v. Los Angeles County Employee Relations Com.*, *supra*, 56 Cal.4th at p. 922; *Voters for Responsible Retirement v. Board of Supervisors*, *supra*, 8 Cal.4th at p. 780; *Seal Beach*, *supra*, 36 Cal.3d at p. 596.) As noted, section 3504.5, subdivision (a) is primarily concerned with requiring notice to employee organizations in one particular circumstance: when a governing body proposes a measure affecting matters within the scope of representation. (*See Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 657.) It includes

no independent requirement to meet and confer, but provides only that the governing body must give the employee organization "the opportunity to meet." (§ 3504.5, subd. (a).) Courts have long held that the duty to meet and confer under section 3505 applies in addition to the requirements of section 3504.5. (*Riverside Sheriff's Assn. v. County of Riverside* (2003) 106 Cal.App.4th 1285, 1289-1290; *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 811; *International Assn. of Fire Fighters Union v. City of Pleasanton* (1976) 56 Cal.App.3d 959, 966.)

Section 3505 expressly imposes the duty to meet and confer on "[t]he governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body." (Italics added.) As PERB points out, the duty regularly attaches to actions taken by agency representatives without a governing body's participation. (*E.g.*, *Indio Police Command Unit Assn. v. City of Indio* (2014) 230 Cal.App.4th 521, 527-528, 539; [police chief reorganized department]; *Holliday v. City of Modesto* (1991) 229 Cal.App.3d 528, 531 540 [fire chief issued drug test directive]; *Long Beach Police Officer Assn. v. City of Long Beach* (1984) 156 Cal.App.3d 996, 999, 1011 [police chief altered practice relating to shooting incidents]; *Solano County Employees' Assn. v. County of Solano* (1982) 136 Cal.App.3d 256, 258, 265 [county administrator altered vehicle use policy].) Here, the mayor was the city's chief executive, empowered by the city charter to make policy recommendations with regard to city employees and to negotiate with the city's unions. Under the terms of section 3505, he was required to meet and confer with the unions "prior to arriving at a determi-

nation of policy or course of action" on matters affecting the "terms and conditions of employment."[9]

Any doubts as to whether these key terms of section 3505 extended to the mayor's sponsorship of the Initiative must be resolved by adopting "the construction that comports most closely with the Legislature's apparent intent, with a view to promoting rather than defeating the [statute's] general purpose, and to avoid a construction that would lead to unreasonable, impractical, or arbitrary results. [Citations.] We will not adopt '[a] narrow or restricted meaning' of statutory language 'if it would result in an evasion of the evident purpose of [a statute], when a permissible, but broader, meaning would prevent the evasion and carry out that purpose.'" (*Copley Press,*

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[9] Section 3505 describes the duty as an obligation "personally to meet and confer promptly upon request by either party. . . ." Consistent with its earlier decisions, PERB interprets this provision to require that employers provide employee representatives with reasonable advance notice and an opportunity to bargain before reaching a firm decision to establish or change a policy within the scope of the representation. (*See*, *e.g.*, *City of Sacramento* (2013) PERB Dec. No. 2351-M, p. 28; *County of Santa Clara* (2013) PERB Dec. No. 2321-M, p. 21.)

We need not decide precisely when the mayor's duty to meet and confer was triggered here because it clearly arose at least by the time the unions submitted their first demand letter. Although the Initiative was circulating for signatures by that time, PERB and the unions suggest the parties could have discussed circulating an alternative, less drastic, pension measure or delaying the Initiative's placement on the ballot to permit consideration of other alternatives. (*See Jeffrey v. Superior Court* (2002) 102 Cal.App.4th 1, 6 [Elections Code imposes no maximum time limit on when initiatives to amend city charters must be placed on ballot].) We express no view on the viability of these topics as subjects of bargaining.

Inc. v. Superior Court (2006) 39 Cal.4th 1272, 1291-1292.) Allowing public officials to purposefully evade the meet-and-confer requirements of the MMBA by officially sponsoring a citizens' initiative would seriously undermine the policies served by the statute: fostering full communication between public employers and employees, as well as improving personnel management and employer-employee relations. (§ 3500; *Seal Beach*, *supra*, 36 Cal.3d at p. 597.)

Under the facts presented here, Sanders pursued pension reform as a matter of policy while acting as the city's chief executive officer. As a "strong mayor" and the city's designated bargaining agent, he was required to meet and confer with employee representatives in this process. The obligation to meet and confer did not depend on the means he chose to reach his policy objectives or the role of the city council in the process. Because the mayor was directly exercising his executive authority on behalf of the city, no resort to agency principles is required to bring him within the scope of section 3505. Moreover, even if one could argue Sanders acted beyond the scope of his mayoral authority, it cannot be that an executive action within the scope of the executive's authority would trigger the duty to meet and confer but one exceeding that authority would not. Such a rule would be contrary to the broad purposes of the MMBA. The relevant question is whether the executive is using the powers and resources of his office to alter the terms and conditions of employment.

Here the answer is plainly "yes." Sanders informed San Diegans that he would place a pension reform measure on the ballot as part of his "agenda to streamline city operations, increase accountability and

reduce pension costs . . . by the time he leaves office." In his state of the city address, he formally recommended to the city council the "policy" of substituting 401(k)-style plans for defined benefit pensions, as well as the "course of action" of pursuing reform by way of a citizens' initiative measure. He pledged to work with others in city government to achieve this goal, and he did. He and his staff were deeply involved in developing the proposal's terms, monitoring the campaign in support of it, and assisting in the signature-gathering effort. He signed ballot arguments in favor of the measure as "Mayor Jerry Sanders." He consistently invoked his position as mayor and used city resources and employees to draft, promote, and support the Initiative. The city's assertion that his support was merely that of a private citizen does not withstand objective scrutiny.

The line between official action and private activities undertaken by public officials may be less clear in other circumstances. However, when a local official with responsibility over labor relations uses the powers and resources of his office to play a major role in the promotion of a ballot initiative affecting terms and conditions of employment, the duty to meet and confer arises. Whether an official played such a major role will generally be a question of fact, on which PERB's conclusion is entitled to deference. (§ 3509.5, subd. (b).) Substantial evidence supports PERB's conclusion here that Sanders's activity created an obligation to meet and confer.

Finally, in reversing the ALJ on the question of remedy, PERB observed that it is the province of courts alone to invalidate the results of an initiative election. PERB therefore ordered a make-whole remedy based on

compensation lost as a result of the Initiative. The Court of Appeal did not consider the remedy issue because it concluded Sanders and the city had not violated the duty to meet and confer. On remand, the court should address the appropriate judicial remedy for the violation identified in this opinion.

III. DISPOSITION

We reverse the Court of Appeal's judgment and remand for further proceedings to resolve issues beyond the scope of this opinion.

Corrigan
Judge

We Concur:

Cantil-Sakauye, C.J.

Chin, J.

Liu, J.

Cuellar, J.

Kruger, J.

Miller, J.

OPINION OF THE COURT OF APPEALS STATE OF CALIFORNIA (APRIL 11, 2017)

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

CATHERINE A. BOLING ET AL.,

Petitioners,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,

Respondent,

CITY OF SAN DIEGO ET AL.,

Real Parties in Interest.

D069626

CITY OF SAN DIEGO,

Petitioner,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,

Respondent,

SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION ET AL.,

Real Parties in Interest.

D069630

Before: McCONNELL, Presiding Judge., HUFFMAN, Judge., NARES, Judge.

Petition for extraordinary relief from a decision of the Public Employment Relations Board. Decision annulled.

Lounsbery Ferguson Altona & Peak, Kenneth H. Lounsbery, James P. Lough and Alena Shamos for Petitioners and Real Parties in Interest Catherine A. Boling, T. J. Zane and Stephen B. Williams in No. D069626 and No. D069630.

Jan I. Goldsmith and Mara Elliott, City Attorneys, Daniel F. Bamberg, Assistant City Attorney, Walter C. Chung and M. Travis Phelps, Deputy City Attorneys, for Petitioner and Real Party in Interest City of San Diego in No. D069630 and No. D069626.

JONES DAY, Gregory G. Katsas, G. Ryan Snyder, Karen P. Hewitt and Brian L. Hazen for San Diego Taxpayers Education Foundation as Amicus Curiae on behalf of Petitioner in No. D069630.

Renne Sloan Holtzman Sakai and Arthur A. Hartinger for League of California Cities as Amicus Curiae on behalf of Petitioner in No. D069630.

Meriem L. Hubbard and Harold E. Johnson for Pacific Legal Foundation, Howard Jarvis Taxpayers

Association and National Tax Limitation Committee as Amici Curiae on behalf of Petitioner in No. D069630.

J. Felix de la Torre, Wendi L. Ross, Mary Weiss, and Joseph W. Eckhart for Respondent.

Smith, Steiner, Vanderpool & Wax and Ann M. Smith for Real Party in Interest San Diego Municipal Employees Association in No. D069626.

Smith, Steiner, Vanderpool & Wax and Fern M. Steiner for Real Party in Interest San Diego City Firefighters Local 145 in No. D069626.

Rothner, Segall and Greenstone, Ellen Greenstone and Connie Hsiao for Real Party in Interest AFCSME Local 127 in No. D069626.

Law Offices of James J. Cunningham and James J. Cunningham for Real Party in Interest Deputy City Attorneys Association of San Diego in No. D069626.

In June 2012 the voters of City of San Diego (City) approved a citizen-sponsored initiative, the "Citizens Pension Reform Initiative" (hereafter, CPRI), which adopted a charter amendment mandating changes in the pension plan for certain employees of City of San Diego (City). In the proceedings below, the Public Employment Relations Board (PERB) determined City was obliged to "meet and confer" pursuant to the provisions of the Meyers-Milias-Brown Act (MMBA) (Gov. Code,[1] § 3500 et seq.) over the CPRI before placing it on the ballot and further determined that, because City violated this purported obligation, PERB could order

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[1] All statutory references are to the Government Code unless otherwise specified.

"make whole" remedies that de facto compelled City to disregard the CPRI.

We conclude, for the reasons stated below, that under relevant California law the meet-and-confer obligations under the MMBA have no application when a proposed charter amendment is placed on the ballot by citizen proponents through the initiative process, but instead apply only to proposed charter amendments placed on the ballot by the governing body of a charter city. We also conclude that, although it is undisputed that Jerry Sanders (City's Mayor during the relevant period) and others in City's government provided support to the proponents to develop and campaign for the CPRI, PERB erred when it applied agency principles to transform the CPRI from a citizen-sponsored initiative, for which no meet-and-confer obligations exist, into a governing-body-sponsored ballot proposal within the ambit of *People ex rel. Seal Beach Police Officers Assn. v City of Seal Beach* (1984) 36 Cal.3d 591 (*Seal Beach*). Accordingly, we hold PERB erred when it concluded City was required to satisfy the concomitant "meet-and-confer" obligations imposed by *Seal Beach* for governing-body-sponsored charter amendment ballot proposals, and therefore PERB erred when it found Sanders and the San Diego City Council (City Council) committed an unfair labor practice by declining to meet and confer over the CPRI before placing it on the ballot.

I
OVERVIEW

The San Diego Municipal Employees Association and other unions representing the prospectively affected employees (Unions) made repeated demands on Sanders

and the City Council for City to meet and confer pursuant to the MMBA over the CPRI before placing it on the ballot. (*San Diego Municipal Employees Assn. v. Superior Court* (2012) 206 Cal.App.4th 1447, 1451-1452 (*San Diego Municipal Employees*).) However, there was no dispute the proponents of the CPRI had gathered sufficient signatures to qualify the CPRI for the ballot, and the City Council declined Unions' meet-and-confer demands and placed it on the ballot. (*Id.* at pp. 1452-1453.) The citizens of San Diego ultimately voted to approve the CPRI.

Unions filed unfair practice claims with the Public Employment Relations Board (PERB), asserting the rejection by Sanders and the City Council of their meet-and-confer demands constituted an unfair practice under the MMBA. PERB commenced proceedings against City and ultimately ruled City violated the MMBA by refusing to meet and confer over the CPRI before placing it on the June 2012 ballot. PERB ordered, among other remedies, that City in effect refuse to comply with the CPRI. City filed this petition for extraordinary review challenging PERB's conclusion that, because high level officials and other individuals within City's government publicly and privately supported the campaign to adopt the citizen-sponsored charter amendment embodied in the CPRI, City committed an unfair labor practice under the MMBA by placing the CPRI on the ballot without complying with the MMBA's meet-and-confer requirements.

In *Seal Beach, supra,* 36 Cal.3d 591, our high court was required to harmonize the provisions of the meet-and-confer requirements of the MMBA with the constitutional grant of power to a "governing body" to place a charter amendment on the ballot that would

impact the terms and conditions of employment for employees of that city. The *Seal Beach* court concluded that, before a governing body may place such a charter amendment on the ballot, it must first comply with the meet-and-confer obligations under the MMBA. (*Seal Beach,* at pp. 597-601.) The *Seal Beach* court cautioned, however, that the case before it "[did] not involve the question whether the meet-and-confer requirement was intended to apply to charter amendments proposed by initiative." (*Id.* at p. 599, fn. 8.)

The present proceeding requires that we first determine the issue left open in *Seal Beach*: does the meet-and-confer requirement apply when the charter amendment is proposed by a citizen-sponsored initiative rather than a governing-body-sponsored ballot proposal? We conclude the meet-and-confer obligations under the MMBA apply only to a proposed charter amendment placed on the ballot by the governing body of a charter city, but has no application when such proposed charter amendment is placed on the ballot by citizen proponents through the initiative process. With that predicate determination, we must then decide whether PERB properly concluded City nevertheless violated its meet-and-confer obligations because the CPRI was *not* a citizen-sponsored initiative outside of *Seal Beach's* holding, but was instead a "City"-sponsored ballot proposal within the ambit of *Seal Beach*. Although several people occupying elected and nonelected positions in City's government did provide support for the CPRI, we conclude PERB erred when it applied agency principles to transform the CPRI into a governing-body-sponsored ballot proposal. Because we conclude that, notwithstanding the support given to the CPRI by Sanders and others, there is no evidence

the CPRI was ever approved by City's governing body (the City Council), we hold PERB erred when it concluded City was required to satisfy the concomitant "meet-and-confer" obligations imposed by *Seal Beach* for governing-body-sponsored charter amendment ballot proposals.

II
FACTUAL AND PROCEDURAL BACKGROUND

A. DeMaio's Pension Reform Proposal

In early November 2010, City Councilmember Carl DeMaio announced his comprehensive plan to reform the City's finances. His wide-ranging plan to reform the City's finances included, among its many proposals, a proposal to replace defined benefit pensions with 401(k)-style plans for newly hired employees.

B. Sanders's Pension Reform Proposal

In late November 2010, Sanders also announced that he would attempt to develop and place a citizen's initiative on the ballot to eliminate traditional pensions for new hires at City and to replace them with a 401(k)-style plan for nonsafety new hires. Sanders believed replacing the old system with the new 401(k)-style plan was necessary to solve what he viewed to be the unsustainable cost to City of the defined benefit pension for City employees.

Sanders, after discussions with various members of his staff, decided to pursue his pension reform proposal as a citizens' initiative, rather than to pursue it by a City Council-sponsored ballot measure. Sanders chose to pursue his pension reform proposal as a citizen-sponsored initiative, rather than a City

Council-sponsored ballot proposal, because he did not believe the City Council would put his proposal on the ballot "under any circumstances," and he also believed pursuing a City Council-sponsored ballot proposal (which would also require negotiating with the unions) could require unacceptable compromises to his proposal.[2]

Sanders held a "kick-off" press conference to announce his intent to pursue his pension reform plans through a private initiative. This event, which was held at City Hall and at which Sanders was joined by others,[3] was covered by the local media and included media statements informing the public that "San Diego voters will soon be seeing signature-gatherers for a ballot measure that would end guaranteed pensions for new [C]ity employees."[4] Sanders's office also issued a news release—styled as a "Mayor Jerry Sanders Fact Sheet"—to announce his decision. Faulconer disseminated Sanders's press release by an e-mail stating

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[2] Sanders, in a tape-recorded interview with a local magazine, explained he pursued a citizen-sponsored initiative rather than other avenues to achieve his pension reform objectives because: "[W]hen you go out and signature gather and it costs a tremendous amount of money, it takes a tremendous amount of time and effort. . . . But you do that so that you get the ballot initiative on that you actually want. [A]nd that's what we did. Otherwise, we'd have gone through the meet and confer and you don't know what's going to go on at that point. . . . "

[3] Also in attendance were City Attorney Jan Goldsmith, City Councilmember Kevin Faulconer, and City's Chief Operating Officer Jay Goldstone).

[4] NBC San Diego news coverage of Sanders's press conference included a photograph of Sanders standing in front of the City seal to make his initiative announcement.

Sanders and Faulconer "would craft a groundbreaking [pension] reform ballot measure and lead the signature-gathering effort to place the measure before voters," and Sanders sent a similar e-mail announcing he was partnering with Faulconer to "craft language and gather signatures" for a ballot initiative to reform public pensions.

Over the ensuing months, Sanders continued developing and publicizing his pension reform proposal, and in early January 2011 a committee was formed (San Diegans for Pension Reform (SDPR)) to raise money to support his proposed initiative. At his January 2011 State of the City address,[5] Sanders vowed to "complete our financial reforms and eliminate our structural budget deficit." He stated he was "proposing a bold step" of "creating a 401(k)-style plan for future employees . . . [to] contain pension costs and restore sanity to a situation confronting every big city" and that, "acting in the public interest, but as private citizens," Sanders announced that he, Faulconer, and the San Diego City Attorney (City Attorney) "will soon bring to voters an initiative to enact a 401(k)-style plan." That same day, Sanders's office issued a press release publicizing his vow "to push forward his ballot initiative" for pension reform.[6]

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[5] Article XV, section 265(c) of the City Charter requires the address as a message from the Mayor to the City Council that includes "a statement of the conditions and affairs of the City" and "recommendations on such matters as he or she may deem expedient and proper." Members of Sanders's staff helped write the speech.

[6] After his speech, Sanders continued his publicity efforts for his proposal, and he was aided in those efforts by individuals who were also members of his staff.

Sanders believed he had made it clear to the public that he undertook his efforts as a private citizen even though he was identified as "Mayor" when speaking in public about his proposal.

C. DeMaio's Competing Pension Reform Initiative

The plan announced by DeMaio in early November 2010 for pension reform differed in some respects from Sanders's proposal. For example, DeMaio's proposed plan for a 401(k)-style plan for new hires did not exempt police, firefighters and lifeguards. DeMaio's proposed plan also included a "cap" on pensionable pay.[7] Two local organizations, the Lincoln Club and the San Diego County Taxpayers Association (SDCTA),

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[7] By mid-March 2011, SDPR (the committee formed to support Sanders's proposed plan) hired an attorney to provide advice related to Sanders's proposed plan, and the attorney had opined the "cap" on pensionable pay as proposed by DeMaio's plan would make such a plan more vulnerable to legal challenges. SDPR also independently hired Buck Consultants, then serving as City's actuary for City's existing pension plan (and therefore with access to the data on City's pension system database), to provide a fiscal analysis of the impacts of 401(k) plans for new employees. Apparently, during the transition period to a 401(k)-style plan for new employees, there would be an immediate shorter term cost to City (because the change in the actuarial method used in doing the calculation would increase City's payments into the pension plan in the first three or four years), and a proposal for a "hard cap" on total payroll expenses could have mitigated the short-term impacts on City from the pension reform proposal. At his March 24, 2011, press conference, Sanders (along with Faulconer and the co-chairman for SDPR) reiterated their intent to move forward as private citizens with their pension reform proposal, and stated it would include caps and restrictions (including a five-year cap on City's payroll expenses) to produce greater savings for City.

supported DeMaio's competing plan as a plan that was "tougher" than Sanders's proposal.

D. The CPRI

In the aftermath of Sanders's January 2011 State of the City address, people in the business and development community informed Sanders they believed two competing initiative proposals—the DeMaio proposal and the Sanders proposal—would be confusing and there would be inadequate money to fund two competing citizen initiatives. Shortly after a March 24, 2011, press conference at which Sanders presented his refined proposal, people within either the Lincoln Club or SDCTA told Sanders they were "moving forward" with DeMaio's plan because it had sufficient money and was going to go onto the ballot, and that Sanders could either join them or go off on his own. This apparently triggered a series of meetings between supporters of the competing proposals,[8] and they reached an accord on the parameters of a single initiative.

The final initiative proposal, which ultimately became the CPRI, melded elements of both Sanders's and DeMaio's proposals: newly hired police would still continue with a defined benefit pension plan for newly-hired police officers, but newly-hired firefighters would be placed into the 401(k)-style plan. The pensionable pay freeze would be subject to the meet-and-confer process and could be overridden by a two-thirds majority of the City Council, but there would be no cap on total payroll. Sanders called the negotiations

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[8] Among those who attended one or more of the meetings were Sanders, Goldstone and Dubick (Sanders's chief of staff).

"difficult," and testified he did not like every part of the new proposal, but he nonetheless supported it because he believed it was "important for the City in the long run."

A law firm (Lounsbery, Ferguson, Altona & Peak (hereafter Lounsbery)) was hired by SDCTA to draft the language of the CPRI. SDCTA gave Lounsbery the DeMaio draft of the initiative as the starting point for Lounsbery's drafting of the final language for the initiative.[9] Lounsbery made relatively few revisions to it to finalize the language that became the CPRI. Lounsbery was paid by SDCTA for its services.[10]

On April 4, 2011, the City Clerk received a notice of intent to circulate a petition seeking to place the CPRI on the ballot, seeking to amend City's Charter pursuant to section 3 of article XI of the California Constitution. The ballot proponents were Catherine A. Boling (Boling), T.J. Zane (Zane), and Stephen Williams (Williams) (collectively, Proponents).[11]

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[9] Goldstone testified SDCTA sought his feedback on its proposed language, and he reviewed and responded to two or three drafts in the evening or weekends at his home. Dubick and Goldsmith also reviewed and provided feedback on the proposed language.

[10] Lounsbery filed a quarterly disclosure form indicating San Diego Taxpayers Association paid $18,000 to Lounsbery for its services in connection with its work on the CPRI for the first quarter of 2011. Among the people listed as being "lobbied" in connection with Lounsbery's work on the CPRI were Sanders, Goldstone, Goldsmith, Dubick and Faulconer.

[11] Williams and Zane were leaders in the Lincoln Club, and the Lincoln Club (along with SDPR, the committee formed to raise money in support of Sanders's proposed initiative) was a major contributor to the committee formed to promote the campaign for the CPRI. Although Sanders would have preferred that SDPR's

To qualify the CPRI for the ballot, the Proponents needed to obtain verified signatures from at least 15 percent (94,346) of the City's registered voters. On September 30, 2011, Zane delivered to the City Clerk a petition containing over 145,000 signatures, and the City Clerk forwarded the petition to the San Diego County Registrar of Voters (SDROV) to officially verify the signatures. The SDROV determined the initiative petition contained sufficient valid signatures and, 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. 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.

E. Sanders Campaigns for the CPRI

The day after the proponents filed their notice of intent to circulate, Sanders, DeMaio, Goldsmith, Faulconer, Boling, and Zane held a press conference on the City Concourse at which they announced the filing of the CPRI petition.[12] A news media outlet reported that proponents of the dueling ballot measures to curtail San

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head (Shephard) run the campaign, Sanders was persuaded by a vice chairman of the Lincoln Club that Zane was perfectly capable of running the ballot initiative campaign from the Lincoln Club.

[12] Sanders testified he appeared as a private citizen, and assumed the same was true for Goldsmith, although there is no evidence whether they communicated this fact to the press or the public at the press conference.!(XIII:3427-3428)!

Diego City pensions had reached a compromise to combine forces behind a single initiative for the June ballot. Sanders thereafter supported the campaign to gather signatures and promote the CPRI. He touted its importance by providing interviews and quotes to the media and by discussing it at his speaking appearances[13]. Additionally, campaign disclosure statements indicated SDPR (the committee formed to promote Sanders's original initiative proposal) contributed $89,000 in cash and nonmonetary support to the committee supporting the CPRI from January 1, 2011, through June 1, 2011.

