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MEMORANDUM OF LAW

DATE: July 22, 2011

TO: Honorable Mayor and City Council

FROM: City Attorney

SUBJECT: The City's Meet and Confer Obligations Regarding the Use of Volunteers

INTRODUCTION

At the request of the City of San Diego's Budget and Finance Committee, the Office of the Independent Budget Analyst compiled a menu of options consisting of budget balancing suggestions from various sources. One of the options suggested was to expand the use of volunteers. IBA Report No. 11-15 (Mar. 11, 2011), Attachment 4. As discussed in the May 4, 2011, Report to the City Council (Report), volunteers assist the workforce of the City of San Diego by performing tasks beyond the capacity and scope of current City employees, and are not intended to displace the City's paid staff. The Report also noted that the use of volunteers above the current level may be subject to meet and confer with the impacted labor organizations, as the transfer of bargaining unit work to volunteers would be a mandatory subject of bargaining. City Council Report 11-070 (May 4, 2011).

This Memorandum of Law discusses the general meet and confer obligations of the City should the City wish to expand the services of volunteers, including performing all or some of the duties currently performed by, or previously performed by, bargaining unit employees.

QUESTION PRESENTED

When must the City meet and confer with the affected bargaining units regarding the use of volunteers to perform duties currently performed by, or previously performed by, City employees?

SHORT ANSWER

In general, the City has a duty to meet and confer with the impacted bargaining unit on the decision to contract out bargaining unit work. It does not, however, need to meet and confer on the managerial decision to reduce or terminate bargaining unit work because of a

discontinuation of services, *i.e.*, a layoff. Applying this general rule to the use of volunteers, if the City intends to replace existing employees with volunteers to minimize labor costs, the City must meet and confer over the decision and effects of using volunteers to perform work currently performed by bargaining unit employees. If, however, volunteers are not replacing existing employees or otherwise reducing or terminating bargaining unit work, there is no need to meet and confer. Further, the managerial decision to reduce or terminate bargaining unit work because of a discontinuation of services, made independent of the decision to have the work subsequently performed by volunteers, is not subject to meet and confer on the decision, although the City would have a duty to negotiate the effects of any resulting layoffs.

ANALYSIS

I. THE DECISION TO TRANSFER BARGAINING UNIT WORK TO VOLUNTEERS BASED ON LABOR COSTS IS SUBJECT TO MEET AND CONFER.

Under the Meyers-Milias-Brown Act (MMBA), the governing body of a local public agency is required to meet and confer in good faith with the representatives of a recognized employee organization regarding all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment. Cal. Gov't Code § 3504. The MMBA provides that a local public agency and the representatives of recognized employee organizations have the mutual obligation to meet and confer promptly upon request by either party, and continue for a reasonable period of time, in order to freely exchange information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation. Cal. Gov't Code § 3505. The scope of employee representation does not include "consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." Cal. Gov't Code § 3504.

California Public Employment Relations Board (PERB) decisions have long established that the decision and effects of contracting out bargaining unit work are within the scope of representation and subject to the statutory duty to bargain. *Long Beach Community College District*, PERB Dec. No. 1941 (2008) (citing *Lucia Mar Unified School District*, PERB Dec. No. 1440 (2001)). Relying on federal private sector collective bargaining precedent on contracting out bargaining unit work,[1] PERB has held that if a public agency employer replaces its employees with those of a contractor to perform the same services under similar circumstances, the employer must provide notice and opportunity to negotiate prior to the decision to subcontract. *Lucia Mar Unified School District*, PERB Dec. No. 1440 (2001) (relying on *Fibreboard Paper Products Corp. v. National Labor Relations Board*, 379 U.S. 203, 213 (1964)).

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[1] The MMBA parallels the National Labor Relations Act, and California courts may look to federal private sector collective bargaining cases to interpret the MMBA. *Public Employees Association v. Board of Supervisors*, 167 Cal. App. 3d 797, 806-07 (1985); *Vernon Fire Fighters v. City of Vernon*, 107 Cal. App. 3d 802, 815 (1980); *Fire Fighters Union v. City of Vallejo*, 12 Cal. 3d 608, 616-17 (1974).

