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MEMORANDUM OF LAW

DATE: September 18, 2008

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Effect of Decision by Public Employment Relations Board Decision in AFSCME Local 127 & San Diego Municipal Employees Association v. City of San Diego, Case No. LA-CE-352-M

INTRODUCTION

On August 22, 2008, the Administrative Law Judge ("ALJ") issued his decision in the above-referenced matter, arising out of the City's implementation of the voter-approved Propositions B and C (the "Decision"). The ALJ found that the City violated certain provisions of the Meyers-Milias-Brown Act ("MMBA") by failing to follow its own impasse procedures with regard to the implementing ordinances for Propositions B and C, and by failing to bargain in good faith with AFSCME Local 127 and the San Diego Municipal Employees Association about the Managed Competition Guide issued on September 7, 2007.

The Mayor and City Council determined not to file exceptions to the ALJ's Decision. The City Attorney was concerned, however, that the Decision not be interpreted in the future in a way contrary to the Strong Mayor form of government set forth in the City Charter, which establishes the Mayor as the chief labor negotiator for the City.

QUESTIONS PRESENTED

Does the Decision of the Administrative Law Judge regarding the City's impasse hearing procedures bind the City under principals of res judicata? Notwithstanding it may be dictum, is that part of the Decision erroneous and if so, why?

SHORT ANSWER

The City Attorney issues this Memorandum to clarify that the Decision does not expand the role of the City Council in labor negotiations. (See City Charter section 40; Council Policy 300-60.) The Memorandum contains two parts: First, the City Attorney sets forth the law establishing that the Decision is not binding on the City under res judicata principles because the ALJ's comments regarding the City's impasse hearing procedure are dictum; second, the City Attorney discusses the reasons why the ALJ's dictum on the hearing procedure is erroneous.

As discussed in the City Attorney's prior Memorandum (MS 59), dated December 4, 2006, under the Charter, the City Council may: (1) vote to approve a proposed ordinance; (2) vote to reject a proposed ordinance; or (3) vote to reject a proposed ordinance with comments as to what changes would likely result in later adoption of the ordinance, and suggest the Mayor return to the bargaining table to discuss those issues with the unions involved, but the City Council may not: (1) make changes to the ordinance over the objection of the Mayor and then pass the ordinance; (2) add provisions to the ordinance that contradict the Charter language; or (3) order the Mayor to engage in further meet and confer. That rule is not altered by the Decision as a matter of law under the legal doctrine of res judicata because the Decision's discussion of the City's impasse hearing procedure is non-binding dictum. The Decision's discussion of the impasse hearing procedure is also erroneous because it fails to take into account the Strong Mayor Charter provisions, as well as the City Attorney's prior opinion, which should be accorded deference in construing City law.

ANALYSIS

I. The ALJ's Discussion of the City's Impasse Hearing Procedure Is Not Binding

In the Decision, the ALJ found that the City had not complied with its impasse procedures under Council Policy 300-06 because the City did not hold an impasse meeting, and without an impasse meeting, there could be no proper impasse hearing under the Policy. Decision at 26. Thus, because the lack of an impasse meeting prevented the impasse hearing issue from arising, the ALJ did not need to reach the question whether the City conducted a proper impasse hearing. Nonetheless, the ALJ's decision opines that no proper impasse hearing occurred because "the Council could not make a determination that would resolve any part of the dispute in the Coalition's favor." The ALJ observed that limiting the role of the Council to rejecting the proposed ordinance, approving the proposed ordinance, or rejecting it with comments "appears" to be inconsistent with the requirement of Policy No. 300-06.

The ALJ's Decision, to the extent that it suggests that the City Council has a larger role in labor negotiations, is inconsistent with (1) the City Charter (and the Strong Mayor form of government in particular), (2) the intent of the voters in adopting the Strong Mayor system (Proposition F), (3) past practice of the City and the employee organizations, and (4) Policy 300-06. The City is not bound by this aspect of the Decision in the future.