F. The Meet-and-Confer Demands

On July 15, 2011, the San Diego Municipal Employees Association (MEA) wrote to Sanders asserting City had the obligation under the MMBA to meet and confer over the CPRI. When Sanders did not respond, MEA wrote a second letter demanding City satisfy its meet-and-confer obligations concerning the CPRI. City Attorney Goldsmith responded by stating, among other things, the City Council was required (under the California Constitution and state elections law) to place the CPRI without modification on the ballot as long as the proponents submitted the requisite signatures and

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[13] For example, he included the CPRI in the "bullet points" prepared for his speaking engagements before various groups. He also approved issuing a "message from Mayor Jerry Sanders" for circulation to members of the San Diego Regional Chamber of Commerce that solicited financial and other support for the signature gathering effort, although he did not know whether the language of that message was drafted by the campaign or by his staff. Members of Sanders's staff facilitated his promoting of the CPRI by, for example, responding to requests from the media for quotes.

otherwise met the procedural requirements for a citizen initiative to amend the Charter. Goldsmith explained that, "[a]ssuming the proponents of the [CPRI] obtain the requisite number of signatures on their petition and meet all other legal requirements, there will be no determination of policy or course of action by the City Council, within the meaning of the MMBA, triggering a duty to meet and confer in the act of placing the citizen initiative on the ballot."

MEA, in its September 9, 2011, response to Goldsmith's explanation, asserted City was obligated to meet and confer because Sanders was acting as the Mayor to promote the CPRI and hence "has clearly made a determination of policy for this *City* related to mandatory subjects of bargaining. . . . " MEA asserted Sanders was "using the pretense that [the CPRI] is a 'citizens' initiative' when it is, in fact, this *City's* initiative" as a deliberate tactic to "dodge the City's obligations under the MMBA." The City Attorney's office reiterated City had no meet-and-confer obligations "at this point in the process" because "there is no legal basis upon which the City Council can modify the [CPRI], if it qualifies for the ballot," but instead the City Council "must comply with California Elections Code . . . section 9255" and place the CPRI on the ballot if it meets the signature and other procedural requirements set forth in the Elections Code. Accordingly, City declined MEA's demand to meet and confer over the CPRI.[14]

[14] Subsequent demands by MEA (as well as other employee unions) to meet and confer were rejected by City for similar reasons.

G. The Initial Proceedings and *San Diego Municipal Employees*

MEA filed its unfair practice charge (UPC) on January 20, 2012, asserting City refused to meet and confer over the CPRI because "City claims that it is a 'citizen's initiative' not 'City's initiative,'" and MEA alleged this refusal violated the MMBA because the CPRI "is merely a sham device which City's 'Strong Mayor' has used for the express purpose of avoiding City's MMBA obligations to meet and confer." However, on January 30, 2012, the City Council, after recognizing the petitions for the CPRI contained the requisite number of signatures, enacted an ordinance placing the CPRI on the June 2012 ballot.

On February 10, 2012, PERB issued a complaint against City, alleging City's failure to meet and confer violated sections 3505 and 3506, and was an unfair practice within the meaning of section 3509, subdivision (b) and California Code of Regulations, title 8, section 32603, subdivisions (a) through (c).[15] PERB also ordered an expedited administrative hearing and appointed an administrative law judge (ALJ) to hold an evidentiary hearing on the complaints. (*San Diego Municipal Employees, supra,* 206 Cal.App.4th at p. 1453.)

PERB also filed a superior court action seeking, among other relief, an order temporarily enjoining presentation of the CPRI to the voters on the June 2012 ballot, but the trial court rejected PERB's motion for a preliminary injunction. (*San Diego*

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[15] Other unions also filed UPC's and PERB issued complaints on those claims. All of the claims and complaints were ultimately consolidated for hearing.

Municipal Employees, supra, 206 Cal.App.4th at pp. 1453-1454.) After the ALJ scheduled an administrative hearing for early April 2012 on the complaints, City moved in the superior court action for an order staying the administrative hearing and quashing the subpoenas issued by the ALJ. The trial court granted City's motion to stay the administrative proceedings, and MEA pursued writ relief. (*Id.* at pp. 1454-1455.) In *San Diego Municipal Employees,* this court concluded the stay was improper because "[a]s the expert administrative agency established by the Legislature to administer collective bargaining for covered governmental employees, PERB has exclusive initial jurisdiction over conduct that arguably violates the MMBA" (*id.* at p. 1458), and PERB's "initial exclusive jurisdiction extends to activities '"arguably . . . prohibited" by public employment labor law. . . . '" (*Id.* at p. 1460, quoting *City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 606, italics added by *San Diego Municipal Employees*).) This court noted that, had City directly placed the CPRI on the ballot without satisfying the meet-and-confer procedures, it would have engaged in conduct prohibited by the MMBA, and we ultimately concluded that because "MEA's UPC alleges (and provides some evidence to support the allegations) that the CPRI (while nominally a citizen initiative) was actually placed on the ballot by City using straw men to avoid its MMBA obligations, the UPC does allege City engaged in activity *arguably* prohibited by public employment labor law, giving rise to PERB's initial exclusive jurisdiction." (*Id.* at p. 1460.) This court ultimately concluded it was error to stay PERB's exclusive initial jurisdiction over the UPC claims, and vacated the stay. (*Id.* at pp. 1465-1466.)

H. PERB Proceedings and Determination

1. The ALJ Proposed Decision

The ALJ held an administrative hearing and, after taking evidence, issued a proposed decision. The proposed decision found Sanders chose to pursue a citizens' initiative measure, rather than invoke the City Council's authority to place his plan on the ballot as a City Council-sponsored ballot proposal, because he doubted the City Council's willingness to agree with him and because he sought to avoid concessions to the unions. The ALJ found the CPRI, which embodied a compromise between Sanders's proposal and the proposal championed by DeMaio, was then carried forward as a citizens' initiative and was adopted by the electorate. The ALJ found that, because Sanders occupied the office of Mayor in a city that uses the "strong mayor" form of governance, and in that role has certain responsibilities when conducting collective bargaining with represented employee organizations on behalf of City (including the responsibility to develop City's initial bargaining proposals, to map out a strategy for negotiations, and to brief the City Council on the proposals and strategies and to obtain the City Council's agreement to proceed), Sanders "was not legally privileged to pursue implementation of [pension reform] as a private citizen." The ALJ concluded that because Sanders, acting "under the color of his elected office" and with the support of two City Councilmembers and the City Attorney,[16] launched

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[16] The ALJ's decision also cited evidence that "[q]uantifiable time and resources derived from the City . . . were devoted to the Mayor's promotion of his initiative, notwithstanding the views of some or all of the City's witnesses that their activities

and pursued the pension reform initiative campaign, Sanders made "a policy determination that [City] propose[d] for adoption by the electorate" on a negotiable matter but denied the unions "an opportunity to meet and confer over his policy determination in the form of [the CPRI]," in violation of the meet-and-confer obligations under *Seal Beach.* The ALJ further concluded that, because of Sanders's "status as a statutorily defined agent of the public agency and common law principles of agency, the same obligation to meet and confer applie[d] to the City because it has ratified the policy decision resulting in the unilateral change."

2. The PERB Decision

After PERB considered supplemental briefing concerning the ALJ's proposed decision from City, Unions and the ballot proponents, PERB issued the decision challenged in this writ proceeding that largely

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were on personal time." However, the ALJ appeared to find that, even if all of the support work done by individual members of Sanders's staff had been "done on non-work time, their defense that these activities were done for private purposes is no stronger than the Mayor's. . . . " We note this finding because the PERB decision, as well as PERB's arguments in this writ proceeding, devotes substantial analysis to explaining that City-owned resources (as well as time spent by individuals who were members of Sanders's staff) were employed to support the CPRI. Although there is some evidentiary support for these factual findings, neither PERB's decision nor PERB's briefs in this proceeding articulates the legal relevance of these findings on the central issue raised in this proceeding—whether Sanders's acts in supporting the CPRI were as agent for the City Council—and we therefore limit our remaining discussion of those facts.

affirmed the ALJ's decision.[17] Specifically, PERB rejected City's exceptions to the ALJ's conclusions that City was charged with Sanders's conduct under principles of statutory agency, common law principles of agency based on actual and apparent authority, and common law ratification principles.[18] Instead, PERB adopted the ALJ's 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, [Sanders] 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 [Sanders's conduct], by its action and inaction, and, by accepting the benefits of Proposition B, thereby ratified his conduct." PERB's decision also concluded that, because City (through Sanders

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[17] PERB modified the remedies ordered by the ALJ's proposed decision (*see* fn. 20, *post*) but affirmed the core determination that the refusal to meet and confer over the CPRI before placing it on the ballot violated the MMBA.

[18] Curiously, although PERB concluded common law agency principles permitted PERB to charge City with Sanders's conduct in promoting and campaigning for the CPRI, PERB also concluded the evidence showed the Proponents of the CPRI (who paid to have the CPRI drafted and who ran the signature effort and campaign for passage of the CPRI) were <u>not</u> Sanders's agents because they undertook their actions outside of Sanders's control. PERB nevertheless concluded common law principles of ratification and apparent authority applied "so as not to excuse the City's failure to meet and confer based on the actions of private citizens involved in the passage of [the CPRI]."

as its agent) decided to place the CPRI on the ballot while acquiescing in Sanders's rejection of the unions' meet-and-confer demands, City violated the MMBA.[19]

PERB modified the remedy ordered in the ALJ's proposed decision insofar as the proposed decision ordered City to vacate the results of the election adopting the CPRI.[20] However, PERB's remedy, invoking its "make-whole" and "restoration" powers for remedying violations of the MMBA, ordered (among other things) that City "pay employees for all lost

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[19] Specifically, PERB found the City Council "was on notice that, even if pursued as a private citizens' initiative, [Sanders's] public support for an initiative to alter employee pension benefits would be attributed to the City for purposes of MMBA. . . . [¶] . . . [¶] After it became aware of the Unions' requests for bargaining, the City Council, like [Sanders], relied on the advice of Goldsmith that no meet-and-confer obligation arose because [the CPRI] 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 [Sanders's] conduct. [Citation.] The City Council also accepted the benefits of [the CPRI] with prior knowledge of [Sanders's] conduct. . . . [¶] 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 [Sanders'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 [the CPRI], the City Council thereby ratified [Sanders's] conduct."

[20] The ALJ's Proposed Decision required, among other affirmative actions by City, that City "[r]escind the provisions of [the CPRI] adopted by the City and return to the status quo that existed at the time the City refused to meet and confer. . . . " The PERB decision declined to adopt that aspect of the remedy posited in the ALJ's proposed decision because PERB expressed doubts it had the power to rescind an initiative adopted by the voters.

compensation, including but not limited to the value of lost pension benefits, resulting from the enactment of [the CPRI], offset by the value of new benefits required from the City under [the CPRI]."

3. Writ Proceedings Challenging PERB Decision

City timely filed this writ petition challenging PERB's decision (§ 3509.5), and this court issued its writ of review. In City's writ proceeding, City named Proponents as additional real parties in interest and Proponents have filed briefs in that proceeding. Proponents also filed a separate writ petition challenging PERB's decision, and this court issued a writ of review. We subsequently consolidated the two writ proceedings for consideration and disposition.

In City's writ proceeding, PERB (joined by Unions) has moved to dismiss Proponents as real parties in interest, arguing Proponents lack standing to participate as real parties because they were not (and were indeed barred by PERB regulations from being) parties to the underlying PERB proceeding. PERB has separately moved to dismiss Proponents' writ proceeding on the same ground. We conclude official proponents of a ballot initiative have a sufficiently direct interest in the result of the proceeding (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1178) to join as real parties in interest in an action, either by intervention or because they are named by other parties as real parties in interest, which is directed at the evisceration of the ballot measure for which they were the official proponents. (See *Perry v. Brown* (2011) 52 Cal.4th 1116, 1125; *see also Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1250.) Accordingly, we deny PERB's motion to dismiss Proponents as

real parties in interest from City's writ proceeding. Additionally, in light of our conclusion that PERB's decision must be annulled because City was not obligated to meet and confer prior to placing the CPRI on the ballot, PERB's motion to dismiss Proponents' writ proceeding (and the additional arguments raised in Proponents' writ proceeding) are moot and we need not address them.

III
STANDARDS OF REVIEW

The standards applicable to our review of a PERB decision are governed by differing degrees of deference. First, insofar as PERB's decision rests on its resolution of disputed factual questions, we apply the most deferential standard of review. Under this standard, PERB's factual findings are conclusive as long as there is any substantial evidence in the record to support its factual findings. (*Trustees of Cal. State University v. Public Employment Relations Bd.* (1992) 6 Cal.App.4th 1107, 1123; *see*, *e.g.*, *Regents of University of California v. Public Employment Relations Bd.* (1986) 41 Cal.3d 601, 618-623 [affirming PERB determination that students were employees under Higher Education Employer-Employee Relations Act because substantial evidence supported conclusion students' educational objectives were subordinate to the services students performed as housestaff].)

The deference to be accorded PERB's resolution of questions of law, and PERB's application of that law to the facts found by PERB, presents a more complicated question, because "balancing the necessary respect for an agency's knowledge, expertise, and constitutional office with the courts' role as interpreter

of laws can be a delicate matter. . . . " (*Gonzales v. Oregon* (2006) 546 U.S. 243, 255.) PERB asserts that we must follow its determinations of law unless clearly erroneous. Specifically, PERB argues that because it has been invested by the legislative scheme with the "specialized and focused task" of protecting " 'both employees and the state employer from violations of the organizational and collective bargaining rights guaranteed by [law]'" (*Banning Teachers Assn. v. Public Employment Relations Bd.* (1988) 44 Cal.3d 799, 804), PERB is " 'one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect.'" (*Ibid.*, quoting *Universal Camera Corp. v. National Labor Relations Bd.* (1951) 340 U.S. 474, 488.) Accordingly, PERB argues, "[T]he relationship of a reviewing court to an agency such as PERB, whose primary responsibility is to determine the scope of the statutory duty to bargain and resolve charges of unfair refusal to bargain, is generally one of deference" (*Ibid.,* citing *Oakland Unified School Dist. v. Public Employment Relations Bd.* (1981) 120 Cal.App.3d 1007, 1012), and PERB's interpretation will generally be followed unless it is clearly erroneous.

However, in *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1 (*Yamaha*), our Supreme Court explained, " 'The standard for judicial review of agency interpretation of law is the independent judgment of the court, giving deference to the determination of the agency appropriate to the circumstances of the agency action.'" (*Id.* at p. 8.) *Yamaha's* conceptual framework noted that courts must distinguish between two classes of interpretive actions

by the administrative body—those that are "quasi-legislative" in nature and those that represent interpretations of the applicable law—and cautions that "because of their differing legal sources, [each] command significantly different degrees of deference by the courts." (*Id.* at p. 10.) When examining the former type of action, an agency interpretation "represents an authentic form of substantive lawmaking: Within its jurisdiction, the agency has been delegated the Legislature's lawmaking power. [Citations.] Because agencies granted such substantive rulemaking power are truly 'making law,' their quasi-legislative rules have the dignity of statutes. When a court assesses the validity of such rules, the scope of its review is narrow. If satisfied that the rule in question lay within the lawmaking authority delegated by the Legislature, and that it is reasonably necessary to implement the purpose of the statute, judicial review is at an end." (*Id.* at pp. 10-11.)

However, "[t]he quasi-legislative standard of review 'is inapplicable when the agency is not exercising a discretionary rule-making power, but merely construing a controlling statute. The appropriate mode of review in such a case is one in which the judiciary, although taking ultimate responsibility for the construction of the statute, accords great weight and respect to the administrative construction.' [(Quoting *International Business Machines v. State Bd. of Equalization* (1980) 26 Cal.3d 923, 931, fn. 7.)]" (*Yamaha, supra*, 19 Cal.4th at p. 12, italics added by *Yamaha*.) *Yamaha* recognized that, unlike quasi-legislative rule making by the agency, an agency's interpretation of the law does not implicate the exercise of a delegated lawmaking power but "instead . . . represents the agency's view of the statute's legal

meaning and effect, questions lying within the constitutional domain of the courts." (*Id.* at p. 11.) *Yamaha* recognized that an agency may often be interpreting the legal principles within its administrative jurisdiction and, as such "may possess special familiarity with satellite legal and regulatory issues. It is this 'expertise,' expressed as an interpretation . . . , that is the source of the presumptive value of the agency's views. An important corollary of agency interpretations, however, is their diminished power to bind. Because an interpretation is an agency's legal opinion, however 'expert,' rather than the exercise of a delegated legislative power to make law, it commands a commensurably lesser degree of judicial deference." (*Ibid.*)

We construe *Yamaha* as recognizing that, in our tripartite system of government, it is the judiciary—not the legislative or executive branches—that is charged with the final responsibility to determine questions of law (*Yamaha, supra,* 19 Cal.4th at p. 11 & fn. 4), and "[w]hether judicial deference to an agency's interpretation is appropriate and, if so, its extent—the 'weight' it should be given—is thus fundamentally *situational*." (*Id.* at p. 12, italics added.) Thus, while *some* deference to an agency's resolution of questions of law may be warranted when the agency possesses a special expertise with the legal and regulatory milieu surrounding the disputed question (*see New Cingular Wireless PCS, LLC v. Public Utilities Commission* (2016) 246 Cal.App.4th 784, 809-810), the judiciary accords no deference to agency determinations on legal questions falling outside the parameters of the agency's peculiar expertise.[21] (*See*, *e.g.*, *Overstreet ex rel. NLRB*

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[21] Indeed, although a court may accept statutory constructions made by PERB that are "within PERB's legislatively designated

v. United Brotherhood of Carpenters and Joiners of America, Local Union No. 1506 (9th Cir. 2005) 409 F.3d 1199, 1208-1209 [no deference accorded to the NLRB's interpretation of NLRA when judged against backdrop of competing constitutional issues]; accord, *California State Teachers' Retirement System v. County of Los Angeles* (2013) 216 Cal.App.4th 41, 55 [under *Yamaha* "the degree of deference accorded should be dependent in large part upon whether the agency has a "'comparative interpretative advantage over the courts'" and on whether it has probably arrived at the correct interpretation"]; *Azusa Land Partners v. Department of Indus. Relations* (2010) 191 Cal.App.4th 1, 14 [Where dispositive facts are undisputed and purely legal issues remain requiring interpretation of a statute an administrative agency is responsible for

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field of expertise . . . unless it is clearly erroneous" (*San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 854-856 [because PERB is empowered to determine in disputed cases whether a particular item is within or without the scope of representation requiring bargaining, interpretation of a statutory provision defining scope of representation falls squarely within PERB's legislatively designated field of expertise and will not be reversed unless clearly erroneous]), the courts in other contexts have declined to accord any deference when the PERB decision does not adequately evaluate and apply common law principles. (*See*, *e.g.*, *Los Angeles Unified School Dist. v. Public Employment Relations Bd.* (1983) 191 Cal.App.3d 551, 556-557 [PERB determined two local public employee unions, both affiliated with same international, were not "same employee organization" within the meaning of section 3545, subdivision (b)(2), because actual conduct showed international did not exercise dominion and control over local unions; court reversed PERB ruling and concluded two local unions would qualify as the same employee organization within the meaning of the statute as long as international actually or potentially exercised the requisite dominion and control].)

enforcing, courts exercise independent judgment, and "agency's interpretation is '"one of several interpretive tools that may be helpful. In the end, however, '[the court] must . . . independently judge the text of the statute."'"].)

IV
ANALYSIS

A. Overview of MMBA

The MMBA codifies California's recognition of the right of public employees to collectively bargain with their government employers, and reflects a strong policy in California favoring peaceful resolution of employment disputes by negotiations. (§ 3500; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 622.) In furtherance of that goal, section 3504.5 of the MMBA requires that reasonable written notice be given to organizations such as the MEA of any action "proposed to be adopted by the governing body" that directly relates to matters within the scope of representation.[22] It further requires such governing body or its designated representative, "prior to arriving at a determination of policy or course of action," to "meet-

[22] Section 3504.5, subdivision (a) provides that, "Except in cases of emergency as provided in this section, the governing body of a public agency . . . shall give reasonable written notice to each recognized employee organization affected of any ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the governing body . . . and shall give the recognized employee organization the opportunity to meet with the governing body. . . . "

and-confer in good faith" with representatives of the union concerning negotiable subjects.[23]

The duty to meet and confer, which "has been construed as a duty to bargain . . . [citation] [and] . . . requires the public agency to refrain from making unilateral changes in employees' wages and working conditions until the employer and employee association have bargained to impasse" (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 537), thus places on the employer the duties (1) to give reasonable written notice (to each recognized employee organization affected) of an ordinance directly relating to matters within the scope of representation "proposed to be adopted by the governing body" and provide such organization the opportunity to meet with the governing body, and (2) to meet and confer in good faith (and consider fully the presentations by the organization) prior to arriving at any determination on the governing body's course of action. (§§ 3504.5, subd. (a) & 3505.) Accordingly, absent emergency circumstances or other exceptions, a governing body that is subject to the MMBA may not adopt a legislative policy that unilaterally changes its employees' wages and working conditions without first complying with its meet-and-confer obligations imposed by the MMBA.

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[23] Section 3505 provides: "The governing body of a public agency . . . or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations . . . , and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action."

In *Seal Beach*, the court was required to harmonize the provisions of the "meet-and-confer" requirements of the MMBA with the constitutional grant of power to a city council, as governing body for a charter city, to place a charter amendment on the ballot that would (if adopted) impact the terms and conditions of employment for employees of that city. The *Seal Beach* court concluded that, before such a governing body may place this type of charter amendment on the ballot, it must first comply with the meet-and-confer obligations under the MMBA. (*Seal Beach, supra,* 36 Cal.3d at pp. 597-601.) The *Seal Beach* court cautioned, however, that the case before it "[did] not involve the question whether the meet-and-confer requirement was intended to apply to charter amendments proposed by initiative." (*Id.* at p. 599, fn. 8.)

B. *Seal Beach's* Meet-and-Confer Obligations Do Not Apply to Citizen Initiatives

We first address and resolve the issue expressly left open in *Seal Beach:* whether the meet-and-confer requirements of the MMBA, which *Seal Beach* concluded did apply to a city council's determination to place a charter amendment on the ballot, apply with equal force before the governing body of a charter city may comply with its statutory obligation to place on the ballot a duly qualified citizen's initiative proposing the same type of charter amendment.[24]

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[24] We believe it is both necessary and appropriate to resolve this threshold issue. It is necessary because if we were to conclude the same meet-and-confer obligations are compelled, regardless of whether persons associated with city government are involved in drafting and/or campaigning for a citizen-sponsored initiative, we would have to affirm PERB's principal determination that City

1. Citizens Initiatives Do Not Trigger MMBA Procedural Requirements

The charter amendment provisions contained in article XI, section 3, subdivision (b), of the California Constitution provide only two avenues by which a charter amendment may be proposed: it "may be proposed by initiative or by the governing body." When an amendment is proposed by initiative, and at least 15 percent of the registered voters of the charter city sign the initiative petition, the governing body "shall . . . [submit the initiative] to the voters" at an election not less than 88 days after the date of the order of election. (Elec. Code, 9255, subd. (c), italics added.) The "governing body" has no discretion to do anything other than to place a properly qualified initiative on the ballot.[25] (*Farley v. Healey* (1967) 67 Cal.2d 325,

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violated the MMBA by refusing unions' demands to meet and confer before placing the CPRI on the ballot, and all of PERB's subsidiary conclusions regarding Sanders's actual or ostensible agency relationship to City (even if legally erroneous) would become superfluous. (*Cf. Reed v. Gallagher* (2016) 248 Cal.App.4th 841, 853 [when decision is correct on any theory applicable to the case, appellate court will affirm the decision regardless of correctness of grounds relied on below to reach conclusion].) We believe resolution of the question left open in *Seal Beach* is also appropriate because it provides some illumination for our analysis of whether City violated its MMBA obligations when it placed the CPRI on the ballot without first meeting and conferring with the unions.

[25] The governing body arguably has some flexibility as to at which election the initiative is presented to the voters (*Jeffrey v. Superior Court* (2002) 102 Cal.App.4th 1, 4-10), but PERB cites no authority that such flexibility would have permitted the City Council to refuse to place the CPRI on a ballot without modification in contravention of the mandatory language contained in Elections Code section 9255.