On the other hand, a decision that involves a "core restructuring" of services, such as eliminating a particular service, is a management prerogative and would fall outside the scope of bargaining. *Long Beach Community College District*, PERB Dec. No. 1941 (2008) (citing *Lucia Mar Unified School District*, PERB Dec. No. 1440 (2001)); *see also Ventura County Community College District*, PERB Dec. No. 1547 (2003) ("a decision to 'subcontract' may constitute a managerial decision 'at the core of entrepreneurial control' and be based upon factors not amenable to negotiation"). Where the decision to subcontract is related to overall enterprise costs, however, it will be within the scope of representation regardless of whether the decision is "at the core of entrepreneurial control." *Ventura County Community College District*, PERB Dec. No. 1547 (2003) (citing *Fibreboard*, 379 U.S. at 213-14; *Otis Elevator Company*, 269 NLRB 891, 900-01 (1984)). PERB has reasoned, "subcontracting decisions motivated by an employer's enterprise costs are 'peculiarly suitable for resolution through the collective bargaining framework.'" *Id.* (citing *First National Maintenance Corp. v. National Labor Relations Board*, 452 U.S. 666, 680 (1981)).

In a case involving the transfer of bargaining unit work under the MMBA, the Supreme Court of California established a balancing test for determining whether a meet and confer requirement applies to a managerial decision. In *Building Material and Construction Teamsters' Union, Local 216 v. Farrell*, 41 Cal. 3d 651 (1986), the agency deleted one vacant and one part-time position from its budget, and reassigned the work to workers outside the bargaining unit without engaging in meet and confer with the impacted union. *Id.* at 655. The court held that these actions had adverse effects on matters within the scope of representation (one and one-half bargaining positions were eliminated, and the affected employee was offered a job at a different location with different hours), constituting more than a de minimis violation of the duty to bargain under the MMBA. *Id.* at 662. The agency argued that even if their actions had adverse effects on matters within the scope of representation, the decision fell under the "fundamental managerial policy" exception to the MMBA. *Id.* at 662-63.

Acknowledging federal and state decisions that recognize the right of employers to make fundamental managerial decisions at the core of entrepreneurial control, the Court in *Building Material* held that when a fundamental managerial decision significantly affects the wages, hours, or working conditions of its employees, a balancing test applies: "If an action is taken pursuant to a fundamental managerial or policy decision, it is within the scope of representation only if the employer's need for unencumbered decision making in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question." *Id.* at 660 (citing *First National Maintenance Corp. v. National Labor Relations Board*, 452 U.S. 666, 686 (1981)); *see also Claremont Police Officers Ass'n v. City of Claremont*, 39 Cal. 4th 623, 638 (2006). In this case, the Court held that unlike the decision to close a plant or reduce the size of an entire workforce, the employer's unilateral decision to transfer bargaining unit work, with little or no effect on the services provided by the agency, was a "suitable subject for collective bargaining" and subject to the meet and confer provisions of the MMBA. *Building Material*, 41 Cal. 3d at 663-64, 668.

The balancing test in *Building Material* was applied in *Rialto Police Benefit Association v. City of Rialto*, 155 Cal. App. 4th 1295 (2007), another MMBA case, which held that the City of Rialto's decision to contract out law enforcement services rather than continue to provide such services through the city's own police department was subject to meet and confer.

Id. at 1298. The court, relying on *Building Material*, concluded that the city's decision did not involve discontinuing the public services but instead involved the transfer of services to non-employees, motivated in part by the cost savings that could be accomplished by contracting out the work. *Id.* at 1305. As such, the court concluded that the city was required to meet and confer over the decision to contract out law enforcement services, and noted that the issues motivating the decision, including labor costs, were "eminently suitable for resolution through collective bargaining." *Id.* at 1309.