While an administrative law judge's decision can have res judicata (legally binding) effect on future government actions, there are strict requirements before res judicata may be applied.[1] In particular, to be binding, an issue must be ***actually and necessarily decided*** in the prior proceeding. *Lucido v. Superior Court,* 51 Cal. 3d 335, 341 (1990). Here, because the ALJ did not need to reach the question of whether the City Council hearing complied with the impasse hearing procedure in Council Policy No. 300-06 (having concluded there was no impasse meeting triggering the hearing issue), his observations regarding the hearing procedure were dictum. *United Steelworkers of America v. Board of Education,* 162 Cal. App. 3d 823, 834 (1984) ["It is an elementary concept that ratio decidendi is the principle or rule which constitutes the basis of the decision and creates binding precedent, while dictum is a general argument or observation unnecessary to the decision which has no force as precedent."]. As dictum, the ALJ's comments on the City's impasse hearing procedure have no binding effect. (E.g., *Stanson v. Mott,* 17 Cal. 3d 206, 212-13 (1976) [dictum has no res judicata effect].)

Moreover, any interpretation of the requirements of Council Policy 300-06 presents a question of law—interpretation of ***City law***—and the interpretation of the City Attorney, the official responsible for City legal issues (Charter § 40), is entitled to deference, as recognized by Council Policy 300-06. An administrative law judge's interpretation of City law has no binding effect under these circumstances. (E.g., *Chern v. Bank of America,* 15 Cal. 3d 866, 872 (1976) [rulings of law are not binding under res judicata]; see also *Bank of America v. City of Long Beach,* 50 Cal. App. 3d 882, 894 (1975) [where the city itself had not had an opportunity to determine the legal question, prior determination not binding]; see generally 2 *Cal. Jur.* 3d Administrative Law § 606 [courts will not preclude "relitigation of an issue of law covering a public agency's ongoing obligation to administer a statute enacted for the public benefit and affecting members of the public not before the court"].) Accordingly, the ALJ's interpretation of the meaning of a City Council Policy—a legal question—is not binding.

Finally, an administrative decision is not binding in the future if that result would be contrary to public policy. (E.g., *Chern v. Bank of America*, 15 Cal. 3d at 872 [there is a "sound judicial policy" against applying res judicata "in cases which concern matters of important public interest"].) The important public policies implicated here are the will of the voters in adopting the Strong Mayor system (including the intent that the Mayor be afforded plenary authority in labor negotiations), and that Propositions B and C be implemented as written, not as modified by the City Council.[2] The dictum in the ALJ's opinion regarding what may be an appropriate Council hearing procedure should not be afforded binding effect given the strong countervailing public policies.[3]

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[1] Administrative decisions are afforded less res judicata effect than judicial decisions. E.g., *Louis Stores, Inc. v. Dep't of Alcoholic Beverage Control,* 57 Cal. 2d 749, 758 (1962); see generally 2 *Cal. Jur.* 3d Administrative Law § 606.

[2] If res judicata were erroneously to be applied, the ALJ's Decision would put the Council back in charge of collective bargaining, and give the Council the power to negotiate, not the Mayor. The Mayor would lose his authority to control labor negotiations, and his failure to appeal the decision would eviscerate the power of San Diego mayors now and in the future.

[3] It should be noted in this regard that Council Policy No. 300-06 itself reserves to the City

II. The ALJ's Discussion of the City's Impasse Hearing Procedure Is Erroneous

Background

In 2004, City voters passed Proposition F, giving the City a Strong Mayor form of government. Under the prior practice, conflicts between the City Manager and the labor unions over the terms and conditions of employment were resolved by the City Council, which directed the City Manager as to agreements. Those practices were a principal cause of the City's $2 billion City employee pension and retiree health care deficit. To change such practices, voters were given the opportunity to create a Strong Mayor form of government.

Under Proposition F, which became a part of the City's Charter, the Mayor became the head of City government and was placed in charge of the executive branch in the place of the previous city manager, who was appointed by and served at the pleasure of the City Council.