327; *Save Stanislaus Area Farm Economy v. Board of Supervisors* (1993) 13 Cal.App.4th 141, 148 ["local governments have the purely ministerial duty to place duly certified initiatives on the ballot"].) Because "[p]rocedural requirements which govern *council* action . . . generally do not apply to initiatives" (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 594), the courts have repeatedly noted "it is well established . . . that the existence of procedural requirements for the adoptions of local ordinances generally does not imply a restriction of the power of [a citizen-sponsored] initiative. . . . " (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 785; accord, *Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 823-824 [procedural requirements of § 65863.6, which must be met before local agency adopts no-growth ordinance, inapplicable to voter-sponsored initiative adopting no-growth ordinance].)

In contrast, when a governing body of a city votes to adopt a proposal for submission to its voters, such action is a discretionary rather than ministerial determination by the governing body. (*See*, *e.g.*, *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 187 (*Friends of Sierra Madre*).) Because of the "clear distinction between voter-sponsored and city-council-generated initiatives" (*id.* at p. 189), the courts have repeatedly concluded the same procedural limitations that would otherwise apply to the same discretionary determination by a governing body will apply to a city council-generated ballot proposal. Thus, in *Friends of Sierra Madre,* the court held that the procedural mandates of CEQA were required for a ballot measure, generated by a city council in exercise of its discretion, which would remove certain structures

from protection as historic landmarks. While similar citizen-sponsored measures do not require compliance with analogous regulatory procedural prerequisites (*see*, *e.g.*, *Stein v. City of Santa Monica* (1980) 110 Cal.App.3d 458, 460-461; *cf. Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1035-1037), *Friends of Sierra Madre* concluded a *city council*-sponsored ballot proposal for a discretionary project could not evade compliance with CEQA. (*Friends of Sierra Madre,* at pp. 186-191.)

In this setting, *Seal Beach* concluded the procedural requirements of the MMBA did apply to a city council-sponsored ballot proposal amending the charter as to matters concerning the terms and conditions of public employment. The court reasoned the meet-and-confer requirements, imposed on public agencies as procedural requirements a public agency must satisfy before adopting its final budget for the ensuing year (*Seal Beach, supra*, 36 Cal.3d at pp. 596-597), were procedural requirements that could coexist with the constitutional power of a city council to propose a substantive charter amendment. (*Id.* at p. 600, fn. 11 [noting "there is a clear distinction between the substance of a public employee labor issue and the procedure by which it is resolved" and acknowledging that although salaries of local employees of a charter city constitute municipal affairs not subject to general laws, the process by which salaries are fixed is matter of statewide concern].) *Seal Beach* noted that "[a]lthough [section 3505] encourages binding agreements resulting from the parties' bargaining, the governing body of the agency—here the city council—retains the ultimate power to refuse an agreement and to make its own decision. [Citation.]

This power preserves the council's rights under article XI, section 3, subdivision (b)—it may still propose a charter amendment if the meet-and-confer process does not persuade it otherwise. [¶] We therefore conclude that the meet-and-confer requirement of section 3505 is compatible with the city council's constitutional power to propose charter amendments." (*Id.* at p. 601, fn. omitted.)

The core tenets of *Seal Beach* were that (1) the MMBA was clearly intended to apply to regulate actions by the governing bodies of charter cities and (2) the MMBA mandates that those governing bodies satisfy the procedural prerequisites (the meet-and-confer process) before unilaterally imposing any changes to the matters within the scope of representation. (*Seal Beach, supra,* 36 Cal.3d at pp. 596-597.) From those tenets, *Seal Beach* concluded a governing body constrained by the procedural requirements of the MMBA cannot circumvent the meet-and-confer requirement by using a charter amendment to unilaterally implement the same changes that would otherwise be subjected to the meet-and-confer requirement. (*Id.* at p. 602.)[26]

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[26] Indeed, *Seal Beach* specifically noted that "[t]he logical consequence of the city's position is, actually, that the MMBA cannot be applied to charter cities at all. If a meet-and-confer session with the city council concerning contemplated charter amendments impinges on the council's constitutional power, what of salary ordinances? It is 'firmly established that the mode and manner of passing ordinances is a municipal affair . . . and that there can be no implied limitations upon charter powers concerning municipal affairs.' [(Quoting *Adler v. City Council* (1960) 184 Cal.App.2d 763, 776-777.)] If meeting and conferring on charter amendments is an illegal limitations [sic] on the city council's power, why is the same not true of any ordinance which

In contrast, the courts have refused to subject citizen-sponsored initiatives to the same procedural constraints that would apply if the same subject matter were embodied in a city council-sponsored ballot proposal (compare *Stein v. City of Santa Monica, supra,* 110 Cal.App.3d at pp. 460-461 with *Friends of Sierra Madre, supra,* 25 Cal.4th at pp. 186-191), which militates in favor of a conclusion that the procedural meet-and-confer obligation cannot be superimposed on a citizen-sponsored initiative addressing matters within the "scope of representation" as that term is used in the MMBA. (Accord, *Native American Sacred Site & Environmental Protection Assn. v. City of San Juan Capistrano* (2004) 120 Cal.App.4th 961, 968 ["it is plain that voter-sponsored initiatives are not subject to the procedural requirements that might be imposed on statutes or ordinances proposed and adopted by a legislative body, regardless of the substantive law that might be involved"].) More importantly, the meet-and-confer requirements of the MMBA by its express terms constrains only proposals by the "governing body" (§§ 3504.5, subd. (a) ["the governing body . . . shall give reasonable written notice . . . of any ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the governing body"] & 3505 ["[t]he governing body . . . shall meet and confer . . . prior to arriving at a determination of policy or course of action].) Because a citizen-sponsored initiative does not involve a proposal by the "governing body,"

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affects 'terms and conditions of public employment?'" (*Id.* at p. 602, fn. 12.)

we are convinced there are no analogous meet-and-confer requirements for citizen-sponsored initiatives.[27]

2. PERB's Contrary Analysis Is Unpersuasive

The PERB decision ostensibly "decline[d] to decide" the "significant and difficult questions about the applicability of the MMBA's meet-and-confer requirement to a pure citizens' initiative," which it appeared to deem unnecessary because it concluded the CPRI was not a "pure" citizen-sponsored initiative because of Sanders's involvement in promoting the CPRI. However, PERB nevertheless appeared to conclude the citizen's initiative rights enshrined in article II, section 11, and article XI, section 3, subdivision (b), of the California Constitution would not obviate the meet-and-confer obligations imposed on City by the

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[27] Indeed, we are convinced that imposing a "meet-and-confer" obligation on a city before it can place a citizen-sponsored initiative on the ballot would also be inconsistent with the "the rule under the MMBA 'that a public agency is bound to so "meet and confer" only in respect to "any agreement that the public agency is authorized [by law] to make. . . . " [Citation.]' [Citation.] As a practical matter, it would be inappropriate to attribute to the Legislature a purpose of requiring the County to make very substantial negotiating expenditures on subjects over which the County has no authority to act. Nothing in the statutory language calls for this result. As in other areas of the law, the MMBA is not to be construed to require meaningless acts." (*American Federation of State, etc. Employees v. County of San Diego* (1992) 11 Cal.App.4th 506, 517.) Because a governing body lacks authority to make any changes to a duly qualified citizen's initiative (Elec. Code, § 9032), and instead must simply place it on the ballot without change (*Save Stanislaus Area Farm Economy v. Board of Supervisors, supra*, 13 Cal.App.4th at pp. 148-149), imposing a meet-and-confer obligation on the governing body before it could place a duly qualified citizen's initiative on the ballot would require an idle act by the governing body.

MMBA.[28] In this writ proceeding, PERB and Unions appear to resurrect this argument, asserting the PERB decision does no violence to the citizen's initiative process. Specifically, they note the Legislature can limit (or entirely preempt) the local initiative power on matters of statewide (as opposed to purely local) concern, and contend that because the Supreme Court in *Voters* concluded a local referendum could not be used to reverse the adoption of a memorandum of understanding (MOU) following negotiations pursuant to the MMBA because allowing such use of the referendum would harm the statewide interest underlying the MMBA, the same conclusion applies equally to the initiative process. Accordingly, PERB and Unions argue that when the electorate seeks to exercise control over matters (such as pension benefits) that would be negotiable subjects under the MMBA, the constitutional right of initiative must yield to the state-

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[28] Specifically, PERB's decision reasoned (1) the local electorate's right to legislate directly is generally co-extensive with the legislative power of the local governing body, (2) the constitutional right of a local electorate to legislate by initiative extends only to municipal affairs and (as such) is preempted by general laws affecting matters of statewide concern, and (3) "[l]egislation 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" (quoting and relying on *Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 780 (*Voters*)). These authorities apparently led PERB to conclude that "[w]here local control implicates matters of statewide concern" and the two competing interests cannot be harmonized, "the constitutional right of local initiative is preempted by the general laws affecting statewide concerns."

wide objectives of the MMBA, including the procedural requirements of the MMBA imposing a meet-and-confer process before proposals impacting negotiable subjects may be adopted.[29]

We believe PERB and Unions misconstrue, and hence overstate, the import of *Voters*. The *Voters* court addressed a distinct and limited issue: whether voters in a county were entitled to mount a referendum challenge to a county ordinance (which adopted an MOU impacting county employee pension benefits) under the relevant constitutional and statutory pro-

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[29] PERB's decision did recognize that at least one recent Supreme Court case (*Tuolumne Jobs & Small Business Alliance v. Superior Court, supra*, 59 Cal.4th 1029) concluded certain procedural prerequisites under CEQA that would apply before a governing body may make a discretionary determination do not apply to adoption of initiatives seeking to enact that same determination. Moreover, PERB acknowledges numerous other courts have reached the same conclusion as to other procedural prerequisites. (*See*, *e.g.*, *Associated Home Builders, Inc. v. City of Livermore, supra,* 18 Cal.3d at p. 594 [holding that state law, which required any ordinance changing zoning or imposing specified land use restrictions can be enacted only after noticed hearing before the city's planning commission and legislative body, does not apply to initiative enacting same type of ordinance]; *Building Industry Assn. v. City of Camarillo, supra,* 41 Cal.3d at pp. 823-824 [procedural requirements of § 65863.6, which must be met before local agency adopts no-growth ordinance, inapplicable to citizen's initiative adopting no-growth ordinance]; *Dwyer v. City Council of Berkeley* (1927) 200 Cal. 505; *DeVita v. County of Napa, supra,* 9 Cal.4th at p. 785 ["the existence of procedural requirements for the adoptions of local ordinances generally does not imply a restriction of the power of [a citizen-sponsored] initiative"].) However, PERB peremptorily concluded (and argues here) the MMBA's meet-and-confer procedure is somehow "qualitatively different" from these other provisions, and thus exempted from the type of procedural rules that ordinarily do not apply to initiatives.

visions. The court first concluded that article XI, section 1, subdivision (b), of the California Constitution neither authorized nor restricted voters from challenging the county ordinance by referendum. (*Voters*, *supra*, 8 Cal.4th at pp. 770-776.) The court, after recognizing courts should apply a liberal construction to the initiative power, with any reasonable doubt resolved in favor of preserving it, opined that "we will presume, absent a clear showing of the Legislature's intent to the contrary, that legislative decisions of a city council or board of supervisors—including local employee compensation decisions [citation]—are subject to initiative and referendum. In this case, the legislative intent to bar the referendum power over the ordinance in question is unmistakable." (*Id.* at p. 777, italics added.) Specifically, *Voters* determined the Legislature, by its enactment of section 25123, subdivision (e), evinced an unmistakable legislative intent to bar challenges by referendum to county ordinances specifically related to the adoption or implementation of MOU's. (*Voters,* at pp. 777-778.)[30] The *Voters* court

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[30] The court explained the legislative procedures for county referenda are set forth in the Elections Code. Those statutes provide that all county ordinances, with certain enumerated exceptions, "shall become effective 30 days from and after the date of final passage" by the board of supervisors (Elec. Code, § 9141, subd. (b)), and Elections Code section 9144 provides that between the date of the adoption of the ordinance and the date the ordinance becomes finally effective 30 days later, a petition signed by the requisite number of voters will suspend the ordinance and compel the board of supervisors to reconsider it. If the board of supervisors fails to "entirely repeal" the ordinance, it must be submitted to a countywide referendum. (*Id.*, § 9145.) However, Elections Code section 9141 excepts certain types of county ordinances from the 30-day effective date rule, providing instead that these ordinances go into effect immediately, including

then rejected the petitioner's claim that section 25123, subdivision (e), was unconstitutional, reasoning the Legislature may properly restrict the right of referendum "if this is done as part of the exercise of its plenary power to legislate in matters of statewide concern," and concluded it was required to uphold section 25123, subdivision (e)'s constitutionality if its referendum restriction, which was effectively an "implied delegation of exclusive decisionmaking authority to the boards of supervisors to adopt and implement memoranda of understanding between counties and their employee associations" (*Voters,* at p. 780), could be construed as fulfilling some legislative purpose of statewide import. The court inferred the legislative purpose of statewide import existed because of the MMBA, which was "a statutory scheme in an area of statewide concern that justifies the

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ordinances "specifically required by law to take immediate effect." (*Id.*, subd. (a)(2).) These provisions, when read together, "make[] clear that when the Legislature desired to denominate certain types of ordinances that were not subject to county referendum procedures, it did so not by specifically declaring these ordinances ineligible for referendum, but rather by providing that they go into effect immediately." (*Voters*, *supra*, 8 Cal.4th at p. 777.) The court then noted section 25123 (which parallels Elec. Code, § 9141 et seq. in providing all county ordinances shall become effective 30 days from final passage except for certain classes of ordinances, which are to go into effect immediately), specifically provides at subdivision (e) that ordinances related to the adoption or implementation of MOU's with employee organizations are to take effect immediately. This statutory scheme convinced the court that, by designating MOU ordinances as a class of ordinances specifically required by law to take effect immediately, the Legislature evinced an unmistakable intent to exempt such ordinances from the referendum procedures. (*Voters*, *supra.*)

referendum restriction inherent in section 25123, subdivision (e)." (*Id.* at pp. 780, 778-784.)

The distinct and limited issue examined in *Voters* —whether the Legislature clearly and unmistakably intended to delimit the electorate's referendum rights and (if so) whether that constraint was constitutionally permissible—has no applicable counterpart here. Although *Voters* would support the constitutionality of an enactment by the California Legislature barring citizen initiatives that seek to amend a city charter to limit employee compensation, we are unaware of any statute clearly and unmistakably barring such citizen initiatives[31] (nor have PERB or Unions identified any such bar) and "we will presume, absent a clear showing of the Legislature's intent to the contrary, that . . . local employee compensation decisions [citation] . . . are subject to initiative and referendum." (*Voters, supra,* 8 Cal.4th at p. 777.) The courts have repeatedly upheld the ability of the electorate of a charter city to legislate on compensation issues by initiative (*see*, *e.g.*, *Spencer v. City of Alhambra* (1941) 44 Cal.App.2d 75, 77-79; *Kugler v. Yocum* (1968) 69 Cal.2d 371, 374-377 (*Kugler*)), and the *Voters* court specifically declined to extend its holding to overrule another decision, *United Public Employees v. City and County of San Francisco* (1987) 190 Cal.App.3d 419, which concluded a charter provision requiring that all increases in employee benefits be subject to

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[31] Indeed, the *Voters* court noted the statute it was considering "is applicable to counties only and has no counterpart for cities," and hence cautioned that "[w]e do not decide whether *city* ordinances that adopt or implement memorandums of understanding pursuant to the MMBA are subject to referendum." (8 Cal.4th at p. 784, fn. 6.)

voter approval by referendum was compatible with the MMBA. (*Voters*, at pp. 781-782 & fn. 4.)

Thus, contrary to PERB and Union's arguments, *Voters* does not support the conclusion that the MMBA preempts, or superimposes procedural restrictions on, the right of citizens to invoke the initiative process to legislate on compensation issues for the employees of a charter city.

3. Conclusion

We conclude, in light of the language of the MMBA and the "clear distinction between voter-sponsored and city-council-generated initiatives" (*Friends of Sierra Madre, supra,* 25 Cal.4th at p. 189), a city has no obligation under the MMBA to meet and confer before placing a duly qualified citizen-sponsored initiative on the ballot because such an initiative does not involve a proposal by the "governing body" nor could produce an agreement regarding such an initiative that the public agency is authorized to make.

C. PERB's Determination That City Was Obligated by the MMBA to meet and confer before Placing the CPRI on the Ballot Is Erroneous

PERB concluded City owed, but failed to discharge, the meet-and-confer obligations imposed by the MMBA on governing bodies by placing the CPRI on the ballot without first meeting and conferring with unions. We have already concluded, contrary to PERB's apparent opposing conclusion, a governing body has no obligation to meet and confer before placing a duly qualified citizen-sponsored initiative on the ballot, but does have meet-and-confer obligations before placing on the ballot a proposal adopted by the governing body

that falls within the parameters of sections 3504.5 and 3505.[32] We thus turn to the critical question: whether PERB correctly held the CPRI was not a duly qualified citizen-sponsored initiative exempted from the meet-and-confer requirements, but was instead a governing-body-sponsored ballot proposal within the ambit of *Seal Beach* and the meet-and-confer obligations the MMBA imposes on actions that constitute a "determination of policy" (§ 3505) that have been "proposed [for] adopt[ion] by the governing body" (§ 3504.5, subd. (a)) within the meaning of the MMBA.

We begin by noting the evidence was undisputed (and PERB did not conclude to the contrary) the charter amendment embodied in the CPRI was placed on the ballot because it qualified for the ballot under the "citizen initiative" procedures for charter amendments as provided by the first clause of article XI, section 3, subdivision (b), of the California Constitution (which provides that a charter amendment "may be proposed by initiative or by the governing body") and the governing provisions of Elections Code 9200 et seq. We also note there was no evidence, and PERB did not find, that the charter amendment embodied in the CPRI

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[32] The parties have brought to our attention the recent decision in *City of Palo Alto v. Public Employment Relations Bd.* (2016) 5 Cal.App.5th 1271, which evaluated whether the City of Palo Alto committed an unfair labor practice when it failed to meet and consult with the unions before placing a ballot proposal on the ballot. We conclude that case provides no guidance here because it involved whether a governing body owed meet-and-consult obligations before it could place a *city council*-sponsored ballot proposal on the ballot (*id.* at p. 1284), and not whether a governing body owes meet-and-confer obligations for a *citizen*-sponsored initiative when some city officials and city staff members assisted in drafting and campaigning for the initiative.

was placed on the ballot because it qualified as a ballot measure sponsored or proposed by the governing body of City under the second clause of article XI, section 3, subdivision (b), of the California Constitution.[33] (*See generally Hernandez v. County of Los Angeles* (2008) 167 Cal.App.4th 12, 21 ["Under the California Constitution there are only two methods for proposing an amendment to a city charter: (1) an initiative qualified for the ballot through signed voter petitions; or (2) a ballot measure sponsored by the governing body of the city," and noting differing stan-

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[33] Finally, we note the record is devoid of any evidence, and PERB did not find, that the Proponents of the CPRI were merely straw men used by the City Council (as governing body for City) to achieve placement of a City Council-sponsored proposal onto the ballot as a ruse to circumvent the concomitant meet-and-confer obligations that would have been required for an *overt* City Council-sponsored ballot proposal. In *San Diego Municipal Employees, supra*, 206 Cal.App.4th 1447, this court noted the unions' UPC's alleged a significant factual claim—that the CPRI was not a true citizen-sponsored initiative but was instead a sham device employed to circumvent the meet-and-confer obligations owed by City under the MMBA (*id.* at p. 1463)—which in turn raised the question of whether "the CPRI (while nominally a citizen initiative) was actually placed on the ballot by City using straw men to avoid its MMBA obligations." (*Id.* at p. 1460.) It was because such activity was arguably prohibited by public employment labor law within PERB's initial exclusive jurisdiction (*ibid.*) that led us to conclude it was error to divest PERB of its ability to conduct proceedings on this issue. (*Ibid.*) However, PERB's decision did not sustain this allegation; to the contrary, PERB's decision appeared to reject the Unions' claims that Proponents acted as agents for City in pursuing the CPRI. Accordingly, we have no occasion to address the distinct issue of whether an entity would violate its meet-and-confer obligations if its governing body sought to avoid its meet-and-confer obligations by enlisting private citizens to recast a governing-body-sponsored ballot proposal into a citizen-sponsored initiative.

dards applicable to each].) Accordingly, we evaluate whether PERB's decision, which appears to rest on the theory that the participation by a few government officials and employees in drafting and campaigning for a citizen-sponsored initiative somehow converted the CPRI from a citizen-sponsored initiative into a governing-body-sponsored ballot proposal, is erroneous under applicable law.

We conclude PERB's determination was error. As a preliminary matter, we believe that, under *Yamaha*, *supra*, 19 Cal.4th 1, we must apply de novo review of PERB's determination, rather than the more deferential standards of review advocated by PERB and Unions, because PERB's determination turned almost entirely upon its application of the interplay among City's charter provisions (and Sanders's powers and responsibilities thereunder), common law principles of agency, and California's constitutional and statutory provisions governing charter amendments, and did not turn upon resolution of material factual disputes (to which the deferential "substantial evidence" standard would apply) or upon PERB's application of legal principles of which PERB's special expertise with the legal and regulatory milieu surrounding the disputed legal principles would warrant deference. Accordingly, we accord no deference to PERB's legal conclusions as to the constitutional or statutory scheme governing initiatives (*Overstreet ex rel. NLRB v. United Brotherhood of Carpenters and Joiners of America, Local Union No. 1506, supra,* 409 F.3d 1199, 1208-1209; *Azusa Land Partners v. Department of Indus. Relations, supra,* 191 Cal.App.4th at p. 14) or to PERB's application of common law principles of agency over which PERB has

no specialized expertise warranting deference.[34] (*Cf. Styrene Information and Research Center v. Office of Environmental Health Hazard Assessment* (2012) 210 Cal.App.4th 1082, 1100 [no deference where agency in question has no particular interpretive advantage

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[34] PERB, citing *Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 Cal.App.4th 937, 965, argues on appeal that because the existence of an agency relationship is a question of fact, we must defer to PERB's determination on appeal as long as it is supported by substantial evidence. Certainly, the existence of an agency relationship can present a question of fact. However, when the material facts are undisputed, the question of the existence of a principal-agent relationship is a matter of law for the courts (*see*, *e.g.*, *Kaplan v. Coldwell Banker Residential Affiliates, Inc.* (1997) 59 Cal.App.4th 741, 745), of which PERB has no specialized expertise. Indeed, because we will conclude the relevant inquiry is *not* whether Sanders was an agent for City (at least in some capacities), but instead whether he was the actual or ostensible agent for the governing body when he helped draft and campaign for the CPRI, we will examine whether PERB correctly concluded Sanders's actions can be charged to a governing body under common law principles. For example, under common law principles, unless a party (the putative principal) has the legal right to control the action of the other person (the putative agent), the former ordinarily cannot be held vicariously liable for the other person's acts on an agency theory. (*See generally Edwards v. Freeman* (1949) 34 Cal.2d 589, 592 [absent right of control, no true agency and therefore no imputation of wrongdoer's negligence]; *Kaplan,* at p. 746 ["Absent a showing that Coldwell Banker controlled or had the right to control the day-to-day operations of Marsh's office, it was not liable for Marsh's acts or omissions as a real estate broker on a true agency-respondent superior theory."].) Thus, even if the appropriate inquiry was under a "substantial evidence" rubric, there is no evidence the City Council had the right to control Sanders's actions here, and hence there would be no substantial evidence to support the conclusion Sanders was the agent of the City Council in promulgating and promoting the CPRI.

over the courts based on some expertise]; *Sanchez v. Unemployment Ins. Appeals Bd.* (1984) 36 Cal.3d 575, 584-585 [agency denied applicant unemployment benefits based on finding employee lacked "good cause" to leave employment; court reviewed lack of good cause finding de novo as issue of law].)

It is clear that, apart from charter commission proposals (*see generally* §§ 34451-34458), California recognizes only two avenues by which a proposed city charter amendment may be placed before the electorate: an initiative that qualifies for the ballot through signed voter petitions, or a ballot proposal that qualifies for the ballot because the governing body (here, the City Council) adopts a resolution placing it on the ballot.[35] (*Hernandez v. County of Los Angeles, supra,* 167 Cal. App.4th at p. 21.) Whether PERB correctly concluded meet-and-confer obligations were triggered here rests on whether it properly recast the CPRI from the former into the latter. Because PERB employed several variants of agency theory to reformulate the CPRI from a citizen-sponsored proposal to a City Council-sponsored proposal, we examine PERB's theories seriatim.