Based on *Building Material* and *City of Rialto*, if the City proposes to use volunteers to perform the duties currently performed by City employees to reduce labor costs, the decision to transfer the duties would be subject to meet and confer under the MMBA. Transfer of the duties of the bargaining unit employees would significantly affect the wages, hours, and working conditions of the bargaining unit employees, in that the employees' hours and pay may be reduced or eliminated. A court would likely hold that a proposal to transfer bargaining unit work to volunteers to minimize labor costs would be amenable to the bargaining process, the benefits of which would outweigh the City's need for unencumbered decision making in managing its operations, similar to the circumstances in *City of Rialto*. This is also consistent with *Ventura County Community College District* and federal National Labor Relations Board precedent, which held that subcontracting decisions based on costs are "peculiarly suitable for resolution" through the collective bargaining process. *First National Maintenance Corp.*, 452 U.S. at 680; *Ventura County Community College District*, PERB Dec. No. 1547 (2003).

II. THE DECISION TO REDUCE OR ELIMINATE SERVICES IS A FUNDAMENTAL MANAGEMENT DECISION AND IS NOT SUBJECT TO MEET AND CONFER.

If, on the other hand, the City decides to cease providing certain services and eliminates bargaining unit work because of a lack of funds, *i.e.*, a layoff, that decision is a fundamental management decision and is not subject to meet and confer on the decision.[2] *See Fire Fighters Union v. City of Vallejo*, 12 Cal. 3d 608, 621 (1974) (stating that a reduction of the city's fire fighting force based on the city's decision that as a matter of policy of fire prevention the force was too large was not within the scope of representation or bargaining); *International Association of Firefighters, Local 188, AFL-CIO v. Public Employment Relations Board (City of Richmond)*, 51 Cal. 4th 259 (2011) (affirming the rule in *City of Vallejo* that an employer has the right to unilaterally lay off employees to reduce labor costs so long as it provides an opportunity for bargaining over the implementation of the decision). Under the balancing test set forth in *Building Material*, the decision to discontinue services would weigh toward being a fundamental management right and there would be little to no benefit of bargaining, even if labor costs are minimized. Additionally, if the service is later resurrected through the use of outside workers or volunteers, it is not necessarily subject to meet and confer, as discussed in the following line of California cases.

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[2] Although the decision to lay off employees is not subject to meet and confer, the City must provide the opportunity to bargain over the implementation of the decision, including the number of employees to be laid off, the timing of the layoffs, as well as the effects of the layoffs on the workload and safety of the remaining employees. *International Association of Firefighters, Local 188, AFL-CIO v. Public Employment Relations Board (City of Richmond)*, 51 Cal. 4th 259, 277 (2011).

In *San Diego Adult Educators, Local 4289, AFL-CIO v. Public Employment Relations Board*, 223 Cal. App. 3d 1124 (1990), a case involving the Educational Employment Relations Act (EERA)[3], a community college district decided to discontinue certain language classes, known as the "popular" language classes, and advised the affected teachers of their terminations. *Id.* at 1128. The district did not discontinue other language classes, known as the "minor" language classes. *Id.* The reason for the discontinuance of the classes was economic. *Id.* Following the decision, the district received public pressure to reinstate the classes, which the district did two months later by contracting with a separate non-profit organization to provide both the "popular" and "minor" language classes. *Id.* at 1128-29. The district did not meet and confer with the teachers' union during this process. *Id.* at 1133.

In determining that the district did not commit an unfair labor practice in contracting out the "popular" language classes, the court stated:

> The evidence in this case is undisputed . . . that at the time the College District determined to terminate the ["popular" language classes] it had no intention or expectation of sponsoring these courses through other means . . . There is no suggestion in the factual record or in appellate briefs that the separation of the two decisions was not bona fide, or that the original decision to eliminate these classes was made in contemplation of restoring such classes under the auspices of the Foundation. The most important factor in determining whether an employer's decision to have work done by a subcontractor rather than regular employees is unlawful is the impact of the subcontracting on the regular employees.