Under the Strong Mayor Charter provisions, the Mayor has the authority to set the City's bargaining position in collective bargaining, not the City Council. The Mayor presents his final proposals related to union contracts to the City Council; the City Council either votes to approve the Mayor's proposal, reject it, or reject with comments as to what changes would likely result in later adoption of the Mayor's proposal and advise the Mayor to return to the bargaining table to further negotiate. The Council may not add new provisions or integrate the union proposals with the City's final proposal. This harmonizes the Strong Mayor Charter provision with the Government Code and the Council Policy on impasse procedures, as required by *Seal Beach Police Officers Association v. City of Seal Beach,* 36 Cal. 3d 591 (1984), and its progeny.

In November 2006, City voters passed two Propositions which were added to the City Charter. Proposition B requires future voter approval for certain increases to City employees' retirement benefits. Proposition C permits the Mayor, with City Council approval, to contract out City services to independent contractors, assuming certain conditions are met.

Even prior to passage of Propositions B and C, the City and its labor unions engaged in negotiations over implementing Ordinances for the two Propositions. On December 1, 2006, the City declared it was at an impasse with the unions regarding those negotiations. Policy 300-06 requires an impasse meeting between the negotiating teams be held prior to an impasse hearing before the City Council. The Mayor determined that he wanted the impasse hearing held before the Council on December 5, 2006. His negotiating team, late on Friday, December 1, notified the unions that the City considered itself at impasse, and offered to hold the required impasse meeting with them on the implementing Proposition C (Managed Competition Ordinance) over the weekend or on Monday, December 4, 2006, but advised that the City was going ahead with an impasse hearing before the Council on December 5.

Despite protests by the unions that the timing of an impasse meeting was too quick, and requests for a continuance of the Council impasse hearing so a meaningful impasse meeting could take place, the Mayor's bargaining team refused. The ALJ ultimately found that the City acted in bad faith by offering an impasse meeting on such short notice and not allowing

sufficient time for the parties to approach the meeting in a serious and meaningful manner. The ALJ concluded that this failure doomed the impasse procedure process at that point. As to the implementing Ordinance for Proposition B, (Employee Retirement Benefits), the ALJ concluded that Policy 300-06 was violated when the Mayor's team held no impasse meeting with the Unions, despite the fact neither party requested one. Proposed decision, pg. 26. As to the implementing Ordinance for Proposition C (Managed Competition), the union did request an impasse meeting when the Mayor's team notified them on Friday evening it was declaring impasse. The ALJ concluded that the City violated Policy 300-06 by insisting that any impasse meeting between the negotiating teams be held that weekend or following Monday, just prior to the impasse hearing on Tuesday. Proposed decision, pg. 35.

In discussing the failure of the Mayor's team to hold impasse meetings the ALJ stated:

> "Finally, the City argues that 'if an impasse meeting were required, none was held only because the Coalition never responded to the City's offer to hold one.' Again, given the public's interest in impasse procedures, I do not see how the Coalition's conduct could relieve the City of the requirement that an impasse meeting "shall" be scheduled. Furthermore, in this case the City declared impasse on a Friday and then offered to schedule an "impasse meeting" with the Coalition "this weekend, or Monday," before an "impasse hearing" on Tuesday. Not surprisingly, the Coalition found this scheduling offer 'not feasible.' The offer certainly seems to have been inconsistent with MMBA section 3503, which requires 'adequate time for the resolution of impasses' where impasse procedures exist. …
>
> I therefore conclude that the City did not follow its own Policy 300-06 with regard to holding an impasse meeting." Proposed decision, pg. 26.

Strong Mayor Charter Amendment

The City Council adopted Policy 300-06 in 1992, when the City had a city manager, rather than a Strong Mayor. In November of 2004, the voters of San Diego changed their form of Government by passing Proposition F, which authorizes "Strong Mayor" form of governance, which was incorporated into the City Charter as Article XV.

The argument in favor of Proposition F stated, in part:

> **MAYOR NEEDS AUTHORITY TO MAKE CHANGES**
>
> Currently, the authority to run the City of San Diego is held by an unelected City Manager. Proposition F ends the buck-passing and finger-pointing. Proposition F gives you the power to elect someone with **the authority to make changes**.

Under prior practice, conflicts between the City Manager and the labor unions over the terms and conditions of employment were resolved by Council directive issued to the City Manager in closed session. In the hopes of changing such practices, voters were given the opportunity to create a Strong Mayor form of government with Proposition F in the November 2, 2004 election.