1. Statutory Agency

PERB's first theory, which it denominated as a statutory agency theory, focused on the fact that Sanders, both in his capacity as a so-called "strong mayor" and in his role as the lead negotiator for the

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[35] Section 34458 et seq. prescribing the methods for a governing body to place a proposed charter amendment before the voters, only appears to permit "the governing body" to make the proposal and submit it to the voters for approval. (*Id.*, subd. (a).)

City Council in labor-related matters,[36] was empowered by the City Charter to recommend "measures and ordinances" that he believed to be "necessary and expedient" (San Diego City Charter, art. XV, § 265(b)(3)), including recommendations encompassed in his "State of the City" address. (*Id.*, art. XV, § 265(c).) From these predicates, PERB deemed the activities of Sanders in aiding in the drafting of and campaign for the CPRI (both individually and insofar as additional actions were undertaken by the staff of his mayoral office at his direction) to have been the actions of the City Council because he was the "statutory agent" for the City Council in labor-related matters. Under this theory, PERB appeared to rule that (1) the CPRI was sufficiently interwoven with Sanders's proposal such that the CPRI was as much Sanders's proposal as it was the Proponents' proposal, and (2) Sanders was statutorily empowered to act on behalf of (and to make proposals on labor-related matters for) the City Council in labor-related matters, and therefore the CPRI became a City Council-sponsored (or at least co-

[36] Sanders was the City's lead negotiator in collective bargaining with the City's nine represented bargaining units. In this role, Sanders developed proposals for the City's initial bargaining proposals, but the practice was for the Mayor to brief and obtain approval from the City Council on his proposals before he presented them to the Unions. If the negotiations between Sanders and a bargaining unit produced a tentative agreement, however, Council Policy 300-06 still required the agreement be presented to the City Council (or the Civil Service Commission) for determination and adoption. Thus, the ultimate authority to approve a proposal remained with the City Council.

sponsored) proposal carrying meet-and-confer obligations within the meaning of *Seal Beach*.[37]

We conclude reliance on this theory was error because it ignores fundamental principles governing the charter amendment process and the conduct of municipal affairs. First, a charter amendment measure only becomes a "proposal" if it qualifies for the ballot under the citizen-sponsored-proposal provisions (for which no meet-and-confer obligation exists) or qualifies for the ballot as a governing-body-sponsored ballot measure (which would trigger meet-and-confer obligations) under section 34458 et seq. PERB's statutory agency theory essentially deemed Sanders's actions to have been those of the City Council, thereby treating the CPRI as a governing-body-sponsored ballot mea-

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[37] PERB also appeared to conclude that, because section 3505 states (in relevant part) that "The governing body of a public agency, . . . or other representatives as may be properly designated by law or by such governing body, shall meet and confer," the Legislature contemplated that, in addition to the governing body of an agency, other designated representatives would make policy decisions on behalf of the agency and that such decisions would trigger meet-and-confer obligations. We reject this reading of the statutory scheme. Section 3504.5, subdivision (a) describes <u>when</u> meet-and-confer obligations are triggered (*i.e.* when there is an "ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the governing body"), and section 3505 describes <u>how</u> that process should be accomplished, including <u>who</u> (*i.e.* the "governing body . . . or other representatives as may be properly designated by law or by such governing body") shall participate on behalf of the governing body. The designation in section 3505 of who shall <u>conduct</u> the meet-and-confer process does not expand who <u>owes</u> the meet-and-confer obligations imposed by section 3405.5.

sure, even though the City Charter[38] specifically provides all legislative powers of the City are vested in the City Council (San Diego City Charter, art. III, § 11) as City's legislative body (*id.*, art. XV, § 270(a)), and provides such legislative power may not be delegated (*id.*, art. III, § 11.1) but must be exercised by a majority vote of the elected councilmembers. (*Id.*, art III, § 15 & art. XV, § 270(c).) PERB cites no law suggesting Sanders was in fact (or even could have been) statutorily delegated the power to place a City Council-sponsored ballot proposal on the ballot without submitting it to (and obtaining approval from) the City Council (*Kugler, supra,* 69 Cal.2d at p. 375 [legislative power may not be delegated]; *City of Redwood City v. Moore* (1965) 231 Cal.App.2d 563, 575-576, disapproved on other grounds by *Bishop v City of San Jose* (1969) 1 Cal.3d 56, 63, fn. 6 [recognizing "the general principle that the public powers or trusts devolved by law or charter upon a governing body cannot be delegated to others"]), and because there was no evidence suggesting Sanders sought or obtained

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[38] PERB asserts in this proceeding that, although it introduced portions of the San Diego City Charter to support its statutory agency claim, it is improper for this court to consider the impact of City Charter provisions not introduced below and not presently the subject of a request for judicial notice. However, charter provisions are judicially noticeable materials (*cf. Giles v. Horn* (2002) 100 Cal.App.4th 206, 225, fn. 6), and we are aware of no impediment to judicially noticing those provisions on our own motion (*PG&E Corp. v. Public Utilities Com.* (2004) 118 Cal.App.4th 1174, 1204, fn. 25), particularly where it is necessary to examine the entirety of a document to construe the effect of individual portions contained therein. (*See generally Dow v. Lassen Irrigation Co.* (2013) 216 Cal.App.4th 766, 780-781.) Accordingly, we will take judicial notice of the provisions of the San Diego City Charter.

such approval, PERB erred in concluding Sanders's actions in supporting the CPRI were in fact acts creating a City Council-sponsored ballot proposal. (*Cf. First Street Plaza Partners v. City of Los Angeles* (1998) 65 Cal.App.4th 650, 667 [where city charter prescribes procedures for taking binding action, those requirements may not be deemed satisfied by implication from use of procedures different from those specified in charter]; *Dynamic Ind. Co. v. City of Long Beach* (1958) 159 Cal.App.2d 294, 299 ["When the charter provision has not been complied with, the city may not be held liable in quasi contract, and it will not be estopped to deny the validity of the contract"].)

PERB nevertheless argues its agency theory was correct because employers (including governmental entities) can be held liable for unfair labor practices committed by their agent even when the agent's actions were not formally approved by the governing body. PERB also asserts its agency theory is supported by a 2008 opinion by a former City Attorney (the Aguirre Memo) that concluded, if the Mayor "initiate[d] or sponsor[ed]" a voter petition drive to place a measure on the ballot to amend the City Charter provisions related to retirement pensions, City "would have the same meet-and-confer obligations with its unions over a voter-initiative sponsored by the Mayor as with any City proposal implicating wages, hours, or other terms and conditions of employment."

We are unconvinced the Aguirre Memo undermines our analysis, for several reasons. First, a later opinion from the City Attorney rejected the conclusions of the Aguirre Memo, which it described as "overly broad and incomplete in its analysis," and explained why the City Attorney believed the conclusions reached

by the Aguirre Memo were unsound.[39] Second, PERB cites nothing to suggest the opinions expressed in the Aguirre Memo are somehow binding on City, much less that such opinions are entitled to any deference by this court. (*Yamaha, supra,* 19 Cal.4th 1, 11 ["an agency's legal opinion, however 'expert,' . . . commands a commensurably lesser degree of judicial deference"].) Because the Aguirre Memo reached its conclusions without considering (or even mentioning) the limiting language of section 3404.5, which triggers meet-and-confer obligations only as to "any ordinance, rule, resolution, or regulation . . . proposed to be adopted by the governing body," its conclusion that meet-and-confer obligations exist for a Mayoral-initiated voter petition drive (which appears to have rested on the erroneous assumption that a measure supported by the Mayor is equivalent to a measure proposed to be adopted by the governing body) is unpersuasive.

We are equally unpersuaded that the cases cited by PERB that upheld unfair labor practices claims against governmental entities for conduct by their agents even when the agent's actions were undertaken without approval by the governing body have any relevance here. In the cases relied on by PERB, the agents' unapproved actions involved statements or

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[39] Specifically, the later letter explained the Aguirre Memo had relied on a misapplication of *Inglewood Teachers Assn. v. Public Employment Relations Bd.* (1991) 227 Ca1.App.3d 767 (*Inglewood*), and had been generated in a different context in which "[i]t was contemplated the Mayor's proposal would be submitted to voters as a City Council proposal." The later letter explained the Aguirre Memo did not address whether any meet-and-confer obligation would exist when "there is no evidence . . . that the City Council is proposing the [CPRI], or authorizing the Mayor to propose or sponsor it."

actions by the agents that are declared to be unfair labor practices without the necessity of any predicate involvement by the governing body. Specifically, the unapproved actions interfered with, restrained, or coerced the employees in violation of section 3506 of the MMBA (*see Public Employees Assn. v. Bd. of Supervisors* (1985) 167 Cal.App.3d 797, 806-807 ["section 3506 is patterned closely after section 8(a)(1) of the NLRA [citation], which provides it is an unfair labor practice for an employer to 'interfere with, restrain, or coerce' employees in the exercise of rights to 'bargain collectively'"]) or in violation of section 3543.5, subdivision (a). However, both of those sections are distinct from section 3504.5, because both of those sections condemn specified conduct as unlawful labor practices, regardless of whether that specified conduct was accompanied by actions of the governing body.[40] In contrast, the unlawful labor

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[40] The PERB decisions cited by PERB and Unions are of a similar ilk. For example, in *County of Riverside* (2010) PERB Decision No. 2119-M [34 PERC ¶ 108], the alleged unlawful labor practice included allegations that the defendant interfered with employee rights because of the unauthorized actions of two county officials, who made separate statements to SEIU representatives (who were attempting to create a bargaining unit for "TAP" employees) that such employees would get a union when the officials died, retired or the county went out of business, which PERB concluded violated section 3506's proscription against interfering with, restraining, or coercing employees in the exercise of rights to bargain collectively. (*County of Riverside,* at pp. 16-23.) Similarly, in *San Diego Unified School Dist.* (1980) PERB Decision No. 137E [4 PERC ¶ 11115], PERB concluded the unauthorized action of two school board members in placing letters of commendation into the personnel files of nonstriking teachers violated the proscription contained in section 3543.5, subdivision (a), which prohibits a public school employer from imposing or threatening to impose reprisals on employees because of their exercise of

practice condemned by section 3504.5—the failure to meet and confer—is condemned only if preceded by specified conduct or actions of the governing body, *i.e.* when there is an "ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the governing body." Because section 3504.5 requires predicate action by "the governing body" before the meet-and-confer obligations of section 3505 can be triggered, cases addressing statutes that do not contemplate similar predicate action by a governing body have no persuasive value on the issues presented by the present action.

For all of these reasons, we agree with City that PERB erred in applying "statutory agency" principles to find the CPRI was a de facto governing-body-sponsored ballot proposal that could have triggered meet-and-confer obligations within the contemplation of section 3504.5.

2. Common Law Agency: Actual Authority

PERB's second set of theories, which it denominated as a common law agency theory, focused on the common law doctrine of when a principal can be charged with the acts of its agent. PERB's articulated rationale for attributing Sanders's support of the CPRI (as putative agent) to the City Council (as putative principal) under "actual authority" principles was that actual authority is the authority a principal either intentionally confers on the agent or "by want of ordinary care" allows the agent to believe himself to possess (Civ. Code, § 2316), and a principal is res-

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rights guaranteed under the Educational Employment Relations Act, section 3540 et seq.

ponsible 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.) Under this theory, PERB noted (1) Sanders had broad authority as Mayor to recommend legislation to the City Council, (2) he pursued pension reform as a goal for his remaining tenure as Mayor and for the announced purpose of improving the City's financial well-being, and (3) the City Council was aware of Sanders's desire for pension reform and of his efforts to implement it through a citizen-sponsored initiative. From these facts, PERB concluded Sanders's actions could be charged to the City Council because:

> "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 for collective bargaining and his rights as a private citizen. . . . 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, [and] by placing the measure on the ballot, . . . while accepting the considerable financial benefits resulting from the passage and implementation of [the CPRI]." (Fn. omitted.)

We conclude PERB's use of a common law agency theory, which PERB appears to have used in order to find Sanders's actions are to be charged to or deemed

the acts of the City Council, is erroneous.[41] "Actual" authority is (1) the authority the principal intentionally gives the agent, or (2) the authority the principal intentionally or negligently allows the agent to believe he possesses. (Civ. Code, § 2316.) There is no evidence the City Council actually authorized Sanders to act on its behalf to formulate and campaign for the CPRI, nor any evidence Sanders believed he was acting or had the authority to act on behalf of the City Council when he took those actions.[42]

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[41] We accord no deference to PERB's legal conclusions because, although PERB certainly evaluates and applies common law principles of agency when making its administrative adjudications (*see*, *e.g.*, *Chula Vista Elementary School Dist.* (2004) PERB Decision No. 1647E [28 PERC ¶ 184] [applying agency principles to hold school district liable for acts of school principal that constituted unlawful intimidation in violation of § 3543.5]; *Inglewood Unified School Dist.* (1990) PERB Decision 792E [14 PERC ¶ 21057] [concluding ALJ erroneously applied agency principles to hold school district liable for acts of school principal that allegedly constituted unlawful intimidation]), it has no comparative expertise in the common law that would warrant deference by this court (*California State Teachers' Retirement System v. County of Los Angeles, supra,* 216 Cal.App.4th at p. 55), and we therefore accord no deference to PERB's legal analysis of common law principles.

[42] Indeed, PERB appears to have acknowledged it was not relying on any actual authorization when applying the actual agency theory, because it acknowledged that "[u]nder the circumstances, making liability dependent on whether the City Council expressly authorized Sanders . . . to pursue a 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.' [(Citing *Voters, supra,* 8 Cal.4th 765, 782.)]" Moreover, when PERB evaluated whether the City Council had "'intentionally, or by want of ordinary care'" induced Sanders to

3. PERB's "Apparent Agency" Theory[43]

PERB's decision also relied on common law agency principles of "apparent authority" to support charging the City Council (as putative principal) with the acts of Sanders (as putative agent) in promulgating and supporting the CPRI. PERB's articulated rationale for attributing Sanders's support of the CPRI to the City Council under "apparent" authority principles was that the City Council intentionally or negligently caused or allowed the employees to reasonably believe Sanders was acting on behalf of the City Council in promulgating and supporting the CPRI within the meaning of the apparent authority principles codified in Civil Code section 2317. PERB, although acknowledging that *Inglewood, supra,* 227 Ca1.App.3d 767 re-

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believe he was acting on behalf of the City Council when he took those actions, PERB merely recited that Sanders "believed pension reform was needed to eliminate the City's $73 million structural budget deficit" and could be accomplished by the CPRI and therefore "believed himself to be acting on behalf of the City." However, PERB erroneously transformed the only "belief" for which there *was* evidentiary support—that Sanders believed his support for the CPRI was in the City's best financial interests—into a finding for which there was *no* evidentiary support: that the City Council somehow induced Sanders to believe his actions in promoting the CPRI were on behalf of the City Council. Although the evidence supports the finding that Sanders believed his actions promoted the City's best financial interests, there is no evidentiary support he believed he was promoting the CPRI on behalf of the City Council, and therefore this aspect of PERB's actual agency theory lacks support.

[43] The courts have interchangeably used the nomenclature of "apparent" agency or "ostensible" agency to describe this principle of vicarious liability. (*See*, *e.g.*, *Hartong v. Partake, Inc.* (1968) 266 Cal.App.2d 942.) We will refer to it, as did PERB, as "apparent" agency.

quired the party asserting an agency relationship by way of apparent authority to satisfy the burden of proving the elements of that theory (*id.* at p. 780) and that "[m]ere surmise as to the authority of an agent is insufficient to impose liability on the principal" (*id.* at p. 782), concluded *Inglewood's* test was satisfied. PERB reasoned that, because employees knew Sanders was an elected official and City's chief executive officer, and knew Sanders touted the CPRI as a measure that was in the best interests of City, employees "would reasonably conclude[] that the City Council had authorized or permitted [Sanders] to pursue his campaign for pension reform to avoid meeting and conferring with employee labor representatives."

We conclude PERB's "apparent agency" rationale is erroneous, for several reasons. First, apparent agency focuses on whether the principal (either intentionally or by want of ordinary care) caused or allowed a third person to believe the agent possessed authority to act on behalf of the principal (Civ. Code, § 2317), and therefore must be established through the conduct of the principal and cannot be created merely by a purported agent's conduct or representations.[44] (*Mosesian v. Bagdasarian* (1968) 260 Cal.App. 2d 361, 367; *Young v. Horizon West, Inc.* (2013) 220

[44] We also note that "[l]iability of the principal for the acts of an ostensible agent rests on the doctrine of 'estoppel,' the essential elements of which are representations made by the principal, justifiable reliance by a third party, and a change of position from such reliance resulting in injury." (*Preis v. American Indemnity Co.* (1990) 220 Cal.App.3d 752, 761.) PERB's decision does not explain how the third element necessary to application of the common law principle was satisfied, which further undermines the propriety of invoking that doctrine in this case.

Cal.App.4th 1122, 1132.) Thus, even assuming apparent agency could be applied to permit Sanders's actions to somehow "bind" the City Council into being a co-sponsor of the CPRI,[45] PERB's decision (and PERB's and Unions' briefs on appeal) cite only the actions of Sanders and his staff as the evidentiary foundation for application of "apparent" agency theory. Neither PERB's decision nor PERB's and Unions' brief's on appeal cite any evidence that the putative principal (the City Council) affirmatively did or said anything that could have caused or allowed a reasonable employee to believe Sanders had been authorized to act on behalf of the City Council in promoting the CPRI, which undermines PERB's "apparent" agency theory.[46]

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[45] We have substantial doubt an "apparent agency" theory can even be applied here. In *Boren v. State Personnel Bd.* (1951) 37 Cal.2d 634, the court (although noting that "[e]ven in the field of private contracts, the doctrines of ostensible agency or agency by estoppel are not based upon the representations of the agent but upon the representations of the principal" (*id.* at p. 643), rejected a plaintiff's effort to invoke "agency by estoppel," noting that "[t]o invoke estoppel in cases like the present would have the effect of granting to the state's agents the power to bind the state merely by representing that they have the power to do so. It [has been] held that the authority of a public officer cannot be expanded by estoppel. [Citations.]" (*Ibid.*) We need not decide that issue here because, even assuming it could apply, there appears to be no evidentiary support for that theory.

[46] We recognize that apparent agency can be premised on inaction by the principal because "where the principal knows that the agent holds himself out as clothed with certain authority, and remains silent, such conduct on the part of the principal may give rise to liability." (*Preis v. American Indemnity Co., supra,* 220 Cal.App.3d at p. 761.) However, even assuming this theory can apply here (but *see* fn. 45, *ante*), PERB recognized that Sanders repeatedly stated

PERB's "apparent" agency theory in the present decision eschewed any reliance on affirmative manifestations by the City Council affirming Sanders's support for the CPRI was on its behalf.[47] Instead, PERB relied solely on the fact that Sanders supported the CPRI while occupying an office the responsibilities of which included acting for the City Council as the labor relations point man and recommending measures on labor issues to the City Council, and based thereon concluded Sanders had apparent or actual discretionary authority to promote the CPRI on behalf of the City Council, and therefore the City Council can be charged with liability for Sanders's failure to meet and confer over the CPRI. We recognize that "apparent" agency, like a respondeat superior theory (*see Inglewood, supra,* 227 Cal.App.3d at p. 779 [noting courts do not always distinguish between ostensible agency theory and tort doctrine of respondeat superior]), permits a third party to hold a principal liable for the wrongful conduct of his agent within the scope of his authority

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his efforts in promoting the CPRI were in his capacity as a private citizen, and there is no evidence Sanders ever claimed his efforts were as the City Council's representative, which renders the City Council's inaction or silence incapable of supporting an "apparent" authority finding.

[47] PERB's prior decisions have appeared to acknowledge that " 'apparent authority to act on behalf of the employer may be found where the manifestations of the employer create a reasonable basis for employees to believe that the employer has authorized the alleged agent to perform the act in question'" (*Trustees of the California State University* (2014) PERB Decision No. 2384-H, p. 39, quoting *West Contra Costa County Healthcare District* (2011) PERB Dec. No. 2164-M, p. 7, italics added by *Trustees*), but PERB's decision here cites no such conduct by the City Council.

even where the agent was not operating with the express authorization of his principal when engaging in that conduct. (*See generally Saks v. Charity Mission Baptist Church* (2001) 90 Cal.App.4th 1116, 1137-1139; *J.L. v. Children's Institute, Inc.* (2009) 177 Cal.App.4th 388, 403 [noting ostensible agency principles can be used to hold principal vicariously liable for agent's acts].)[48] In the field of labor relations, some cases decided under the Agricultural Labor Relations Act (ALRA) have upheld imposing liability on an employer for an act by an agent that constituted an unfair labor practice, even when such act was not expressly authorized by the employer, as long as such act was within the scope of the agent's duties.[49] (*See Vista*

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[48] Many PERB decisions have also held that an employer's officials, particularly those whose duties include employee or labor relations or collective bargaining matters, have been presumed to have acted on behalf of the employer such that their commission of acts constituting unfair labor practices were imputed to the employer. (*San Diego Unified School Dist., supra,* PERB Decision No. 137-E [unauthorized action of two school board members in placing letters of commendation into the personnel files of nonstriking teachers violated the proscription violated "no reprisal" rule of § 3543.5, subd. (a)]; *Trustees of the California State University, supra,* PERB Decision No. 2384-H.)

[49] PERB's brief in this writ proceeding also asserts it was appropriate for the PERB decision to charge the City Council with Sanders's actions because he "acted within the scope of his authority as lead labor negotiator" in supporting the CPRI, which can be sufficient under NLRA precedent (*see H. J. Heinz Co. v. NLRB* (1941) 311 U.S. 514, 520-521; *International Assn. of Machinists v. NLRB* (1940) 311 U.S. 72, 80) to charge an employer with the wrongful conduct of its supervisory personnel. However, the court in *Inglewood* recognized NLRA precedent is of limited value in the Education Employment Relations Act (EERA) arena because "there are significant differences between

Verde Farms v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 307; *Superior Farming Co. v. Agricultural Labor Relations Bd.* (1984) 151 Cal.App.3d 100.) However, decisions under the ALRA provide little guidance

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the two statutes" and "at times, PERB has even stated that not only is NLRA precedent not controlling, it may not even be instructive." (*Inglewood, supra*, 227 Cal.App.3d at p. 777.) We note that, under the NLRA, an employer is specifically defined to include "any person acting as an agent of an employer, directly or indirectly" (29 U.S.C. § 152(2)), and explicitly states that "[i]n determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." (29 U.S.C. § 152(13).) In light of that statutory scheme, the *Heinz* court explained "[t]he question is not one of legal liability of the employer in damages or for penalties on principles of agency or *respondeat superior*, but only whether the [NLRA] condemns such activities as unfair labor practices so far as the employer may gain from them any advantage in the bargaining process of a kind which the Act proscribes." (*Heinz,* at p. 521.) Although NLRA precedent can be relevant in some circumstances (*see*, *e.g.*, *International Assn. of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259, 272), it is too distinct from the issue presented here: whether the MMBA was designed to permit the governing body to be charged with the unapproved conduct of its agents (*cf. Inglewood,* at p. 778 [rejecting union argument that agent should be included in definition of employer under EERA, because "[s]ince the Legislature is deemed to be aware of the content of its own statutory enactments, it is a reasonable inference that the Legislature would have included the term agent in the definition of employer under the EERA if it wanted school districts perpetually exposed to liability for any unfair labor practice committed by an agent of a school district"]), particularly when the specific conduct—compliance with the meet-and-confer mandate of section 3504.5—is triggered only when there is some action "proposed to be adopted by the governing body" (§ 3504.5, subd. (a)) rather than some action proposed by a putative agent of the governing body.

because "under the ALRA, application of the NLRA standard is statutorily mandated" (*Inglewood, supra*, 227 Cal.App.3d at p. 778), and those standards are not premised on common law principles (*id.* at pp. 776-777; accord, *Superior Farming Co.,* at p. 118 ["employer responsibility for acts of agents or quasi-agents . . . is not governed by common law agency principles"]; *see also* fn. 49, *ante*), nor have PERB or Unions demonstrated there are sufficient parallels between the relevant provisions of the MMBA and the ALRA to permit cases decided under the latter scheme to provide persuasive guidance under the distinct scheme of the MMBA.