Effective January 1, 2006, the City began operating under a Strong Mayor form of government, as reflected in San Diego Charter Article XV, which provides that "[a]ll executive authority, power, and responsibilities conferred upon the City Manager in Article V, Article VII, and Article IX [are] transferred to, assumed, and [will be] carried out by the Mayor.…" (San Diego City Charter § 260(b).)

Article XV of the Charter also expressly conferred on the Mayor a number of "additional rights, powers, and duties" to those conferred by Charter Section 260(b). These rights include the right "to recommend to the Council such measures and ordinances as he or she may deem necessary or expedient.…" (San Diego Charter § 265 (b)(3).) The City Council may not interfere with the Mayor's hiring or administrative powers. (San Diego Charter § 270 (g) and (h).)

City Attorney Opinion of December 4, 2006 on Impasse Procedure at the Council Hearing

On December 4, 2006, the day prior to the impasse hearing before the City Council on the Mayor's last, best, and final offers of language for the implementing ordinances of Propositions B and C, the City Attorney issued a written legal memorandum delineating what the City Council's role was during the Impasse Hearing.

Council Policy 300-06 by its terms, requires the City Attorney to interpret and harmonize the Council 300-06 with the City Charter, so that the impasse hearing procedures do not supersede, contradict, or preempt Charter provisions.[4] The City Attorney's memo of

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[4] I. PURPOSE: A. This Resolution implements Chapter 10, Division 4, Title 1 of the Government Code of the State of California (Sections 3500 et seq.) captioned "Local Public Employee Organizations," by providing orderly procedures for the administration of employer-employee relations between the City and its employee organizations. However, nothing contained herein shall be deemed to supersede the provisions of State law, City Charter, ordinances, resolutions and rules which establish and regulate the merit and civil service system, or which provide for other methods of administering employer-employee relations. This Resolution 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 communications between employees, employee organizations and the City. It is the purpose of this Resolution to provide procedures for meeting and conferring in good faith with Recognized Employee Organizations regarding matters that directly affect and primarily involve the wages, hours and other terms and conditions of employment of employees in appropriate units and that are not preempted by Federal or State law or the City Charter. (Emphasis added.)

December 4, 2006 did just that. It harmonized the City's Strong Mayor Charter provision, Council Policy 300-06 and the Government Code requirement under the Meyers-Milias-Brown Act that if a city has impasse procedures in place, it is to use them.

The City Attorney's opinion stated that the City Council may 1) vote to approve a proposed ordinance; or 2) vote to reject a proposed ordinance; or 3) vote to reject a proposed ordinance with comments as to what changes would likely result in later adoption of the ordinance, and suggest the Mayor return to the bargaining table to discuss those issues with the unions involved. However, the City Council may not: 1) make changes to the ordinance over the objection of the Mayor and then pass the ordinance; or 2) add provisions to the ordinance that contradict the Charter language; or 3) order the Mayor to engage in further meet and confer, and provide guidance on changes that would likely result in adoption of the implementing ordinances.

It important to remember that the Council was voting on implementing Ordinances as to two ballot measures which had been passed by the people. As the City Attorney noted, this was not just a vote on a bargaining proposal for a union contract. It was important that the impasse hearing process not allow for adoption of an Ordinance which would contradict or eviscerate the specific ballot measures passed by the people, and a duty exists to jealously guard the sovereign people's initiative power, "it being on[e] of the precious rights of our democratic process." Therefore, while the power to adopt an implement ordinance is within the City Council's authority, any ordinance adopted by City Council must "conform to, be subordinate to, not conflict with and not exceed the charter" to be valid. (5 McQuillin Mun. Corp. § 15.17 (3d ed. 2006).)

The opinion went on to state that the City Council may not add new provisions or integrate the union proposals with the City's Last Best and Final Offer, because this would usurp the powers of the Strong Mayor who designates the negotiating team (and the negotiating team is the only entity with the authority to present the City's position, make changes/concessions, enter into a Memorandum of Understanding or declares impasse).

The Impasse Hearing

The impasse hearing before the City Council on the language of the Ordinances took place on December 5, 2006.