More importantly, affixing vicarious liability upon a principal under common law agency principles, regardless of whether the principal authorized the explicit conduct at issue, appears to presuppose the agent committed a wrongful act ab initio. (*Cf. Bayuk v. Edson* (1965) 236 Cal.App.2d 309, 320.) This theory may well justify charging a principal with liability for an agent's acts that are inherently wrongful and injurious, such as the act committed by the agent in *Vista Verde Farms v. Agricultural Labor Relations Bd.*, *supra*, 29 Cal.3d at pp. 317-318 (in which the court noted the agent's acts violated Lab. Code, § 1153 and "would unquestionably constitute an unfair labor practice [citation] if engaged in directly by the employer"), regardless of whether the principal authorized those acts. However, the acts alleged here—an individual's advocacy for a citizen-sponsored initiative effecting employee benefits—is not an inherently wrongful act,[50] nor are we

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[50] To the contrary, Sanders's advocacy for the CPRI is not inherently wrongful, but is instead protected under both statutory law (*see* §§ 3203 ["[e]xcept as otherwise provided in this chapter, or as

persuaded the MMBA explicitly proscribes such conduct merely because that individual occupies public office. Instead, the MMBA only requires compliance with the meet-and-confer mandate of section 3504.5 when there is some action "proposed to be adopted by the governing body" (*id.*, subd. (a)), and has no apparent applicability when the "governing body" is not affirmatively involved with the proposal.

We conclude PERB's reliance on common law principles of "apparent" agency or respondeat superior, in order to charge the City Council (as putative principal) with the acts of Sanders (as putative agent) in promulgating and supporting the CPRI despite the absence of any evidence the City Council actually authorized these acts, is without legal support and was erroneous.

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necessary to meet requirements of federal law as it pertains to a particular employee or employees, no restriction shall be placed on the political activities of any officer or employee of a state or local agency"] and 3209 ["[n]othing in this chapter prevents an officer . . . of a state or local agency from soliciting or receiving political funds or contributions to promote the passage or defeat of a ballot measure which would affect the rate of pay, hours of work, retirement, civil service, or other working conditions of officers or employees of such state or local agency, except that a state or local agency may prohibit or limit such activities by its employees during their working hours"]) and under the Constitution. (*See generally Wood v. Georgia* (1962) 370 U.S. 375, 394 ["petitioner was an elected official and had the right to enter the field of political controversy"]; *Bond v. Floyd* (1966) 385 U.S. 116, 136-137.) Accordingly, common law principles of "apparent" agency or respondent superior, which permit a third party to hold a principal liable for the wrongful acts of his agent, have no application here.

4. PERB's "Ratification" Theory

PERB's decision also relied on common law principles of "ratification" to support charging the City Council (as putative principal) with the acts of Sanders (as putative agent) in promulgating and supporting the CPRI. As articulated by PERB, the City Council adopted Sanders's actions in promulgating and supporting the CPRI as their own measure because:

> "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. [Citing *Compton Unified School District* (2003) PERB Decision No. 1518-E at p. 5 and *Dowd v. International Longshoremen's Assn., AFL-CIO* (11th Cir. 1992) 975 F.2d 779, 785-786.] 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. [Citation.] 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."

PERB's decision, noting it was adequately shown the City Council had actual or constructive knowledge of Sanders's actions in support of the CPRI, relied on two grounds for applying "ratification" to convert Sanders's support for the citizen-sponsored CPRI

initiative into City Council support for that initiative: the City Council's inaction (because it was aware of Sanders's support but did not disavow or repudiate his conduct), and the City Council's actions in placing the CPRI on the ballot while rejecting Unions' "meet-and-confer" demands and accepting the financial benefits accruing from its passage. We conclude none of these grounds support PERB's determination that the City Council can be deemed to have promulgated or supported the CPRI under ratification principles.[51]

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[51] We note that, in this writ proceeding, PERB's brief appears to focus almost exclusively on the foundational issue—whether there was substantial evidence the City Council was aware of Sanders's conduct and "failed to disavow it"—with almost no discussion of whether (in light of that knowledge) the City Council's inaction (failure to disavow), or action (placing the CPRI on the ballot and rejecting Unions' "meet-and-confer" demands), or acceptance of the financial benefits supports the legal conclusion that the City Council adopted Sanders's support for the citizen-sponsored CPRI as its own under ratification principles. Similarly, the Unions' brief is largely silent on this issue, arguing only that (by failing to meet and confer over the CPRI) "the City Council ratified [Sanders's] unlawful scheme. . . ." This argument—that the City Council's lawful rejection of Unions' meet-and-confer demands (based on our conclusion there are no meet-and-confer obligations on citizen-sponsored initiatives, *see* part III.B., *ante*) converted such conduct into an unlawful rejection of those meet-and-confer demands under ratification principles—amounts to a *petitio principii* argument (*Jasmine Networks, Inc. v. Superior Court* (2009) 180 Cal.App.4th 980, 1005) and sheds no light on the propriety of PERB's conclusion. While this lacuna would permit us to deem this claim abandoned (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700 ["[w]hen an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary"]), we nevertheless examine PERB's stated basis for its "ratification" theory.

The first basis for PERB's ratification theory appears to be that the City Council did not disavow or repudiate his conduct. Although the failure to repudiate otherwise wrongful conduct can warrant charging a putative principal with responsibility for any unfair practices implicated by that conduct, as was the case in *Compton Unified School District, supra,* PERB Decision No. 1518E [27 PERC ¶ 56] and *Dowd v. International Longshoremen Assn., AFL-CI0, supra,* 975 F.2d 779, this presupposes the issue to be determined: whether Sanders's conduct *was* an unfair labor practice. (*See* fn. 50, *ante*.) We are aware of no law holding that an elected official's support (however vigorous) for a citizen-sponsored ballot measure impacting a subject otherwise negotiable under the MMBA violates the meet-and-confer provisions (or any other provision) of the MMBA, and we are convinced Sanders was entitled to support the CPRI (either as an individual or through capitalizing on his office's bully pulpit) because he was not supporting the proposal as the "governing body," which is the only entity constrained by the meet-and-confer obligations under the MMBA.

Moreover, reliance on the City Council's inaction is incompatible with other common law principles of ratification, which recognize that " 'ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified. . . . ' (Civ. Code, § 2310.) Thus, where the equal dignities rule applies, it requires formal, written ratification." (*van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 571; accord, *John Paul Lumber Co. v. Agnew* (1954) 125 Cal.App.2d 613, 622 [corporation's ratification of alleged agent's unauthorized sale of its property can only be effected through a

resolution of its board of directors when duly assembled].) Accordingly, absent a majority vote of the elected councilmembers (City Charter, art. III, § 15 & art. XV, § 270(c)), it is improper to find that Sanders's support for a citizen-sponsored initiative could convert the CPRI into a City Council-sponsored ballot proposal under ratification principles. (*Kugler, supra,* 69 Cal.2d at p. 375; *First Street Plaza Partners v. City of Los Angeles, supra,* 65 Cal.App.4th at p. 667 [where city charter prescribes procedures for taking binding action, those requirements may not be satisfied by implication from use of procedures different from those specified in charter]; *cf. Stowe v. Maxey* (1927) 84 Cal.App. 532, 547-549 [declining to apply ratification principles to validate act where act was one county board was incapable of delegating].)

Finally, insofar as PERB premised ratification on the City Council's placing the CPRI on the ballot, and the City Council's acceptance of the financial benefits accruing from its passage by the voters, we conclude that theory also lacks legal foundation. This aspect of PERB's legal analysis rests on the unstated predicate that the City Council could have declined to place the CPRI on the ballot or to accept the financial benefits accruing from its passage, and that its decision to act to the contrary adopted Sanders's otherwise unauthorized conduct by ratification. However, ratification has no application when the principal is unable to decline the benefits of an agent's unauthorized actions. (*See generally Pacific Bone, Coal & Fertilizer Co. v. Bleakmore* (1927) 81 Cal.App. 659, 664-665.) The City Council was required by the Elections Code to place the CPRI before the voters (without alteration) because it qualified for the ballot (*cf. Blotter v. Farrell* (1954) 42

Cal.2d 804, 812-813), and PERB cites no authority suggesting the City Council could have elected to ignore the mandates of the CPRI (by refusing to accept the financial benefits accruing from its passage) once the CPRI was approved by the voters. Accordingly, the fact the City Council complied with its legal obligations cannot support PERB's ratification theory.

D. Conclusion

We conclude, for the reasons previously explained, a city has no obligation under the MMBA to meet and confer before placing a duly qualified citizen-sponsored initiative on the ballot, and only owes such obligations before placing a governing-body-sponsored ballot proposal on the ballot. We further conclude PERB's fundamental premise—that under agency principles Sanders's support for the CPRI converted it from a citizen-sponsored initiative on which no meet-and-confer obligations were imposed into a City Council-sponsored ballot proposal to which section 3504.5's meet-and-confer obligations became applicable—is legally erroneous. Because PERB's remaining determinations—that the City Council engaged in an unfair labor practice when it defaulted on its obligations under section 3504.5 and that PERB's "make whole" remedies for that alleged unfair labor practice could order City to de facto refuse to comply with the CPRI—proceeded from this fundamental but legally erroneous premise, PERB's decision must be annulled and remanded for further proceedings consistent with the views expressed in this opinion. (*San Mateo City School Dist. v. Public Employment Relations Bd., supra,* 33 Cal.3d at p. 867.)

DISPOSITION

The Public Employment Relations Board (PERB) decision is annulled, and the matter is remanded to PERB with directions to dismiss the complaints and to order any other appropriate relief consistent with the views expressed within this opinion. Each party shall bear its own costs of this proceeding.

/s/ McConnell
Presiding Judge

KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, does hereby Certify that the preceding is a true and correct copy of the Original of this document/order/opinion filed in this Court, as shown by the records of my office.

WITNESS, my hand and the Seal of this Court.

COURT OF APPEAL * STATE OF CALIFORNIA *

04/11/2017

KEVIN J. LANE, CLERK

By Rita Rodriguez
Deputy Clerk

We Concur:

/s/ Huffman, J.

/s/ Nares, J.

DECISION OF THE PUBLIC EMPLOYMENT RELATIONS BOARD (DECEMBER 29, 2015)

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

Unfair Practice Case No. LA-CE-746-M

SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION,

Charging Party,

v.

CITY OF SAN DIEGO,

Respondent.

Unfair Practice Case No. LA-CE-752-M

DEPUTY CITY ATTORNEYS ASSOCIATION OF SAN DIEGO,

Charging Party,

v.

CITY OF SAN DIEGO,

Respondent.

Unfair Practice Case No. LA-CE-755-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-758-M

PERB Decision No. 2464-M

Before: HUGUENIN, WINSLOW and BANKS, Members.

BANKS, Member: These cases, which were consolidated for hearing, are before the Public Employment Relations Board (PERB or Board) on exceptions filed by the City of San Diego (City) to the proposed decision (attached) of a PERB administrative law judge (ALJ).[1] The proposed decision concluded that the City violated the Meyers-Milias-Brown Act (MMBA)[2]

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[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.

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 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'

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[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).

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]

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,

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[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 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.

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

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[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,

city governed by a 9-member City Council. At all times relevant, it has operated 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

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Sanders was acting under color of his authority as Mayor and on behalf of the City.

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.)

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 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

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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.

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 nongovernmental 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.)

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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.)

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 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.)

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[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.

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 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 responsibil-

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

ity 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 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 prece-

dent, 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 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 unlaw-

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[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.

ful 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

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[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.

school district when he filed a civil lawsuit against the Association and 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 <u>one</u> possible interpretation

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[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.

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 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

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[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.

on notice that, even if pursued as a private citizens' initiative, the Mayor's public support for an initiative to alter employee 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, regu-

latory, 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.)

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

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

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 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 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

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[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.)

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, emphsasis 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 con-

cern. 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 inter-

> jected 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 re-

quired 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 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

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[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.)

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 preelection 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, there-

fore, 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 PER-

B'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 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 employ-

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[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.

ment 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. Such payments shall continue as long as

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[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].)

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 administra-

tive agency against an employee for an unlawful, retaliatory purpose. (*Id.* at p. 18.)

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

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

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

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

We express no opinion on the merits of a petition for writ of mandate, *quo warranto* or any other action or special proceeding the Unions may wish to pursue to obtain a complete restorative and make-whole remedy in this case. We simply order that the City,

as the offending party, rather than the Unions and employees, bear the costs of pursuing complete relief in the courts. Nor do we think that the remedial order outlined above would give the Unions *carte blanche* to pursue frivolous litigation at the City's and ultimately the taxpayers' expense as a way to punish the City. Frivolous or vexatious litigation before the courts is within the competence and jurisdiction of the courts to remedy, if necessary. (Code Civ. Proc., §§ 128.5, 425.16, 907, 1038; Cal. Rules of Court, rules 8.276, 8.544.)

Additionally, we do not agree with the City and the Proponents that the ALJ's proposed remedy in this case, or any Board-ordered remedy, is necessarily defective because it adversely affects persons who were not parties to these proceedings or over whom PERB has no jurisdiction. It is true, as the City and the Proponents point out, that the statute only explicitly authorizes PERB to order a remedy against an offending party. (MMBA, § 3509, subd. (a) [incorporating by reference EERA, § 3541.5, subd. (c)].) However, the fact that third parties beyond the Board's jurisdiction have benefitted by the unlawful conduct of a respondent in unfair practice proceedings does not preclude PERB from ordering the offending party to take whatever steps may be necessary to remedy its unlawful conduct and effectuate the statute's policies and purposes, including actions that may indirectly affect third parties.

In *Folsom-Cordova Unified School District* (2004) PERB Decision No. 1712 (*Folsom-Cordova*), PERB determined that a public school employer had entered into a contract with a private bus company to provide transportation services for students without providing

the exclusive representative notice and opportunity to bargain. As in other unilateral change cases, the Board ordered its traditional restorative and make-whole remedy, including an order for the school district to rescind its agreements with the private bus company. There was no suggestion in *Folsom-Cordova* that the private bus company had acted unlawfully, that the substantive terms of its agreement with the school district were unlawful, or even that it was subject to PERB's jurisdiction. Not only was the private bus company not a party to PERB's proceedings, but, as far as PERB was concerned, its only action was to exercise its constitutionally-protected freedom to contract. (Cal. Const., art. I, § 1; *Ex parte Drexel* (1905) 147 Cal. 763, 764 [inalienable right to "liberty" includes freedom of contract]; *Ex parte Dickey* (1904) 144 Cal. 234, 235 [inalienable right to "property" includes freedom to contract]; U.S. Const. amend. XIV, § 1; *Board of Regents of State Colleges v. Roth* (1972) 408 U.S. 564, 572 [liberty interest protected by due process clause includes freedom of contract].)

Nevertheless, as explained above, PERB's powers and duties extend to administration of the MMBA and California's other public-sector labor relations statutes. Although the Board should strive wherever possible to avoid interpreting those statutes in a manner that conflicts with external law, we are not free to disregard that statutory responsibility, unless directed by the Legislature or appellate authority to do so, even when the rights of third parties outside our jurisdiction may be affected by a Board-ordered remedy. (Cal. Const., art. III, § 3.5; *Lockyer v. City and County of San Francisco, supra,* 33 Cal.4th 1055, 1094-1095.)

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

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

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

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

As noted in the proposed decision, the City does not deny that it altered its established policy

affecting employee pension benefits[22] without providing the Unions with notice or 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.)

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[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 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.)

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 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 employ-

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

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

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

tion of the Mayor." (City Exceptions, p. 26.) We disagree.

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

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

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

The essence of the Mayor's plan to "permanently fix" the problem of "unsustainable" pension costs was to replace the City's defined benefit plan with a 401(k)-style defined contribution plan for all new hires, except safety employees (police, firefighters and lifeguards). His initial plan, like that of Councilmember DeMaio's so-called roadmap for recovery plan, included other features as well, but both plans would implement a defined contribution plan for new hires. Officials of the Lincoln Club, the San Diego Taxpayers Association, the Chamber of Commerce and other business and special interest groups criticized the Mayor's proposal as insufficiently "tough." These same individuals and groups also informed the Mayor and DeMaio that they would not fund and support two competing measures and that they were prepared to move forward on the DeMaio proposal with or without the Mayor. Nevertheless, no

signatures were gathered for several weeks and both campaigns were effectively put on hold while Sanders, DeMaio and others attempted to negotiate a compromise that would result in one measure to be placed before the voters. After weeks of negotiations, the two sides agreed on the language of the CPRI, which Sanders continued to portray as his proposal.

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

Even at the formative stages, before the language of Proposition B had been hammered out, the Lincoln Club and others considered Sanders' participation in the discussion important enough that meetings were scheduled, cancelled and re-scheduled to accommodate his schedule. (CP Ex. 35; R.T. Vol. II, p. 26.) While the Chamber of Commerce

and other special interest groups who initially supported the DeMaio proposal told the Mayor that they would only back one ballot initiative, and that they were prepared to move forward with the DeMaio proposal even without the Mayor, that does not explain why they placed the campaign on hold for several weeks to allow for a compromise between Sanders and DeMaio. The Mayor's participation and support were apparently important enough to the initiative's success that even the advocates of the DeMaio proposals were willing to wait and to accept language deemed less "tough," if it meant having the Mayor's public support for the initiative.

For the purpose of PERB's unilateral change analysis, the relevant inquiry is not whether Sanders achieved all of his political objectives through the compromise language of Proposition B but whether he, as the City's designated representative in collective bargaining, reached a firm decision to change City policy and whether he and other City officials and employees took concrete steps toward implementing the new policy. (*City of Sacramento, supra*, PERB Decision No. 2351-M, p. 27, and authorities cited therein.) The record amply supports the ALJ's findings that Sanders and other persons acting on behalf of the City took concrete steps toward implementing the Mayor's policy objective, as announced in Sanders' State of the City speech and elsewhere, of altering employee pension benefits.

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

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

Following well-settled private-sector precedent, PERB has long held that the employees' representative is not obligated to make proposals or even to request bargaining, when the employer has already reached a firm decision to change policy and does not waver from that decision. (*State of California (Department of Veterans Affairs)* (2010) PERB Decision No. 2110-S, pp. 5-6; *see also S & I Transportation,, Inc.* (1993) 311 NLRB 1388, 1389; *Ciba-Geigy Pharm. Div.* (1982) 264 NRLB 1013, 1017; *Roll & Hold Warehouse & Distribution Corp.* (1997) 325 NLRB 41, affd. (7th Cir. 1998) 162 F.3d 513, 519-520.)

The proposed decision found that the Unions did not demand to bargain over Proposition B per se but over the Mayor's policy decision to alter employee

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

pension benefits, including the contents of his proposed ballot measure to reform employee pensions. (Proposed Dec., pp. 27, 47-48.) As noted in the proposed decision, even accepting the City's characterization of Proposition B as a purely citizens' initiative, the Unions' demands also contemplated the possibility of bargaining over an alternative or competing measure on the subject. (*Id.* at p. 48, fn. 19.) In any event, the City's steadfast refusal to respond to the Unions' requests consummated the Mayor's policy decision to reform pension benefits and thereby alter terms and conditions of employment. As discussed above, in the face of a fait accompli, it would make little sense to require a union to engage in the idle act of making proposals or demanding bargaining over a decision that had already been reached and announced to employees as a fait accompli. (*City of Sacramento, supra,* PERB Decision No. 2351-M, p. 33; *County of Santa Clara, supra,* PERB Decision No. 2321-M, pp. 28-29.)

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

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

The Aguirre Memo acknowledged that the Mayor has the same rights as any other citizen with respect to elections and ballot measures, and that he may, as a

private citizen, initiate or sponsor a voter petition drive to achieve his aim of retirement reform. However, Aguirre also noted, that "such sponsorship would legally be considered as acting with apparent governmental authority because of his position as Mayor, and his right and responsibility under the Strong Mayor Charter provisions to represent the City regarding labor issues and negotiations, including employee pensions." According to Aguirre, because the Mayor would be acting with apparent authority when sponsoring a voter petition, "the City would have the same meet and confer obligations with its unions as [where the Mayor proposed a ballot measure to the unions directly on behalf of the City]." (Proposed Dec., p. 12, emphasis added.)

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

Whether the City has since repudiated the June 19, 2008, legal opinion of its former City Attorney is of no more consequence here than the Mayor's testimony that he did not recall the relevant portion of the memorandum stating that meeting and conferring with the Unions would be required before

finalizing language to place on the ballot.[24] The central legal issue before the ALJ was whether the City had unlawfully refused to meet and confer over negotiable matters – whether, under color of his office, the Mayor had made and publicly announced a policy determination to pursue pension reform without first giving notice and opportunity to the various representatives of City employees to meet and confer over pension reform. Following the U.S. Supreme Court's position in *NLRB v. Katz* (1962) 369 U.S. 736, California courts have adopted the private-sector view that unilateral action affecting mandatory subjects of bargaining constitutes a per se violation of the MMBA for which no showing of bad faith or unlawful intent is necessary. (*Vernon Fire Fighters v. City of Vernon, supra,* 107 Cal.App.3d 802, 824, citing *Katz*; *International Assn. of Fire Fighters Union v. City of Pleasanton, supra,* 56 Cal.App.3d 959, 967-968; *see also Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, p. 15.) Because unlawful intent is not a requirement for proving a unilateral change, what is at issue here is not the City's repudiation or the Mayor's inability to

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

recall a legal opinion of its former City Attorney, but the soundness of the legal reasoning included in that opinion.

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

The Aguirre Memo *is* relevant to the extent the City Council was on notice that the Mayor's public

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

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

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

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

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

CONCLUSION

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

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it has been found that the City of San Diego (City) violated the Meyers-Milias-Brown Act (MMBA) and PERB regulations. The City breached its duty to meet and confer in good faith with the San Diego Municipal Employees Association, the Deputy City Attorneys Association of San Diego, the American Federation of State, County and Municipal Employees, AFL-CIO, Local 127, and the San Diego City Firefighters Association, Local 145 (collectively, Unions) in violation of Government Code section 3505 and Public Employ-

ment Relations Board (PERB or Board) Regulation 32603(c) (Cal. Code of Regs., tit. 8, § 31001 et seq.) when it failed and refused to meet and confer over the Mayor's proposal for pension reform. By this conduct, the City also interfered with the right of City employees to participate in the activities of an employee organization of their own choosing, in violation of Government Code section 3506 and PERB Regulation 32603(a), and denied the Unions their right to represent employees in their employment relations with a public agency, in violation of Government Code section 3503 and PERB Regulation 32603(b).

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

A. CEASE AND DESIST FROM:

1. Refusing to meet and confer with the Unions before adopting ballot measures affecting employee pension benefits and other negotiable subjects.

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

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

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

1. Upon request, meet and confer with the Unions before adopting ballot measures

affecting employee pension benefits and/or other negotiable subjects.

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

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

4. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations in the City, where notices to employees customarily are posted, copies of the Notice attached hereto as an Appendix. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the City to communicate with employees represented by the Unions. The Notice must be signed by an authorized agent of the City, indicating that the City will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps

shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

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

Members Huguenin and Winslow joined in this Decision.

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE PUBLIC EMPLOYMENT RELATIONS BOARD

AN AGENCY OF THE STATE OF CALIFORNIA

After a hearing in Unfair Practice Case Nos. LA-CE-746-M, *San Diego Municipal Employees Organization v. City of San Diego*; LA-CE-752-M, *Deputy City Attorneys Association of San Diego v. City of San Diego*; LA-CE-755-M, *American Federation of State, County and Municipal Employees, AFL-CIO, Local 127 v. City of San Diego*; and LA-CE-758-M, *San Diego City Firefighters Association, Local 145 v. City of San Diego*, in which the parties had the right to participate, it has been found that that the City of San Diego (City) violated the Meyers-Milias-Brown Act (MMBA) and Public Employment Relations Board (PERB) regulations (Cal. Code of Regs., tit. 8, § 31001 et seq.). The City breached its duty to meet and confer in good faith with the San Diego Municipal Employees Association, the Deputy City Attorneys Association of San Diego, the American Federation of State, County and Municipal Employees, AFL-CIO, Local 127, and the San Diego City Firefighters Association, Local 145 (collectively, Unions) in violation of Government Code section 3505 and PERB Regulation 32603(c) when it failed and refused to meet and confer over the Mayor's proposal for pension reform. By this conduct, the City also interfered with the right of City employees to participate in the activities of an employee organization of their own choosing, in violation of Government Code section 3506 and PERB Regula-

tion 32603(a), and denied the Unions their right to represent employees in their employment relations with a public agency, in violation of Government Code section 3503 and PERB Regulation 32603(b).