While the ALJ claimed (in dictum) that statements made by the City Attorney at the beginning of the Impasse Hearing as to the Council's role confused the issues, in actuality the City Attorney was properly carrying out his mandated duties under the specific authority of Council Policy 300-06 and the City Charter provision on the City Attorney's duties and role. (See discussion *supra* on City Attorney's authority.) In conformity with his Legal Opinion of December 4, 2006, and with that reasoning in mind, the City Attorney made it clear at the hearing that the Council was proceeding with the formal impasse hearing and laid out the procedure the City Council would use in the impasse hearing it was about to hold:

> "There are three basic actions the Council can take. Number one, they can approve the two items and implement what the voters voted on; number two, they can vote them

> down; or, number three, they can make requests of the mayor to return to discussions with the unions on specific areas."

The impasse hearing was extensive, lasting approximately two hours and forty two minutes. First, the Council heard the merits of the City's position. Then the Unions were allowed to and did fully present the merits of their positions to the Council on both ordinances. The unions had an almost unlimited opportunity to respond, criticize, and offer their own suggestions. All of the affected Unions attended and made unrestricted presentations to the City Council, both as to the merits of the disputed issues. Each of the charging party Unions spoke, as well as every other union affected by the Ordinance language. In total, representatives of the City's four affected Unions spoke.

The Council heard the merits of the dispute, determined that the City's final offers on the ordinances were reasonable, and resolved the impasse by unanimously authorizing the implementation of the Mayor's last, best, and final offers.

The Impasse Hearing Procedure Used by the City Conforms with its Local Policy and Harmonizes the requirements of the Government Code, the Strong Mayor Charter Provision, and the Council Policy 300-06

As noted above, the ALJ held that the City did not follow its impasse procedures at the impasse meeting. The ALJ then proceeded unnecessarily to evaluate the City's procedures with regard to the subsequent impasse hearing.

The ALJ, without citation to any authority, observed in his dictum that the hearing procedure used by the City Council, as outlined by the City Attorney, wherein the Council could vote to approve, or reject, or reject with a recommendation that the Mayor return to the bargaining table and come back with something more acceptable to the Council, was an unacceptable impasse procedure because it did not allow the Council to intervene into the negotiating process at the impasse hearing and pick and choose union proposals it desired to incorporate into and the labor ordinance the Mayor was presenting.

The ALJ claimed that the City's impasse procedure for hearings must give the Council the power to pick and choose whatever proposals or write whatever language into labor contracts it wished. The ALJ erroneously and unnecessarily suggested—without citation to authority—that the impasse hearing held by the City must conform to his procedures, rather than those used by the City in this case.

The ALJ summed up his view by claiming incredulity that the City might have an impasse hearing procedure that accorded both the Strong Mayor and the City Council important roles. In his mind, no impasse procedure could comply with the Council Policy 300-06 that did not allow the City Council to pick and choose union proposals at the hearing, which in practice would make the City Council the City's negotiating team. He stated in dictum:

> The confusion was exacerbated by the City Attorney's advice to the Council that they could take three basic actions: approve the proposed ordinance (based on the City's last,

> best, and final offer), reject the proposed ordinance (leaving the Proposition B implementation issues unresolved, and possibly leaving Proposition B unimplemented), or make requests that the Mayor return to discussions with the Coalition on specific areas (even though the Mayor made clear he would not budge in bargaining). I do not see how this advice could be consistent with the requirement of Policy 300-06 that "impasses shall then be resolved by a determination by … the City Council after a hearing on the merits of the dispute." It appears that, given the City Attorney's advice, no matter to what extent a hearing might show that the merits favored some position of the Coalition, the Council could not make a determination that would resolve any part of the dispute in the Coalition's favor. Proposed Decision, page 27.

The administrative law judge reached the same conclusion in dictum for the same reasons as to the impasse hearing procedures for Proposition C. Proposed Decision, page 35. As to the impasse hearing, he erroneously stated there was "no real opportunity for the City Council to resolve the impasse other than in the City's favor." Proposed Decision, page 35.