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

A. CEASE AND DESIST FROM:

1. Refusing to meet and confer with the Unions before adopting ballot measures affecting employee pension benefits and other negotiable subjects.

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

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

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

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

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

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

Dated: CITY OF SAN DIEGO

By: Authorized Agent

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

PROPOSED DECISION OF THE PUBLIC EMPLOYMENT RELATIONS BOARD (FEBRUARY 11, 2013)

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION,

Charging Party,

v.

CITY OF SAN DIEGO,

Respondent.

Unfair Practice Case No. LA-CE-746-M

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

Before: Donn GINOZA, Administrative Law Judge.

The Mayor of the City of San Diego announced in November 2010 that he would pursue an amendment to the City Charter to reduce pension benefits for City employees. Elimination of the defined benefit plan for new hires and its replacement with a defined contribution plan was the key feature of his proposal. Previously in his role as the City's chief negotiator,

the Mayor had negotiated to achieve pension reforms with the City's unions, some in connection with proposed ballot initiatives he had developed. On this occasion the Mayor chose to pursue a citizens' initiative measure rather than invoke the City Council's authority to place his plan on the ballot because he doubted the Council's willingness to agree with him and because he sought to avoid concessions to the unions. After achieving a compromise between the language of his proposed ballot measure and that of a City Councilmember's competing reform plan, the Mayor announced to the public that the proposal would be carried forward as a citizens' initiative. The measure prevailed at the June 2012 election. The question presented here is whether the City violated its statutory obligations by failing to meet and confer with its unions over this proposal for pension reform.

PROCEDURAL HISTORY

Four unfair practice charges containing similar allegations were filed by the unions against the City of San Diego (City) under the Meyers-Milias-Brown Act (MMBA or Act).[1] The San Diego Municipal Employees Association (SDMEA), the Deputy City Attorneys Association of San Diego (DCAA), the American Federation of State, County and Municipal Employees, AFL-CIO, Local 127 (AFSCME), and the San Diego City Firefighters Local 145 (Firefighters) filed their

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

unfair practice charges on February 1, February 15, February 24, and March 5, 2012, respectively.[2]

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

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

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

sections 3503, 3505, and 3506 of the Act and PERB Regulation 32603(a), (b), and (c).[4]

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

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

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

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

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

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

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

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

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

FINDINGS OF FACT

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

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

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

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

City Human Resources Department Director Scott Chadwick is responsible for the ongoing relationships with the unions. He provides advice to the Mayor on labor relations matters and serves on the bargaining team. The Mayor directs him as to matters of policy and strategy on bargaining matters.

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

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

The Origins of Pension Reform in San Diego

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

The City has a well-documented history of problems in regard to its pension fund, the San Diego City Employees' Retirement System (SCDERS). In addition to the pressures suffered by funds in general, the City amended its plan to increase benefits to future retirees without adequate measures to fund those benefits. (*See City of San Diego (Office of the City Attorney)*

(2010) PERB Decision No. 2103-M (*City of San Diego*).)[5] The City became referred to as "Enron by the Sea." The ballot initiative at the center of this case claimed the unfunded liability of the City for future pension obligations to be approximately $2 billion.

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

The Mayor's Prior Pension Reforms

Arising out of the City's ongoing struggle to control its pension obligations, Mayor Sanders has accumulated a record of reform. In February 2006, the Mayor developed two ballot measures for the November

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

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

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

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

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

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

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

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

City policy requires that if the Mayor proposes an initiative measure he must obtain the Council's approval. On June 25, 2008, the Mayor presented his ballot measure to the City Council's Rules Committee to fulfill the first step in the process. Goldstone testified: "[T]he Mayor didn't feel that [the] Council was going to . . . impose on labor, and so the Mayor did then pro-

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

pose taking the unsuccessful negotiations to the voters, . . . " At the Rules Committee hearing, the Mayor stated that pension reform was the most important of all the issues on his agenda. In the meantime, Council President Peters had developed his own pension reform proposal. The Mayor quickly announced that he and Council President Peters had reached a compromise proposal for pension reform that would advance to the City Council.

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

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

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

potentially costly litigation and the costs associated with the election. The Mayor withdrew his request for City Council approval of his proposed November 2008 initiative measure.

City Attorney Opinions

In the midst of the 2008 negotiations impasse, then-City Attorney, Michael Aguirre issued a legal memorandum regarding the possible ballot measure on pension reform, which included opinions that became central to this case. In his opinion dated June 19, 2008, Aguirre stated the Mayor generally speaking is the "spokesperson for the City in labor relations with the labor unions and has authority to set the City's bargaining position so long as he acts reasonably and in the bests [sic] interest of the City." In advising on the first of four scenarios, Aguirre explained that the City Council has a constitutional right to present a ballot initiative, constrained however by the holding in *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591 (*Seal Beach*), which requires presentation of the proposed ballot measure to the unions for negotiations. In discharging the *Seal Beach* meet-and-confer obligation on behalf of the City, the City Council would request that the Mayor present its proposal to the unions and return with a report. If no agreement was reached the City would declare its final ballot proposal language, and after a hearing on the matter determine whether to place it on the ballot. In this process, the City Council would "control the decisions related to the substance and language of its proposal, and not the Mayor," "apart from any proposal the Mayor may wish to present to the Council for its consideration." Aguirre distinguished

ballot proposal negotiations from normal negotiations, where the Mayor has control during the negotiations and the Council has no authority to add new provisions to the Mayor's proposals.

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

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

> has the same rights as a citizen with respect to elections and propositions. The Mayor does not give up his constitutional rights upon becoming elected. He has the right to initiate or sponsor a voter petition drive. However, such sponsorship would legally be considered as acting with apparent governmental authority because of his position as Mayor, and his right and responsibility under the Strong Mayor Charter provisions to represent the City regarding labor issues and negotiations, including employee pensions. As the Mayor is acting with apparent authority with regard to his sponsorship of a voter petition, the City would have the same meet and confer obligations with its unions as [where the Mayor proposed a ballot measure to the unions directly on behalf of the City].

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

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

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

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

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

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

When Chadwick was initially questioned whether it was his understanding, based on his reading of the 2009 opinion, that in preparing with the Mayor's Office to engage in bargaining it is the Mayor who "ultimately makes the determination of policy with regard to a meet and confer position that the City is going to bring forward to the unions," he answered yes. He later qualified that statement in regard to the 2009 opinion, stating: "That's where the practice changed. Where previously the Mayor was the lead negotiator and the Mayor had the authority to make the proposals and the end-game or the end result would be Council accepting or rejecting the Mayor's proposal, but with the new opinion that laid out the

positions, the City does not have the ability to offer a proposal, absent Council's confirmation."

The Goldsmith opinion does not explicitly frame that question. But the opinion does state that the Mayor's responsibility for representing the City in labor negotiations is a "shared duty with the City Council;" that the Mayor's duty under the MMBA is to "ensure that the City's responsibilities under the MMBA as they relate to communication with employees are met;" that under a California Attorney General's opinion, the public agency's bargaining representatives perform "an administrative function" and are not "an advisory body" to the legislative body; that the MMBA defines a "central role" for the City Council in directing the meet and confer process; and that the legislative power of the City Council, while subject to the Mayor's veto power, may not be delegated.

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

Mayor Sanders' Next Wave of Pension Reform

In the November 2010 election, Proposition D, a proposed sales tax to generate additional revenue for the City, was defeated by the voters. Proposition D had been proposed by the City Council. In response to the defeat, the Mayor met with his staff and discussed plans for the remaining two years of his term in office. The Mayor established as one of his primary objectives to "permanently fix" the problem of the "unsustainable" cost of the City's defined benefit

plan. The Mayor's idea for his "next wave of pension reform" was to replace the defined benefit plan with a defined contribution plan (*i.e.*, "401(k)-style plan") for all new employees with the exception of police and firefighters. City Council President Pro Tem Kevin Faulconer was the co-sponsor of the plan. The Mayor believed pension reform was needed to eliminate the City's $73 million structural deficit before he left office. He intended to propose and promote a campaign to gather voter signatures for an initiative measure that would accomplish his goal.

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

reform proposals had been "watered down" by the City Council. So the Mayor decided to pursue his latest proposal as a private citizen.

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

Goldstone testified that the question whether this plan would conflict with the Mayor's obligations as the City's chief labor negotiator never came up. Goldstone had read the Aguirre opinion, but it was of no concern to him once the Mayor announced his plan. Goldstone believed the question of the Mayor presenting the proposal at the bargaining table was a closed case, that the Mayor could proceed with his plan as a private citizen, and in doing so avoid meeting and conferring on the subject. Goldstone recalled no discussion or review of the legality of the Mayor's approach, asserting that the Mayor was only obligated for compliance with the MMBA when he was acting as the City's chief negotiator.

On November 19, 2010, the Mayor's communication staff issued a "Fact Sheet" in advance of the

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

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

City Director of Communications Darren Pudgil, a direct report to Dubick, is responsible for publicizing the Mayor's policy goals. In the afternoon following the press conference, the Mayor's staff sent out a mass e-mail to a list of 3,000 to 5,000 community leaders and others, which Pudgil described as an announcement of the Mayor's plan "to address the City's budget issues" and "carry out the initiatives"

he supported. The title of the announcement is "Rethinking City Government." The messages indicated they were sent from "JerrySanders@sandiego.gov."

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

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

The Chamber of Commerce was included in a discussion of the pension proposal. Faulconer was the organizer of the meetings.

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

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

On January 11, 2011, the Mayor gave his State of the City speech. The City Charter calls for the

speech, describing it as a message to the City Council communicating "a statement of the conditions and affairs of the City" together with "recommendations on such matters as he or she may deem expedient and proper." A draft of the speech, prepared by the Mayor's speech writer, was circulated for comment among the Mayor's senior staff, including his chief of staff, policy director, and director of communications.

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

The following day, Pudgil issued a press release restating the Mayor's themes of the "next wave of

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

The Mayor testified that he perceived no conflict between his official role as the Mayor, including that of chief negotiator, and his capacity to act as a private citizen in pursuing his pension reform initiative. The Mayor never directed his negotiators to present his ideas for the mandatory 401(k) plan to the unions. Mayor Sanders believes the occupant of his office by necessity must be able to simultaneously engage in private political campaigning while also serving as an officer of city government. The Mayor testified: "[W]hen you run for office and you run for a second term, you're doing both. You're not allowed to campaign on City time, but elected officials also don't have private time per se. We don't get vacation time. We don't get sick time. We don't get any of those. You move back and forth in the electoral process all the time." The Mayor believed he made it clear to the public that he was pursuing the initiative campaign as a private citizen, as reflected in his State of the City speech. He also testified that he informed the editorial board of the San Diego Union Tribune, news writers, and television interviewers that he was advancing his initiative in a private capacity. Pudgil conceded that the Mayor never directed him in his outreach activities to stress that he was carrying the initiative as a private citizen. Although Pudgil appears not to have made the point in his communications, there is evidence that the press was aware of the Mayor's contention that he could promote the initiative as a private citizen. The Mayor

admitted never clarifying for his staff that his activities were undertaken solely as a private citizen.

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

The DeMaio Plan

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

In contrast to the DeMaio plan, the Mayor's plan included a freeze on the City's total payroll. The total payroll cap provided the flexibility to ameliorate the

early losses associated with the transition to the new plan by reallocating other savings in employee compensation. The Mayor believed the pensionable pay freeze was legally vulnerable in contrast to his plan.

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

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

The Compromise Version of the Initiative

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

Dubick was in contact with the law firm retained by Shepard's committee for that purpose.

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

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

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

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

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

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

On April 4, 2011, Boling, Zane and Williams submitted to the City Clerk a notice of intent to circulate their petition amending the City Charter, entitled the Comprehensive Pension Reform Initiative for San Diego (CRPI). The petition was sponsored by San Diegans for Comprehensive Pension Reform (CPR Committee), which described itself as supported by a coalition of signature gatherers. The CPR Committee was in turn officially sponsored by the Lincoln Club. Zane, the Lincoln Club's executive director, became the chair of the committee. Williams was a past board chair of the Lincoln Club. The provisions of the measure included, inter alia: (1) phase-out of the defined benefit plan for all current members and replacement with a defined contribution plan for new employees; (2) a cap on the defined benefit equivalent to 80 percent at age 55 of the member's highest three years of base compensation for newly hired police officers, with a disincentive for early retirement; (3) an equal division of annual contributions between employees and the City for members of the defined benefit plan; (4) disqualification for defined benefit pensions for

employees convicted of a felony related to their employment; (5) elimination of the requirements for a vote by retirement system members on an amendment to the system and for a vote by retirees on any amendment affecting the vested benefits of retirees; and (6) establishment of the City's initial bargaining position regarding base compensation for the calculation of pension benefits set no higher than the levels in the 2001 salary ordinance for a period of five years. The Mayor acknowledged that City Attorney Goldsmith had reviewed the language of the measure. Lynch asked the Mayor if he approved of Zane running the campaign from the Lincoln Club. Though preferring Shepard, the Mayor agreed.

On April 5, a normal work day, the Mayor led a press conference on the concourse area outside City Hall to acknowledge the successful filing of the petition. The Mayor's staff prepared his statement and briefed him on the contents of the petition. KUSI, airing at 10:00 p.m., reported that the Mayor and Councilmember DeMaio had reached a compromise. The Lincoln Club and San Diego Taxpayers Association were mentioned as having brought the two officials together. Gathered behind the Mayor, among others, were Councilmembers Faulconer and DeMaio, City Attorney Goldsmith, Boling, Zane, and Lutar. DeMaio spoke and credited the Mayor for brokering the compromise. The KUSI report conveys the idea that the Mayor and Councilmember DeMaio were responsible for developing the joint proposal. The Mayor touted his record of achieving the goals he had set as mayor for taxpayers and employees in terms of pension reforms. The Mayor again believed both he and City Attorney Goldsmith were present in their capacities as private

citizens. There is no evidence the Mayor stated he was acting as a private citizen on this occasion.

During the summer and fall of 2011, the Mayor's staff, most notably Pudgil, continued the public relations effort on behalf of the initiative by conducting outreach to both the print and broadcast media, providing quotes, and arranging for appearances. Talking points for various speaking appearances were prepared that describe the pension initiative. Mayor Sanders supported efforts to solicit the signatures needed to qualify Proposition B. Someone on the Mayor's staff prepared a solicitation letter from the Mayor to members of the San Diego Chamber of Commerce, directing supporters to a website and their petition signatures to a listed e-mail address.[11]

Dubick believed that until the initiative was actually filed, her activities related to assessing the viability of the plan constituted official business. Goldstone shared a similar view believing that consideration of the initiative and the work of launching it was legitimate City business, while the private-citizen activity only commenced when the signature

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

gathering began. Once the initiative was filed, Dubick reminded the staff that their work in support of the Mayor's initiative was not official City business and that they needed to submit leave slips for the time they spent on the initiative in order to comply with the City's conflict of interest code. Only Faucett and Pudgil submitted leave slips for small increments of time indicative of pension work (a total of six between the two of them) that occurred prior to the April 2011 news conference. Pudgil presented only four leave slips for the period after the April 2011 news conference. As a possible explanation for the paucity of leave slips, Dubick assumed that all staffers knew that activities in support of the Mayor's "private" initiative were to be done on non-work time and that they had flexibility to conduct these activities during the work week because they were salaried employees.

According to campaign disclosure statements for the period of January 1, through June 30, 2011, San Diegans for Pension Reform contributed approximately $89,000 to the CPR Committee. The Lincoln Club donated $56,000. DeMaio's committee donated $15,000. Total receipts for the period amounted to $235,000.

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

2011 Contract Negotiations

Between January and May 2011, all six of the City's unions were engaged in negotiations for successor MOUs. Separately but concurrently, all of the unions negotiated over a City proposal to reduce ex-

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

The City's Refusals to Meet and Confer

By letter dated July 15, 2011, Ann Smith, attorney for SDMEA, issued a demand to the Mayor to meet and confer over his "much publicized 'Pension Reform' Ballot Initiative." The letter objected to the Mayor's failure to offer negotiations of the matters contained in the proposed measure, and stated that if the Mayor did not present his own proposal, the unions would presume his opening proposal would be the contents of the CPRI. Smith objected to the Mayor "bargaining" with entities, not the unions, "inside and outside the City." Mayor Sanders referred the letter to the City Attorney for a response. A second letter from Smith dated August 10, 2011, repeated the demand.

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

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

independent legal advice regarding the City's obligations under the MMBA. The Mayor never directed Chadwick to open negotiations with the unions regarding his pension proposal.

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

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

The Passage of Proposition B

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

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

reform measures including the pension reform negotiated in 2008.

ISSUE

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

CONCLUSIONS OF LAW

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

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

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

The Mayor's Policy Decision

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

term or condition of employment prior to completion of bargaining].)[12]

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

Seal Beach, supra, 36 Cal.3d 591, describes a unilateral change. Analysis of the elements of the unilateral change test was unnecessary because the only contested issue was whether the city was required to provide the union with an opportunity to meet and confer prior to taking action. The city implemented new terms and condition of employment for its employees, after its city council proposed them as charter amendments pursuant to its constitutional power (Cal. Const., art. XI, § 3, subd. (b)) and the voters approved the amendments at the election. The city was charged with lack of compliance with the MMBA's meet-and-confer requirement. The

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

city argued that it had "absolute, unabridged constitutional authority to propose charter amendments to its electorate, which authority could not be impaired or limited by the requirements of the MMBA." (*Seal Beach, supra*, 36 Cal.3d at p. 596.) Emphasizing that the statute intended to establish a "procedure for resolving disputes" regarding terms and conditions of employment, rather than prescribe "standards" for such (*id.* at p. 597), *Seal Beach* construed section 3505[13] to require harmonization with the city council's constitutional right to propose initiative legislation. (*Id.* at pp. 598-601.) Harmonizing the two, the court held that the meet-and-confer process is to take place before the vote and implementation of a charter amendment. (*Id.* at p. 602.) *Seal Beach* noted prior cases of city charter preemption by the MMBA in cases of direct conflict between the substance of local legislation and the requirements of the statute. (*Id.* at pp. 598-599.) *Seal Beach* describes its application of MMBA preemption as an "a fortiori" case because imposition of the meet-and-confer requirement on a city council proposing a charter amend-

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[13] Section 3505 provides in pertinent part:

> The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

ment is only a procedural overlay on the local legislative activity. (*Id.* at p. 599; *see Baggett v. Gates* (1982) 32 Cal.3d 128, 139.) "Cities function both as employers and as democratic organs of government. The meet-and-confer requirement is an essential component of the state's legislative scheme for regulating the city's employment practices. By contrast, the burden on the city's democratic functions is minimal." (*Seal Beach, supra*, 36 Cal.3d at p. 599.) The city's constitutional right to propose charter amendments was not absolute.

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

PERB has held that a unilateral change occurs when the employer demonstrates a clear intent to change a policy affecting terms and conditions of employment with no subsequent wavering of that intent, and the employer has taken concrete steps to effectuate the change even if its action falls short of

actual implementation. (*Folsom-Cordova Unified School District* (2004) PERB Decision No. 1712; *City of San Juan Capistrano* (2012) PERB Decision No. 2238-M; *City of Vernon, supra,* 107 Cal.App.3d 802, 822-824 [entire policy ordered rescinded, not just portion enforced].) The record establishes that the Mayor announced his intention to seek implementation of a new policy regarding pensions. He did so at the November 2010 press conference, his State of the City speech, and again at the April 2011 press conference. The Mayor emphasized that his latest proposal was a critical objective of his administration and the focus of his remaining years in office.

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

The City does not dispute that the Mayor's proposal contained matters within the scope of representation and that the City rejected the unions' demands to meet and confer over that proposal prior to the reforms being enacted through the passage of Proposition B. As in *Seal Beach, supra,* 36 Cal.3d 591, the critical question is whether the Mayor's announced commitment to pursue a citizens' initiative

triggered a duty to meet and confer on the part of the City. The unions argue the City had such a duty based on the principles of agency. The Mayor is an agent of the City by virtue of the statute—which compels a duty to meet and confer on the City and its designated representatives—and by virtue of common law agency principles—which prevent the City from arguing that the Mayor's pursuit of the initiative as a private citizen relieves the City of its statutory obligations.

Statutory Agency

The MMBA has two stated purposes: "(1) to promote full communication between public employers and employees; and (2) to improve personnel management and employer-employee relations within the various public agencies." (*Seal Beach, supra*, 36 Cal.3d at p. 597.) "These purposes are to be accomplished by establishing methods for resolving disputes over employment conditions and by recognizing the right of public employees to organize and be represented by employee organizations." (*Ibid.*) The principal method for resolution of disputes over employment conditions is the meet-and-confer process.

Section 3505 speaks to the obligation to meet and confer, the core, reciprocal duty imposed on the public agency and its employee organizations. It also contains language referencing the prohibition against unilateral changes in terms and conditions of employment that is applicable to all the statutes administered by PERB. (*See Berkeley Unified School District* (2012) PERB Decision No. 2268, p. 12.) The second clause of the first sentence sets forth the general duty to meet and confer, requiring that the governing board and its designated representatives "consider fully such present-

ations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action." (Emphasis added.) *Seal Beach* illustrates, unremarkably, that a city council's decision to propose an alteration of terms and conditions of employment by way of a charter initiative is a determination of policy or course of action that triggers a duty to meet and confer.

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

Section 3505's command is not limited to the governing body. Although the governing body is legally responsible for enacting legislation on terms and conditions of employment (*e.g.*, most often by adopting a tentative agreement), the duty defined by section 3505 is also imposed on "other representatives as may be properly designated by law or by such governing body." The Mayor is unquestionably such an "other representative." Nor can section 3505 be read as confining itself to policy determinations or intended courses of actions of the governing body. PERB has construed all of the statutes under its jurisdictions as requiring negotiations on proposals

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

to change negotiable subjects regardless of whether accomplished through legislative action by the governing body. (*See Huntington Beach Police Officers' Assn. v. City of Huntington Beach* (1976) 58 Cal.App.3d 492 [chief of police]; *Omnitrans* (2009) PERB Decision No. 2030-M [supervisor]; *Los Angeles Unified School District* (2002) PERB Decision No. 1501 [district superintendent acting on recommendation of chief of police].) Therefore as the City's chief negotiator, the Mayor has a duty by the terms of the statute to provide advance notice and opportunity to meet and confer over proposed changes.

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

The City also contends that the Mayor has no authority to make a bargaining proposal to the unions without the City Council's prior approval, and therefore he could not present his initiative proposal directly to the unions. The unions do not dispute that currently the Mayor must obtain prior approval of all initial bargaining proposals including ballot proposals.[15] But they rely on the City Charter, which establishes a "shared duty" between the Mayor and the City Council for discharging the City's duties under the MMBA and City policy which requires that the Mayor present any proposal for an initiative measure to the City Council. The City Charter does afford the Mayor authority to recommend "measures and ordinances" he finds "necessary and expedient" to the City Council, and the Mayor decided to pursue a legislative "measure" here. He communicated his policy decision to the City Council in his State of the City speech, which, according to the City Charter, is to include recommendations to the Council on the affairs of the City. By seeking the City Council's approval for initiative proposals and complying with City policy in the past, the Mayor has treated the City Council as his supervising authority in labor relations terms. In terms of his statutory duties, the Mayor has gone outside the chain of command. The Mayor cannot have it both ways; he cannot be lacking in authority to make decisions on labor relations

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

matters, yet also have the ability to take actions that have the effect of changing terms and conditions of employment. The Mayor's failure to consult the City Council demonstrates a breach of the shared statutory responsibility, which the Council could reasonably have rebuked if it had so chosen. It is true then that by allowing the Mayor to bypass the City Council in the manner that he did, the City Council abdicated its supervisory responsibility under the MMBA. (*Voters for Responsible Retirement v. Board of Supervisors of Trinity County* (1994) 8 Cal.4th 765, 783 (*Trinity County*) [legislative body has a supervisory role].)