Given the Council policy granted the Council the authority to approve or reject the Mayor's last, best, and final offer, and advise him to return to the bargaining table and come back with something more acceptable to the Council, the ALJ's dictum was clearly in error.

The City's procedures and conduct in the December 5, 2006 impasse hearing were an acceptable application of its local rule that "impasses shall then be resolved by a determination by … the City Council after a hearing on the merits of the dispute," and that the ALJ's dictum to the contrary failed to acknowledge or harmonize local Council Policy 300-06 with the Strong Mayor Charter provisions, as required by the Council Policy itself and required by state law as required by *Seal Beach Police Officers Association v. City of Seal Beach,* 36 Cal. 3d 591 (1984), and its progeny. Nor did the ALJ give proper weight to the past practice, legal opinions of the City Attorney, or to prior PERB findings related to the same impasse procedure.

The Meyers-Milias-Brown Act does not contain provisions requiring a specific impasse resolution procedure, or any impasse procedure at all, for that matter. "The [meet and confer] 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." (Cal. Gov't Code § 3505.) The MMBA specifically allows local agencies the discretion to adopt their own impasse rules. (*Stationary Engineers Local 39 v. City and County of San Francisco,* (2007) PERB Decision No. 1890-M.)

Indeed, the past practice was to use the procedure followed as to implementation of Propositions B and C, and this procedure was followed without union challenge. For example, ballot language for Propositions B and C was voted on at Council impasse hearing in up or down model, without opposition by unions. (*Marysville Joint Unified School District* (1983) PERB Decision No. 314.)

PERB had already previously acknowledged that the impasse hearing procedures outlined by the City Attorney were appropriate. In *Deputy City Attorney Association v. City of San Diego, Office of the City Attorney,* PERB Case No. LA-CE-395, the PERB Regional Attorney

recently dismissed a charge by a San Diego City union alleging the City violated the same impasse procedure challenged here, by requiring an up or down vote on the Mayor's last, best, and final offer.

The ALJ exceeded his authority when he suggested in dictum that a different rule would be more reasonable. The Board has authority to review whether such rules and regulations are reasonable. (*City of San Rafael* (2004) PERB Decision No. 1698-M; *Stationary Engineers Local 39 v. City & County of San Francisco* 2007) PERB Dec. No. 1890-M.) Rules and regulations are presumed to be reasonable, but must not frustrate the policies and purposes of the MMBA. (*Huntington Beach Police Officers' Assn. v. City of Huntington Beach,* 58 Cal. App. 3d 492, 502 (1976); *Organization of Deputy Sheriffs v. County of San Mateo* 48 Cal. App. 3d 331, 338 (1975).)

"[W]hen looking at a disputed rule, the inquiry does not concern whether PERB would find a different rule more reasonable. Rather, the question is whether a disputed rule is consistent with and effectuates the purposes of the express provisions of the MMBA." (*Teamsters Local 542 v. County of Imperial* (2007) PERB Decision No. 1916-M at 16, citing from *International Brotherhood of Electrical Workers v. City of Gridley* 34 Cal. 3d 191 (1983) *and Huntington Beach Police Officers' Assn. v. City of Huntington Beach,* 58 Cal. App. 3d 492 (1976).)

The Board uses its decisional authority to harmonize various statutes, but is not free to rewrite the statute. (*Stationary Engineers Local 39, v. Tehama County Superior Court*, (2008) PERB Decision No. 1957-C.) The ALJ exceeded his authority by his dictum purporting to replace his interpretation of Council Policy 300-06 for that of the City.

Under the prior form of government in effect prior to the passage of Proposition F (the Strong Mayor Charter amendment), the Mayor was one of a nine-member City Council and its president, with the right to set the agenda for the Council. There was a City Manager, appointed by the City Council, who took his/her orders directly from the Council, including carrying out the Council's specific negotiation proposals and strategy.