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

In light of *Seal Beach*, and given the City's legal responsibility to meet and confer and supervisory responsibility over its bargaining representatives, section 3505 must be construed to require that the

City provide its unions the opportunity to meet and confer over the Mayor's proposal for pension reform before accepting the benefits of a unilaterally imposed new policy, when the Mayor, invoking the weight of his office, has taken concrete steps toward qualifying his policy determination as a ballot measure.

The Agency Theory of Liability

Agents are classified according to the origin of their authority (actual or apparent) or the scope of their authority (general or special). (Civ. Code, §§ 2297, 2298, 2299, 2300.) An actual agent is one really employed by the principal. (Civ. Code, § 2299.) "Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess." (Civ. Code, § 2316.) Apparent authority (*i.e.*, ostensible authority) is "such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." (Civ. Code, § 2317.) Ratification allows for a third method of establishing an agency relationship. It occurs through the voluntary election by a person to adopt as his own an act of another, the effect of which is to treat the act as if originally authorized by him. (Civ. Code, § 2307; 2B Cal.Jur.3d (2007) Agency, § 67, p. 261, § 85, p. 289.)

PERB and National Labor Relations Board (NLRB) have adopted the principles of agency. Agency is employed to impose liability on the charged party for the unlawful acts of its employees or representatives even when the principal is not at fault and takes no active part in the action. (*Chula Vista Elementary School District* (2004) PERB Decision No. 1647 (*Chula Vista*); *Inglewood Unified School*

District (1990) PERB Decision No. 792 (*Inglewood*); *D & F Industries, Inc.* (2003) 339 NLRB 618, 619-620; *see Vista Verde Farms v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 307; *see also* Civ. Code, § 2338.) Agency principles are also employed to determine the existence of an agency relationship for purposes of ascertaining authority and imputing notice to the principal. (*Mount Diablo Unified School District, et al.* (1977) EERB[16] Decision No. 44 [whether a grievance representative is an agent of an employee organization]; *Safway Steel Products, Inc.* (2001) 333 NLRB 394, 400 [authority to bind principal in negotiations]; *Marin Community College District* (1995) PERB Decision No. 1092, adopting administrative law judge's decision at p. 78 [notice imputed]; *Repco Distributing, Inc.* (1984) 273 NLRB 158, 163 [same].) Both PERB and the NLRB rely on common law principles of agency. (*Inglewood, supra*, PERB Decision No. 792, pp. 19-20; *Allegany Aggregates, Inc.* (1993) 311 NLRB 1165, 1165.)

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

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

p. 5; but *see Chula Vista*, at p. 9 [actual authority suffices under the NLRB test, distinguishing *Inglewood*].)

Actual Authority

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

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

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

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

The City does not dispute that the Mayor has responsibility for negotiating with the unions, but contends he may only be liable for conduct "when he is engaged in the meet and confer process, which is when he is formulating [the] City's positions for presentation to, and ultimate approval by the City Council." This argument is unpersuasive. Pursuit of the pension reform concepts was within the Mayor's general scope of authority in terms of the subject matter. (Rest.2d Agency, § 228, com. (a).) Agents are afforded discretion by which to achieve their princi-

pal's objectives. "Agency is the relation that results from the act of one person, called the principal, who authorizes another, called the agent, to conduct one or more transactions with one or more third persons and to exercise a degree of discretion in effecting the purpose of the principal." (*Workman v. City of San Diego* (1968) 267 Cal.App.2d 36, 38, quoting *Wallace v. Sinclair* (1952) 114 Cal.App.2d 220, 229, original emphasis; Civ. Code, § 2319.) The Mayor exercised his discretion in a manner he believed would permanently fix the problem with pensions. The City is responsible for the Mayor's pursuit of the citizens' initiative because a principal is responsible for its agent's conduct, so long as that conduct is within the general scope of the agent's authority, even though the principal may not have authorized the specific acts in question or ratified them. (*Contemporary Guidance Service, Inc.* (1988) 291 NLRB 50, 64; *Bio-Medical Applications of Puerto Rico, Inc.* (1984) 269 NLRB 827, 828; *Compton*, *supra*, PERB Decision No. 1518, p. 5; *Monteleone v. Southern California Vending Corp.*, *supra*, 264 Cal.App.2d 798, 806; 2B Cal.Jur.3d, Agency, § 467, pp. 227-228.)

The City Council was well aware of the Mayor's policy decision and his efforts to implement it. The City Council also became aware through the City Attorney's correspondence with the unions' attorneys that the City would refuse to meet and confer over the Mayor's proposal. And it was on notice of City Attorney Aguirre's opinion that the Mayor's pursuit of a citizens' initiative carried potential liability in terms of the duty to meet and confer. The City Council took no action as a body in spite of these events. By want of ordinary care, the City Council

allowed the Mayor to believe he could pursue his citizens' initiative and that no conflict existed between his roles as elected official and private citizen. (*Inglewood Teachers Assn. v. Public Employment Relations Bd., supra,* 227 Cal.App.3d at p. 781.)

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

Apparent Authority

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

The evidence supports the unions' claim of apparent authority. Bargaining unit employees and the public were reasonable in concluding that the Mayor

was pursuing pension reform in his capacity as both elected official and the City's chief executive officer based on his public statements, news coverage of those statements, and his history of dealing with unions on pension matters, some in the form of proposed ballot initiatives. Most telling was the April 2011 news conference, which aired after the culmination of a four-month effort to coalesce support around a single initiative measure in concert with organized private interests. The press conference took place at City Hall. The 10:00 p.m. local television news report described the Mayor's plan to proceed with the compromise initiative as the joint effort of the Mayor and Councilmember DeMaio. The Lincoln Club and San Diego Taxpayers Association were only mentioned as having brought the two City officials together. In the cases of vicarious liability, lower ranking management representatives are less likely to be viewed as speaking for management. The Mayor operates as a strong mayor and is the highest ranking elected official whom the public could reasonably believe spoke for the City and reflected its policy.[18]

The Mayor did not act alone in pursuit of the City's interests. Councilmember Faulconer, Councilmember DeMaio, and City Attorney Goldsmith were known endorsers of the Mayor's proposal. Quantifiable time and resources derived from the City as described in the record were devoted to the Mayor's promotion

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

of his initiative, notwithstanding the views of some or all of the City's witnesses that their activities were on personal time. (*Cf. Inglewood, supra*, PERB Decision No. 792.) Even if done on non-work time, their defense that these activities were done for private purposes is no stronger than the Mayor's, because the evidence establishes they were motivated to act in the interests of the Mayor, who was their supervisor.

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

The City contends that evidence is lacking that the City authorized the Mayor to embark on his plan for a citizens' initiative; that is, there is no evidence "the City Council represented that Jerry Sanders was acting as the City's agent when proposing his pension reform concepts or supporting what became [Proposition B]." Affirmative representations vouching for the conduct of the purported agent have been absent in PERB's vicarious liability cases, and so the inquiry is whether the perception of authority is warranted by other circumstances. Ratification, through failure to repudiate once the agent's conduct has been made known to the principal, is generally the manner in which apparent authority is established in PERB cases. (*Inglewood*, *supra*, PERB Decision No. 792; *Chula*

Vista, *supra*, PERB Decision No. 1647; Civ. Code, § 2310.) The City Council never repudiated the Mayor's publicly stated commitment to pursue a citizens' initiative, or claimed that the Mayor acted outside the scope of his authority. (*State of California (Departments of Veterans Affairs & Personnel Administration*) (2008) PERB Decision No. 1997-S, p. 21.) The fact that the Mayor may have believed the City Council as a whole did not support his pension reform concepts does not undermine the reasonableness of the perception of his authority to speak on behalf of the City. His was a private opinion he shared with no one outside his office.

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

The Citizen Proponents as Special Agents

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

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

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

Agency principles are appropriately applied to find that the City was responsible for the Mayor's policy determination and his activities undertaken toward its implementation. The Mayor's attempt to act as a private citizen—a simultaneous denial he acted on behalf of the City—signaled his intent to shed himself of his role as statutory agent for the City. The success of this strategy was dependent in large measure on the Mayor's representation in his capacity as an elected official that Proposition B was a credible and lawful policy decision, necessary to address the City's unfunded pension liability and deserving of the voters' support.

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

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

The City's defense was established early in the dispute when the City Attorney read the unions'

demands as seeking to negotiate over the ballot initiative presented by the citizen proponents. The City believed its refusal to meet and confer was justified based on the absence of legal precedent requiring negotiations over a citizens' ballot initiative. At the same time, the City ignored the unions' demand to meet and confer over the Mayor's policy decision. Whether this was intentional on the City's part is unimportant. The City's denial that the Mayor made a policy determination for which the City is responsible has been rejected for the reasons explained above. By not seeking to bargain over Proposition B per se, the unions avoid the question left open in *Seal Beach, supra,* 36 Cal.3d 591.[19] The unions' case does not require demonstration that *Seal Beach* should be extended to citizens' initiatives.

Nevertheless, the City asserts that the citizens' right to directly legislate "is by its very nature and purpose a means to bypass the governing body of a public agency;" that the Mayor "obviously chose the initiative to bypass the City Council;" and that the consequence of such a "political decision" is lawful avoidance of the meet-and-confer requirement. Even the Aguirre opinion, upon which the unions rely, suggested this circumvention based on the view that

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

(1) the City has no duty to meet and confer over a citizens' initiative, and (2) the Mayor has a right as a private citizen to participate in such a campaign. However, the former issue is simply unsettled. (*Seal Beach, supra*, 36 Cal.3d at p. 599, fn. 8.) Aguirre qualified the second proposition with the principles of agency. As to that proposition, the question is not whether the Mayor has a constitutional right as a private citizen to support an initiative campaign (he does) but whether he can initiate one when the City he officially represents has failed to provide the unions with an opportunity to meet and confer. In other words, the proper question for this case is whether the Mayor is privileged to bypass the City Council and its *Seal Beach* obligation, and thereby bypass the unions.

The City's argument engenders conflict with the principle of bilateralism that is fundamental to collective bargaining statutes. *Seal Beach, supra*, 36 Cal.3d at p. 597 stated: "The simple question posed . . . is whether the unchallenged constitutional power of a charter city's governing body to propose charter amendments may be used to circumvent the legislatively designed methods of accomplishing the goals of the MMBA." The same question is posed here as to the Mayor's attempt, together with two Councilmembers and the City Attorney, to propose a charter amendment and seek private support to carry it forward. Bilateralism in the bargaining relationship is predicated on face-to-face, give-and-take at the bargaining table. PERB has explained that the duty to bargain includes the "concomitant obligation to meet and negotiate with no others, including the employees themselves [and] actions of a[n] employer

which are in derogation of the authority of the exclusive representative are evidence of a refusal to negotiate in good faith." (*Muroc Unified School District* (1978) PERB Decision No. 80, p. 19, emphasis added, fns. omitted; *see also* § 3543.3; *California State University* (1989) PERB Decision No. 777-H; *Newark Unified School District* (2007) PERB Decision No. 1895.) "Derogation" is defined as "a lessening or weakening (of power, authority, position, etc.)." (Webster's New Twentieth Century Dict.) The principle of bilateralism prohibits the employer from engaging in practices that reward it for bypassing the exclusive representative. Such practices constitute direct interference with the employees' right to be represented by their chosen representative. (*California State University*, citing *Medo Photo Supply Corp. v. NLRB* (1944) 321 U.S. 678, 684-687; *see also Safeway Trails, Inc.* (1977) 233 NLRB 1078, 1082, affd. (D.C. Cir. 1979) 641 F.2d 930, cert. den. (1980) 444 U.S. 1072.)

Bypassing occurs when the offending party's intent is to achieve bargaining objectives while circumventing the negotiations process. It takes the form of conduct seeking to influence a party not involved in the negotiations, typically either the governing board of the employer or rank-and-file employees in the exclusive representative's bargaining unit. (*California State University* (1987) PERB Decision No. 621-H [union president offered two proposals to the board of trustees never offered at the bargaining table]; *County of Inyo* (2005) PERB Decision No. 1783-M [union representative communicated with the In-Home Supportive Services Advisory Board]; *Muroc Unified School District*, *supra*, PERB Decision No. 80 [management's campaign to sway employees].)

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

> [T]he effectiveness of the collective bargaining process under the MMBA rests in large part upon the fact that the public body that approves the MOU under section 3505.1—*i.e.*, the governing body—is the same entity

> that, under section 3505, is mandated to conduct or supervise the negotiations from which the MOU emerges. If the referendum were interjected into this process, then the power to negotiate an agreement and the ultimate power to approve an agreement would be wholly divorced from each other, with the result that the bargaining process established by the MMBA could be undermined. This kind of bifurcation of authority between negotiators and decisionmakers would not be considered lawful were it to occur in the realm of private sector labor relations.

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

The Mayor's choice of a citizens' initiative as a vehicle to implement his policy determination is not privileged because it amounts to bypassing of the unions. The absence of case precedent holding that a duty to meet and confer attaches to a citizens' initiative does not constitute an affirmative license for the Mayor to deprive a union of its right to meet and confer. Though he characterized his initiative

campaign as the activity of a private citizen, the Mayor pursued pension reform in his capacity as an elected official, and could not disown his statutory obligation to comply with the MMBA. (*City of San Diego, supra*, PERB Decision No. 2103-M, pp. 13-14.)

The City cites *League of Women Voters of California v. Countywide Criminal Justice Coordination Com.* (1988) 203 Cal.App.3d 529 for the proposition that if the legislative body has proven disinterested, public officials may draft and propose a citizens' initiative "in the hope a sympathetic private supporter will forward the cause and the public will prove more receptive." That case dealt with the question of whether the use of public funds by governmental staff in developing initiative proposals in the public interest violated the prohibition against use of such funds for partisan political activities. (*See Stanson v. Mott* (1976) 17 Cal.3d 206 [public expenditures supporting or opposing an initiative measure are unlawful, but some expenditures for such measures not in the nature of lobbying or partisan campaigning may be proper].) The determination of a policy to change terms and conditions of employment may in some instances be a matter of "legislative discretion" but it is not simply a determination of "what constitutes a public purpose," like the proposal for an initiative on criminal justice matters in the cited case. (*League of Women Voters of California v. Countywide Criminal Justice Coordination Com.*, *supra*, 203 Cal.App.3d 529, 548.) A determination of policy within the meaning of section 3505 is constrained by the duty to meet and confer. *Seal Beach*, *supra*, 36 cal.3d 591, which embodies that very principle, is not a prohibition on legislative activity.

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

Conclusion

The Mayor under the color of his elected office, supported by two City Councilmembers and the City Attorney, undertook to launch a pension reform initiative campaign, raised money in support of the campaign, helped craft the language and content of the initiative, and gave his weighty endorsement to it, all while denying the unions an opportunity to meet and confer over his policy determination in the

form of a ballot proposal. By this conduct the Mayor took concrete actions toward implementation of the reform initiative, the consequence of which was a unilateral change in terms and conditions of employment for represented employees to the City's considerable financial benefit. *Seal Beach* requires negotiations when a public agency, acting through its governing body, makes a policy determination that it proposes for adoption by the electorate. By virtue of the Mayor's status as a statutorily defined agent of the public agency and common law principles of agency, the same obligation to meet and confer applies to the City because it has ratified the policy decision resulting in the unilateral change, and because the Mayor was not legally privileged to pursue implementation of that change as a private citizen. These conclusions make it unnecessary to address any other contentions urged by the unions.

REMEDY

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

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

The City has violated section 3505 of the MMBA and PERB Regulation 32603(c) by failing and refusing to meet and confer over the Mayor's 2010-2011 proposal to reform the City's defined benefit pension plan prior to placing Proposition B on the ballot. Because the Mayor's policy determination was successfully adopted through the passage of Proposition B, this amounted to a unilateral change. Therefore, the tra-

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

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

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

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

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

Finally, it is the ordinary remedy in PERB cases that the party found to have committed an unfair practice is ordered to post a notice incorporating the terms of the order. Such an order is granted to provide employees with a notice, signed by an authorized agent that the offending party has acted unlaw-

fully, is being required to cease and desist from its unlawful activity, and will comply with the order. Thus, it is appropriate to order the City to post a notice incorporating the terms of the order herein at its buildings, offices, and other facilities where notices to bargaining unit employees are customarily posted. Posting of such notice effectuates the purposes of the MMBA that employees are informed of the resolution of this matter and the City's readiness to comply with the ordered remedy.

PROPOSED ORDER

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

a public agency, in violation of Government Code section 3503 and PERB Regulation 32603(b).

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

A. Cease and Desist From:

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

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

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

B. Take the Following Affirmative Actions Designed to Effectuate the Policies of the MMBA:

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

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

3. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations in the City, where notices to employees customarily are posted, copies of the Notice attached hereto as an

Appendix. The Notice must be signed by an authorized agent of the City, indicating that the City will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

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

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

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

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

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Cal. Code of Regs., tit. 8,

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

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

ORDER OF THE SUPREME COURT OF CALIFORNIA DENYING PETITION FOR REHEARING EN BANC (OCTOBER 10, 2018)

IN THE SUPREME COURT OF CALIFORNIA

CATHERINE A. BOLING ET AL.,

Petitioners,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,

Respondent.

CITY OF SAN DIEGO ET AL.,

Real Parties in Interest.

Court of Appeal, Fourth Appellate District, Division One–Nos. D069626, D069630

S242034

Before: CANTIL-SAKAUYE, Chief Justice.

The petition for rehearing is denied.

Corrigan, J., was absent and did not participate.

/s/ Cantil-Sakauye
Chief Justice

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

CAL. CONST. ART. 11, § 3

Sec. 3.

(a) For its own government, a county or city may adopt a charter by majority vote of its electors voting on the question. The charter is effective when filed with the Secretary of State. A charter may be amended, revised, or repealed in the same manner. A charter, amendment, revision, or repeal thereof shall be published in the official state statutes. County charters adopted pursuant to this section shall supersede any existing charter and all laws inconsistent therewith. The provisions of a charter are the law of the State and have the force and effect of legislative enactments.

(b) The governing body or charter commission of a county or city may propose a charter or revision. Amendment or repeal may be proposed by initiative or by the governing body.

(c) An election to determine whether to draft or revise a charter and elect a charter commission may be required by initiative or by the governing body.

(d) If provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail.

CALIFORNIA GOVERNMENT CODE
SECTIONS 3500-3511

3500

(a) It is the purpose of this chapter to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations. It is also the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the various public agencies in the State of California by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by those organizations in their employment relationships with public agencies. Nothing contained herein shall be deemed to supersede the provisions of existing state law and the charters, ordinances, and rules of local public agencies that establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations nor is it intended that this chapter be binding upon those public agencies that provide procedures for the administration of employer-employee relations in accordance with the provisions of this chapter. This chapter is intended, instead, to strengthen merit, civil service and other methods of administering employer-employee relations through the establishment of uniform and orderly methods of communication between employees and the public agencies by which they are employed.

(b) The Legislature finds and declares that the duties and responsibilities of local agency employer representatives under this chapter are substantially similar to the duties and responsibilities required under existing collective bargaining enforcement procedures and therefore the costs incurred by the local agency employer representatives in performing those duties and responsibilities under this chapter are not reimbursable as state-mandated costs. (Amended by Stats. 2000, Ch. 901, Sec. 1. Effective January 1, 2001.)

3500.5

This chapter shall be known and may be cited as the "Meyers-Milias-Brown Act." (Added by renumbering Section 3510 by Stats. 2000, Ch. 901, Sec. 9. Effective January 1, 2001.)

3501

As used in this chapter:

(a) "Employee organization" means either of the following:

(1) Any organization that includes employees of a public agency and that has as one of its primary purposes representing those employees in their relations with that public agency.

(2) Any organization that seeks to represent employees of a public agency in their relations with that public agency.

(b) "Recognized employee organization" means an employee organization which has been formally acknowledged by the public agency as an employee organization that represents employees of the public agency.

(c) Except as otherwise provided in this subdivision, "public agency" means every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation and every town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not. As used in this chapter, "public agency" does not mean a school district or a county board of education or a county superintendent of schools or a personnel commission in a school district having a merit system as provided in Chapter 5 (commencing with Section 45100) of Part 25 and Chapter 4 (commencing with Section 88000) of Part 51 of the Education Code or the State of California.

(d) "Public employee" means any person employed by any public agency, including employees of the fire departments and fire services of counties, cities, cities and counties, districts, and other political subdivisions of the state, excepting those persons elected by popular vote or appointed to office by the Governor of this state.

(e) "Mediation" means effort by an impartial third party to assist in reconciling a dispute regarding wages, hours and other terms and conditions of employment between representatives of the public agency and the recognized employee organization or recognized employee organizations through interpretation, suggestion and advice.

(f) "Board" means the Public Employment Relations Board established pursuant to Section 3541. (Amended by Stats. 2003, Ch. 215, Sec. 2. Effective January 1, 2004.)

3501.5

As used in this chapter, "public agency" does not mean a superior court. (Amended by Stats. 2002, Ch. 784, Sec. 123. Effective January 1, 2003.)

3502

Except as otherwise provided by the Legislature, public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public employees also shall have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public agency. (Added by Stats. 1961, Ch. 1964.)

3502.1

No public employee shall be subject to punitive action or denied promotion, or threatened with any such treatment, for the exercise of lawful action as an elected, appointed, or recognized representative of any employee bargaining unit. (Added by Stats. 2001, Ch. 788, Sec. 1. Effective January 1, 2002.)

3502.5

(a) Notwithstanding Section 3502, any other provision of this chapter, or any other law, rule, or regulation, an agency shop agreement may be negotiated between a public agency and a recognized public employee organization that has been recognized as the exclusive or majority bargaining agent pursuant to reasonable rules and regulations, ordinances, and

enactments, in accordance with this chapter. As used in this chapter, "agency shop" means an arrangement that requires an employee, as a condition of continued employment, either to join the recognized employee organization or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of the organization.

(b) In addition to the procedure prescribed in subdivision (a), an agency shop arrangement between the public agency and a recognized employee organization that has been recognized as the exclusive or majority bargaining agent shall be placed in effect, without a negotiated agreement, upon (1) a signed petition of 30 percent of the employees in the applicable bargaining unit requesting an agency shop agreement and an election to implement an agency fee arrangement, and (2) the approval of a majority of employees who cast ballots and vote in a secret ballot election in favor of the agency shop agreement. The petition may be filed only after the recognized employee organization has requested the public agency to negotiate on an agency shop arrangement and, beginning seven working days after the public agency received this request, the two parties have had 30 calendar days to attempt good faith negotiations in an effort to reach agreement. An election that may not be held more frequently than once a year shall be conducted by the California State Mediation and Conciliation Service in the event that the public agency and the recognized employee organization cannot agree within 10 days from the filing of the petition to select jointly a neutral person or entity to conduct the election. In the event of an agency fee arrangement outside of an

agreement that is in effect, the recognized employee organization shall indemnify and hold the public agency harmless against any liability arising from a claim, demand, or other action relating to the public agency's compliance with the agency fee obligation.

(c) An employee who is a member of a bona fide religion, body, or sect that has historically held conscientious objections to joining or financially supporting public employee organizations shall not be required to join or financially support a public employee organization as a condition of employment. The employee may be required, in lieu of periodic dues, initiation fees, or agency shop fees, to pay sums equal to the dues, initiation fees, or agency shop fees to a nonreligious, nonlabor charitable fund exempt from taxation under Section 501(c)(3) of the Internal Revenue Code, chosen by the employee from a list of at least three of these funds, designated in a memorandum of understanding between the public agency and the public employee organization, or if the memorandum of understanding fails to designate the funds, then to a fund of that type chosen by the employee. Proof of the payments shall be made on a monthly basis to the public agency as a condition of continued exemption from the requirement of financial support to the public employee organization.

(d) An agency shop provision in a memorandum of understanding that is in effect may be rescinded by a majority vote of all the employees in the unit covered by the memorandum of understanding, provided that: (1) a request for that type of vote is supported by a petition containing the signatures of at least 30 percent of the employees in the unit, (2) the vote is by secret ballot, and (3) the vote may be taken

at any time during the term of the memorandum of understanding, but in no event shall there be more than one vote taken during that term. Notwithstanding the above, the public agency and the recognized employee organization may negotiate, and by mutual agreement provide for, an alternative procedure or procedures regarding a vote on an agency shop agreement. The procedures in this subdivision are also applicable to an agency shop agreement placed in effect pursuant to subdivision (b).

(e) An agency shop arrangement shall not apply to management employees.

(f) A recognized employee organization that has agreed to an agency shop provision or is a party to an agency shop arrangement shall keep an adequate itemized record of its financial transactions and shall make available annually, to the public agency with which the agency shop provision was negotiated, and to the employees who are members of the organization, within 60 days after the end of its fiscal year, a detailed written financial report thereof in the form of a balance sheet and an operating statement, certified as to accuracy by its president and treasurer or corresponding principal officer, or by a certified public accountant. An employee organization required to file financial reports under the federal Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. Sec. 401 et seq.) covering employees governed by this chapter, or required to file financial reports under Section 3546.5, may satisfy the financial reporting requirement of this section by providing the public agency with a copy of the financial reports. (Amended by Stats. 2012, Ch. 46, Sec. 4. (SB 1038) Effective June 27, 2012.)

3503

Recognized employee organizations shall have the right to represent their members in their employment relations with public agencies. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership. Nothing in this section shall prohibit any employee from appearing in his own behalf in his employment relations with the public agency. (Amended by Stats. 1968, Ch. 1390.)

3504

The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order. (Amended by Stats. 1968, Ch. 1390.)

3504.5

(a) Except in cases of emergency as provided in this section, the governing body of a public agency, and boards and commissions designated by law or by the governing body of a public agency, shall give reasonable written notice to each recognized employee organization affected of any ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the governing body or the designated boards and commissions and shall give the recognized employee

organization the opportunity to meet with the governing body or the boards and commissions.

(b) In cases of emergency when the governing body or the designated boards and commissions determine that an ordinance, rule, resolution, or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the governing body or the boards and commissions shall provide notice and opportunity to meet at the earliest practicable time following the adoption of the ordinance, rule, resolution, or regulation.

(c) The governing body of a public agency with a population in excess of 4,000,000, or the boards and commissions designated by the governing body of such a public agency shall not discriminate against employees by removing or disqualifying them from a health benefit plan, or otherwise restricting their ability to participate in a health benefit plan, on the basis that the employees have selected or supported a recognized employee organization. Nothing in this section shall be construed to prohibit the governing body of a public agency or the board or commission of a public agency and a recognized employee organization from agreeing to health benefit plan enrollment criteria or eligibility limitations. (Amended by Stats. 2002, Ch. 1041, Sec. 1. Effective January 1, 2003. Applicable from July 1, 2001, pursuant to Sec. 2 of Ch. 1041.)

3505

The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer

in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

"Meet and confer in good faith" means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent. (Amended by Stats. 1971, Ch. 1676.)

3505.1

If a tentative agreement is reached by the authorized representatives of the public agency and a recognized employee organization or recognized employee organizations, the governing body shall vote to accept or reject the tentative agreement within 30 days of the date it is first considered at a duly noticed public meeting. A decision by the governing body to reject the tentative agreement shall not bar the filing of a charge of unfair practice for failure to meet and

confer in good faith. If the governing body adopts the tentative agreement, the parties shall jointly prepare a written memorandum of understanding. (Amended by Stats. 2013, Ch. 785, Sec. 1. (AB 537) Effective January 1, 2014.)

3505.2

If after a reasonable period of time, representatives of the public agency and the recognized employee organization fail to reach agreement, the public agency and the recognized employee organization or recognized employee organizations together may agree upon the appointment of a mediator mutually agreeable to the parties. Costs of mediation shall be divided one-half to the public agency and one-half to the recognized employee organization or recognized employee organizations. (Added by Stats. 1968, Ch. 1390.)

3505.3

(a) Public agencies shall allow a reasonable number of public agency employee representatives of recognized employee organizations reasonable time off without loss of compensation or other benefits when they are participating in any one of the following activities:

(1) Formally meeting and conferring with representatives of the public agency on matters within the scope of representation.

(2) Testifying or appearing as the designated representative of the employee organization in conferences, hearings, or other proceedings before the board, or an agent thereof, in

matters relating to a charge filed by the employee organization against the public agency or by the public agency against the employee organization.

(3) Testifying or appearing as the designated representative of the employee organization in matters before a personnel or merit commission.

(b) The employee organization being represented shall provide reasonable notification to the employer requesting a leave of absence without loss of compensation pursuant to subdivision (a).

(c) For the purposes of this section, "designated representative" means an officer of the employee organization or a member serving in proxy of the employee organization. (Amended by Stats. 2013, Ch. 305, Sec. 1. (AB 1181) Effective January 1, 2014.)

3505.4

(a) The employee organization may request that the parties' differences be submitted to a fact finding panel not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant to the parties' agreement to mediate or a mediation process required by a public agency's local rules. If the dispute was not submitted to mediation, an employee organization may request that the parties' differences be submitted to a fact finding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse. Within five days after receipt of the written request, each party shall select a person to serve as its member of the fact finding panel. The

Public Employment Relations Board shall, within five days after the selection of panel members by the parties, select a chairperson of the fact finding panel.

(b) Within five days after the board selects a chairperson of the fact finding panel, the parties may mutually agree upon a person to serve as chairperson in lieu of the person selected by the board.

(c) The panel shall, within 10 days after its appointment, meet with the parties or their representatives, either jointly or separately, and may make inquiries and investigations, hold hearings, and take any other steps it deems appropriate. For the purpose of the hearings, investigations, and inquiries, the panel shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence. Any state agency, as defined in Section 11000, the California State University, or any political subdivision of the state, including any board of education, shall furnish the panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the panel.

(d) In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:

(1) State and federal laws that are applicable to the employer.

(2) Local rules, regulations, or ordinances.

(3) Stipulations of the parties.

(4) The interests and welfare of the public and the financial ability of the public agency.

(5) Comparison of the wages, hours, and conditions of employment of the employees involved in the fact finding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.

(6) The consumer price index for goods and services, commonly known as the cost of living.

(7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

(8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

(e) The procedural right of an employee organization to request a fact finding panel cannot be expressly or voluntarily waived. (Amended by Stats. 2012, Ch. 314, Sec. 1. (AB 1606) Effective January 1, 2013.)

3505.5

(a) If the dispute is not settled within 30 days after the appointment of the fact finding panel, or, upon agreement by both parties within a longer period, the panel shall make findings of fact and recommend terms of settlement, which shall be advi-

sory only. The factfinders shall submit, in writing, any findings of fact and recommended terms of settlement to the parties before they are made available to the public. The public agency shall make these findings and recommendations publicly available within 10 days after their receipt.

(b) The costs for the services of the panel chairperson selected by the board, including per diem fees, if any, and actual and necessary travel and subsistence expenses, shall be equally divided between the parties.

(c) The costs for the services of the panel chairperson agreed upon by the parties shall be equally divided between the parties, and shall include per diem fees, if any, and actual and necessary travel and subsistence expenses. The per diem fees shall not exceed the per diem fees stated on the chairperson's resume on file with the board. The chairperson's bill showing the amount payable by the parties shall accompany his or her final report to the parties and the board. The chairperson may submit interim bills to the parties in the course of the proceedings, and copies of the interim bills shall also be sent to the board. The parties shall make payment directly to the chairperson.

(d) Any other mutually incurred costs shall be borne equally by the public agency and the employee organization. Any separately incurred costs for the panel member selected by each party shall be borne by that party.

(e) A charter city, charter county, or charter city and county with a charter that has a procedure that applies if an impasse has been reached between the public agency and a bargaining unit, and the proce-

dure includes, at a minimum, a process for binding arbitration, is exempt from the requirements of this section and Section 3505.4 with regard to its negotiations with a bargaining unit to which the impasse procedure applies. (Added by Stats. 2011, Ch. 680, Sec. 3. (AB 646) Effective January 1, 2012.)

3505.7

After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5, a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding the impasse, implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law. (Added by Stats. 2011, Ch. 680, Sec. 4. (AB 646) Effective January 1, 2012.)

3505.8

An arbitration agreement contained in a memorandum of understanding entered into under this chapter shall be enforceable in an action brought pursuant to Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure. An assertion

that the arbitration claim is untimely or otherwise barred because the party seeking arbitration has failed to satisfy the procedural prerequisites to arbitration shall not be a basis for refusing to submit the dispute to arbitration. All procedural defenses shall be presented to the arbitrator for resolution. A court shall not refuse to order arbitration because a party to the memorandum of understanding contends that the conduct in question arguably constitutes an unfair practice subject to the jurisdiction of the board. If a party to a memorandum of understanding files an unfair practice charge based on such conduct, the board shall place the charge in abeyance if the dispute is subject to final and binding arbitration pursuant to the memorandum of understanding, and shall dismiss the charge at the conclusion of the arbitration process unless the charging party demonstrates that the settlement or arbitration award is repugnant to the purposes of this chapter. (Added by Stats. 2013, Ch. 785, Sec. 2. (AB 537) Effective January 1, 2014.)

3506

Public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502. (Added by Stats. 1961, Ch. 1964.)

3506.5

A public agency shall not do any of the following:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with,

restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

(b) Deny to employee organizations the rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and negotiate in good faith with a recognized employee organization. For purposes of this subdivision, knowingly providing a recognized employee organization with inaccurate information regarding the financial resources of the public employer, whether or not in response to a request for information, constitutes a refusal or failure to meet and negotiate in good faith.

(d) Dominate or interfere with the formation or administration of any employee organization, contribute financial or other support to any employee organization, or in any way encourage employees to join any organization in preference to another.

(e) Refuse to participate in good faith in an applicable impasse procedure. (Added by Stats. 2011, Ch. 271, Sec. 2. (AB 195) Effective January 1, 2012.)

3507

(a) A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of a recognized employee organization or organizations for the administration of employer-employee relations under this chapter.

The rules and regulations may include provisions for all of the following:

(1) Verifying that an organization does in fact represent employees of the public agency.

(2) Verifying the official status of employee organization officers and representatives.

(3) Recognition of employee organizations.

(4) Exclusive recognition of employee organizations formally recognized pursuant to a vote of the employees of the agency or an appropriate unit thereof, subject to the right of an employee to represent himself or herself as provided in Section 3502.

(5) Additional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment.

(6) Access of employee organization officers and representatives to work locations.

(7) Use of official bulletin boards and other means of communication by employee organizations.

(8) Furnishing nonconfidential information pertaining to employment relations to employee organizations.

(9) Any other matters that are necessary to carry out the purposes of this chapter.

(b) Exclusive recognition of employee organizations formally recognized as majority representatives pursuant to a vote of the employees may be revoked by a majority vote of the employees only after a period of not less than 12 months following the date of recognition.

(c) No public agency shall unreasonably withhold recognition of employee organizations.

(d) Employees and employee organizations shall be able to challenge a rule or regulation of a public

agency as a violation of this chapter. This subdivision shall not be construed to restrict or expand the board's jurisdiction or authority as set forth in subdivisions (a) to (c), inclusive, of Section 3509. (Amended by Stats. 2003, Ch. 215, Sec. 3. Effective January 1, 2004.)

3507.1

(a) Unit determinations and representation elections shall be determined and processed in accordance with rules adopted by a public agency in accordance with this chapter. In a representation election, a majority of the votes cast by the employees in the appropriate bargaining unit shall be required.

(b) Notwithstanding subdivision (a) and rules adopted by a public agency pursuant to Section 3507, a bargaining unit in effect as of the effective date of this section shall continue in effect unless changed under the rules adopted by a public agency pursuant to Section 3507.

(c) A public agency shall grant exclusive or majority recognition to an employee organization based on a signed petition, authorization cards, or union membership cards showing that a majority of the employees in an appropriate bargaining unit desire the representation, unless another labor organization has previously been lawfully recognized as exclusive or majority representative of all or part of the same unit. Exclusive or majority representation shall be determined by a neutral third party selected by the public agency and the employee organization who shall review the signed petition, authorization cards, or union membership cards to verify the exclusive or

majority status of the employee organization. In the event the public agency and the employee organization cannot agree on a neutral third party, the California State Mediation and Conciliation Service shall be the neutral third party and shall verify the exclusive or majority status of the employee organization. In the event that the neutral third party determines, based on a signed petition, authorization cards, or union membership cards, that a second labor organization has the support of at least 30 percent of the employees in the unit in which recognition is sought, the neutral third party shall order an election to establish which labor organization, if any, has majority status. (Amended by Stats. 2012, Ch. 46, Sec. 5. (SB 1038) Effective June 27, 2012.)

3507.3

Professional employees shall not be denied the right to be represented separately from nonprofessional employees by a professional employee organization consisting of those professional employees. In the event of a dispute on the appropriateness of a unit of representation for professional employees, upon request of any of the parties, the dispute shall be submitted to the California State Mediation and Conciliation Service for mediation or for recommendation for resolving the dispute. "Professional employees," for the purposes of this section, means employees engaged in work requiring specialized knowledge and skills attained through completion of a recognized course of instruction, including, but not limited to, attorneys, physicians, registered nurses, engineers, architects, teachers, and the various types of physical, chemical, and biological scientists. (Amended by Stats. 2012, Ch. 46, Sec. 6. (SB 1038) Effective June 27, 2012.)

3507.5

In addition to those rules and regulations a public agency may adopt pursuant to and in the same manner as in Section 3507, any such agency may adopt reasonable rules and regulations providing for designation of the management and confidential employees of the public agency and restricting such employees from representing any employee organization, which represents other employees of the public agency, on matters within the scope of representation. Except as specifically provided otherwise in this chapter, this section does not otherwise limit the right of employees to be members of and to hold office in an employee organization. (Amended by Stats. 1969, Ch. 1389.)

3508

(a) The governing body of a public agency may, in accordance with reasonable standards, designate positions or classes of positions which have duties consisting primarily of the enforcement of state laws or local ordinances, and may by resolution or ordinance adopted after a public hearing, limit or prohibit the right of employees in these positions or classes of positions to form, join, or participate in employee organizations where it is in the public interest to do so. However, the governing body may not prohibit the right of its employees who are full-time "peace officers," as that term is defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, to join or participate in employee organizations which are composed solely of those peace officers, which concern themselves solely and exclusively with the wages, hours, working conditions,

welfare programs, and advancement of the academic and vocational training in furtherance of the police profession, and which are not subordinate to any other organization.

(b)

(1) This subdivision shall apply only to a county of the seventh class.

(2) For the purposes of this section, no distinction shall be made between a position designated as a peace officer position by Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code at the time of the enactment of the 1971 amendments to this section, and a welfare fraud investigator or inspector position designated as a peace officer position by any amendment to that Chapter 4.5 at any time after the enactment of the 1971 amendments to this section.

(3) It is the intent of this subdivision to overrule *San Bernardino County Sheriff's Etc. Assn. v. Board of Supervisors* (1992) 7 Cal. App.4th 602, 611, with respect to San Bernardino County designating a welfare fraud investigator or inspector as a peace officer under this section.

(c)

(1) This subdivision shall apply only to a county of the seventh class and shall not become operative until it is approved by the county board of supervisors by ordinance or resolution.

(2) For the purposes of this section, no distinction shall be made between a position designated as a peace officer position by Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code at the time of the enactment of the 1971 amendments to this section, and a probation corrections officer position designated as a peace officer position by any amendment to that Chapter 4.5 at any time after the enactment of the 1971 amendments to this section.

(3) It is the intent of this subdivision to overrule *San Bernardino County Sheriff's Etc. Assn. v. Board of Supervisors* (1992) 7 Cal. App.4th 602, 611, to the extent that it holds that this section prohibits the County of San Bernardino from designating the classifications of Probation Corrections Officers and Supervising Probation Corrections Officers as peace officers. Those officers shall not be designated as peace officers for purposes of this section unless that action is approved by the county board of supervisors by ordinance or resolution.

(4) Upon approval by the Board of Supervisors of San Bernardino County, this subdivision shall apply to petitions filed in May 2001 by Probation Corrections Officers and Supervising Probation Corrections Officers.

(d) The right of employees to form, join and participate in the activities of employee organizations shall not be restricted by a public agency on any grounds other than those set forth in this section.

(Amended by Stats. 2002, Ch. 865, Sec. 1. Effective January 1, 2003.)

3508.1

For the purposes of this section, the term "police employee" includes the civilian employees of the police department of any city. Police employee does not include any public safety officer within the meaning of Section 3301.

(a) With respect to any police employee, except as provided in this subdivision and subdivision (d), no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of the public agency's discovery by a person authorized to initiate an investigation of the allegation of an act, omission, or other misconduct. This one-year limitation period shall apply only if the act, omission, or other misconduct occurred on or after January 1, 2002. In the event that the public agency determines that discipline may be taken, it shall complete its investigation and notify the police employee of its proposed disciplinary action within that year, except in any of the following circumstances:

(1) If the act, omission, or other allegation of misconduct is also the subject of a criminal investigation or criminal prosecution, the time during which the criminal investigation or criminal prosecution is pending shall toll the one-year time period.

(2) If the police employee waives the one-year time period in writing, the time period shall

be tolled for the period of time specified in the written waiver.

(3) If the investigation is a multijurisdictional investigation that requires a reasonable extension for coordination of the involved agencies.

(4) If the investigation involves more than one employee and requires a reasonable extension.

(5) If the investigation involves an employee who is incapacitated or otherwise unavailable, the time during which the person is incapacitated or unavailable shall toll the one-year period.

(6) If the investigation involves a matter in civil litigation in which the police employee is named as a party defendant, the one-year time period shall be tolled while the civil action is pending.

(7) If the investigation involves a matter in criminal litigation in which the complainant is a criminal defendant, the one-year time period shall be tolled during the period of that defendant's criminal investigation and prosecution.

(8) If the investigation involves an allegation of workers' compensation fraud on the part of the police employee.

(b) When a pre-disciplinary response or grievance procedure is required or utilized, the time for this response or procedure shall not be governed or limited by this chapter.

(c) If, after investigation and predisciplinary response or procedure, the public agency decides to impose discipline, the public agency shall notify the police employee in writing of its decision to impose discipline, including the date that the discipline will be imposed, within 30 days of its decision, except if the police employee is unavailable for discipline.

(d) Notwithstanding the one-year time period specified in subdivision (a), an investigation may be reopened against a police employee if both of the following circumstances exist:

(1) Significant new evidence has been discovered that is likely to affect the outcome of the investigation.

(2) One of the following conditions exists:

(A) The evidence could not reasonably have been discovered in the normal course of investigation without resorting to extraordinary measures by the agency.

(B) The evidence resulted from the police employee's predisciplinary response or procedure.

(Added by Stats. 2001, Ch. 801, Sec. 1. Effective January 1, 2002.)

3508.5

(a) Nothing in this chapter shall affect the right of a public employee to authorize a dues or service fees deduction from his or her salary or wages pursuant to Section 1157.1, 1157.2, 1157.3, 1157.4, 1157.5, or 1157.7.

(b) A public employer shall deduct the payment of dues or service fees to a recognized employee organization as required by an agency shop arrangement between the recognized employee organization and the public employer.

(c) Agency fee obligations, including, but not limited to, dues or agency fee deductions on behalf of a recognized employee organization, shall continue in effect as long as the employee organization is the recognized bargaining representative, notwithstanding the expiration of any agreement between the public employer and the recognized employee organization. (Amended by Stats. 2000, Ch. 901, Sec. 6. Effective January 1, 2001.)

3509

(a) The powers and duties of the board described in Section 3541.3 shall also apply, as appropriate, to this chapter and shall include the authority as set forth in subdivisions (b) and (c). Included among the appropriate powers of the board are the power to order elections, to conduct any election the board orders, and to adopt rules to apply in areas where a public agency has no rule.

(b) A complaint alleging any violation of this chapter or of any rules and regulations adopted by a public agency pursuant to Section 3507 or 3507.5 shall be processed as an unfair practice charge by the board. The initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board, except that in an action to recover damages due to an unlawful strike,

the board shall have no authority to award strike-preparation expenses as damages, and shall have no authority to award damages for costs, expenses, or revenue losses incurred during, or as a consequence of, an unlawful strike. The board shall apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter.

(c) The board shall enforce and apply rules adopted by a public agency concerning unit determinations, representation, recognition, and elections.

(d) Notwithstanding subdivisions (a) to (c), inclusive, the employee relations commissions established by, and in effect for, the County of Los Angeles and the City of Los Angeles pursuant to Section 3507 shall have the power and responsibility to take actions on recognition, unit determinations, elections, and all unfair practices, and to issue determinations and orders as the employee relations commissions deem necessary, consistent with and pursuant to the policies of this chapter.

(e) Notwithstanding subdivisions (a) to (c), inclusive, consistent with, and pursuant to, the provisions of Sections 3500 and 3505.4, superior courts shall have exclusive jurisdiction over actions involving interest arbitration, as governed by Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure, when the action involves an employee organization that represents firefighters, as defined in Section 3251.

(f) This section shall not apply to employees designated as management employees under Section 3507.5.

(g) The board shall not find it an unfair practice for an employee organization to violate a rule or regulation adopted by a public agency if that rule or regulation is itself in violation of this chapter. This subdivision shall not be construed to restrict or expand the board's jurisdiction or authority as set forth in subdivisions (a) to (c), inclusive. (Amended by Stats. 2011, Ch. 539, Sec. 1. (SB 857) Effective January 1, 2012.)

3509.3

Notwithstanding any other law, if a decision by an administrative law judge regarding the recognition or certification of an employee organization is appealed, the decision shall be deemed the final order of the board if the board does not issue a ruling that supersedes the decision on or before 180 days after the appeal is filed. (Added by Stats. 2011, Ch. 242, Sec. 1. (SB 609) Effective January 1, 2012.)

3509.5

(a) Any charging party, respondent, or intervenor aggrieved by a final decision or order of the board in an unfair practice case, except a decision of the board not to issue a complaint in such a case, and any party to a final decision or order of the board in a unit determination, representation, recognition, or election matter that is not brought as an unfair practice case, may petition for a writ of extraordinary relief from that decision or order. A board order directing an election may not be stayed pending judicial review.

(b) 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. Upon the filing of the petition, the court shall cause notice to be served upon the board and thereafter shall have jurisdiction of the proceeding. The board shall file in the court the record of the proceeding, certified by the board, within 10 days after the clerk's notice unless that time is extended by the court for good cause shown. The court shall have jurisdiction to grant any temporary relief or restraining order it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as modified, or setting aside in whole or in part the decision or order of the board. The findings of the board with respect to questions of fact, including ultimate facts, if supported by substantial evidence on the record considered as a whole, shall be conclusive. Title 1 (commencing with Section 1067) of Part 3 of the Code of Civil Procedure relating to writs shall, except where specifically superseded by this section, apply to proceedings pursuant to this section.

(c) If the time to petition for extraordinary relief from a board decision or order has expired, the board may seek enforcement of any final decision or order in a district court of appeal or superior court having jurisdiction over the county where the events giving rise to the decision or order occurred. The board shall respond within 10 days to any inquiry from a party to the action as to why the board has not sought court enforcement of the final decision or order. If the response does not indicate that there has been compliance with the board's final decision or order, the board

shall seek enforcement of the final decision or order upon the request of the party. The board shall file in the court the record of the proceeding, certified by the board, and appropriate evidence disclosing the failure to comply with the decision or order. If, after hearing, the court determines that the order was issued pursuant to the procedures established by the board and that the person or entity refuses to comply with the order, the court shall enforce the order by writ of mandamus or other proper process. The court may not review the merits of the order. (Added by Stats. 2002, Ch. 1137, Sec. 3. Effective January 1, 2003.)

3510

(a) The provisions of this chapter shall be interpreted and applied by the board in a manner consistent with and in accordance with judicial interpretations of this chapter.

(b) The enactment of this chapter shall not be construed as making the provisions of Section 923 of the Labor Code applicable to public employees. (Added by renumbering Section 3509 by Stats. 2000, Ch. 901, Sec. 7. Effective January 1, 2001.)

3511

The changes made to Sections 3501, 3507.1, and 3509 of the Government Code by legislation enacted during the 1999–2000 Regular Session of the Legislature shall not apply to persons who are peace officers as defined in Section 830.1 of the Penal Code. (Added by Stats. 2000, Ch. 901, Sec. 10. Effective January 1, 2001.)