With the approval of Proposition F, the Mayor was removed from the Council, so he was no longer a voting member. Instead the Charter Amendment "create[d] a Mayor-Council form of government," with the Council consisting of eight members. **"The Mayor, (not the Council) would have the authority to give direction to all City officers and employees…"**with certain exceptions, such as the City Attorney. (Emphasis added.) It would take an affirmative vote of five council members to take any action, and five votes to override any mayoral veto. The Mayor, City Attorney, and presiding officer of the Council would jointly set the agenda for closed session meetings, and when present, the Mayor would preside over those meeting, but the Mayor would have no right to vote, a right he held prior to the passage of the Strong Mayor Amendment. The Mayor would appoint the City Manager with Council confirmation. The City Manager would serve at the pleasure of the Mayor, not the Council, as had been the case before Strong Mayor.

Under the ALJ's faulty dictum, opining unnecessarily on the City's impasse hearing procedure, the Mayor would have less power now than he did as a voting member of the Council, prior to the passage of the Strong Mayor Charter Amendment.

The ALJ failed give proper weight to the legal opinion of the San Diego City Attorney

PERB generally gives great weight to the interpretation offered by the public agency's attorney who is empowered to give legal opinions:

> The contemporaneous construction of a statute by those charged with its enforcement and interpretation, although not necessarily controlling, "is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized." (*Meyer v. Board of Trustees of the San Dieguito Union High School District*, 195 Cal. App. 2d 420, 431-432 (1961), citing from *Coca-Cola co. v. State Board of Equalization*, 25 Cal. 2d 918, 921.)

The ALJ failed to give proper weight to the legal opinion of the City of San Diego's City Attorney. The City Attorney made clear in his legal opinion of December 4, 2006, and at the hearing before the ALJ, that the impasse hearing procedure under Council Policy 300-06 provided for the City Council, after a full public hearing, to either vote to approve or vote to reject the Mayor's last, best, and final offer of language, or to suggest the Mayor return to the bargaining table and pursue negotiations with the unions until something more acceptable to the Council was achieved.

Charter section 40 mandates that the City Attorney is the "**chief legal adviser** of, and the **attorney for the City** and **all** Departments and **offices thereof in matters relating to their official powers and duties.**" (Emphasis added.) As such, his legal opinion as to the impasse hearing procedure under Council Policy 300-06 that the Council was to follow should have been accorded great weight.

CONCLUSION

The Mayor and Council City opted to comply with, rather than challenging further, the ALJ's Decision. The ALJ's Decision, to the extent that it comments on the City's hearing procedures under Council Policy 300-06, does not preclude the City from following the will of the voters in adopting the Strong Mayor system of government, and in implementing Propositions B and C, under the impasse hearing procedures outlined by the City Attorney. This is so because the rules of res judicata establish that the ALJ's dictum on City impasse hearing procedures has no binding effect on future City actions.

Moreover, the dictum by the ALJ regarding the City's impasse hearing procedure is erroneous and fatally flawed: The ALJ did not take into account the Charter provision of Strong Mayor, nor, as required by law, attempt to harmonize the Government Code impasse language with the City's Strong Mayor Charter or City Council Policy. The decision is contrary to the law that the Mayor is the City's sole representative in negotiations with unions. The decision, if it were legally binding, would usurp the Charter provision for Strong Mayor passed by the citizens of the City.

The City Attorney repeatedly has called upon the Mayor to uphold the Charter provisions on the Strong Mayor form of government and to seek clarification of the Decision to remove the erroneous dictum. Despite this advice, the Mayor has chosen not to seek clarification. In addition, on September 9, 2008, without consulting with the City Attorney, who is the legal representative of the City in the case, the Mayor and City Council President sent a letter to the Public Employment Relations Board notifying them the City was waiving its right to appeal and choosing to abstain from filing an exception to the Decision. The Mayor and Council President also indicated the City intended to comply with the PERB decision. That forfeiture of the City's legal right to clarification and appeal is unfortunate because it prevented the City Attorney from obtaining correction of the Decision to remove the erroneous dictum. As discussed above, however, the City is not bound by that portion of the administrative law judge's Decision because the unnecessary comments on the City's hearing impasse procedure are dictum, are an unwarranted and incorrect interpretation of City law, and are against public policy; they therefore are without binding (res judicata) effect.

MICHAEL J. AGUIRRE, City Attorney

By
Michael J. Aguirre
City Attorney

MJA:jdf
cc: Andrea Tevlin, Independent Budget Analyst
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