Id. at 1134.

The court concluded:

> Here, because the District terminated "popular" language classes before the public pressure caused it to contract with the Foundation to provide the classes, the former District-employed teachers suffered no detriment by the decision to contract with the Foundation. Absent some showing that union members were terminated *because* of the decision to contract out their jobs, we decline to hold that the decision to contract out was a subject of mandatory negotiation.

Id.

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[3] Where public sector labor relations statutes are similar or contain analogous provisions, PERB and court interpretations under one statute are instructive under another and may establish precedent. *See Redwoods Community College Dist. v. Public Employment Relations Bd.*, 159 Cal. App. 3d 617, 623-24 (1984); *City of San Rafael*, PERB Dec. No. 1698-M (2004); *Alameda County Medical Center*, PERB Dec. No. 1620-M (2004) ("when interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions.")

In reaching its decision, the court relied on *Fremont Union High School District*, PERB Dec. No. 651 (1987). In *Fremont,* the district discontinued courses because of financial reasons. Four years later, the district induced a private university to offer and operate the same courses. PERB found that there was no "contracting out," because there was no connection between the decision to discontinue the courses and its resurrection four years later. *San Diego Adult Educators*, 223 Cal. App. 3d at 1135. Notably, *San Diego Adult Educators* stated that the time interval between the two events, whether two months or four years, was inconsequential to the analysis. *Id.* With regard to the "minor" language classes, however, the court concluded that the district had committed an unfair labor practice because it contemporaneously terminated the "minor" language classes being taught by bargaining unit members, and transferred the work to the outside workers. *Id.*

In *Whisman Elementary School District*, PERB Dec. No. 868-E (1991), a decision under EERA, PERB applied the subcontracting analysis in *San Diego Adult Educators* to the use of volunteers. In *Whisman*, the tutorial center of a school was eliminated due to a lack of funding. *Id.* at 3. Six years later, the school started the Homework Club, which offered similar assistance as the tutorial center. *Id.* at 2, 10. Services provided by the Homework Club were provided by volunteers. *Id.* at 9. PERB, relying on the analysis set forth in *San Diego Adult Educators,* held that because the district had no intention of resuming the tutorial center when it was eliminated, the decision to resurrect the services through the use of volunteers for the Homework Club was not subject to meet and confer. *Id.* at 21-23. The decision to use the volunteers had no effect on unit employees, because at the time the Homework Club was formed, the unit members were not performing the work of the Homework Club. As such, the decision to start the Homework Club was not negotiable. *Id.*

San Diego Adult Educators was also recently relied upon in *Trustees of the California State University (San Diego)*, PERB Dec. No. 1955-H (2008), a case under the Higher Education Employer-Employee Relations Act. In *Trustees,* due to budget reductions, San Diego State University (SDSU) stopped staffing certain classes without meeting and conferring with the bargaining unit affected. *Id.* at 9-10. Later, SDSU contracted with San Diego Community College (SDCC) to teach the classes. *Id.* at 12. PERB focused on the decision to terminate the services, stating:

> [I]t does not appear that SDSU decided 'contemporaneously' to contract with SDCC for more remedial classes and to cut its own remedial classes. On the contrary, it appears most likely . . . that SDSU and SDCC did not enter into an agreement . . . until . . . months after SDSU's decision to cut its own classes was final.

Id. at 15.

Trustees, like *San Diego Adult Educators*, emphasized that the decision was not based on timing alone. Rather, PERB looked at whether the decision to cut the classes was dependent or independent from its contract with SDCC. PERB noted that while timing is a relevant factor, it is not the only factor. *Id.* at 15-16.

In the above decisions, all of the work previously performed by bargaining unit employees was later performed by non-employees or volunteers. The same analysis has been applied to the use of non-employees or volunteers to perform only part of the work previously provided by bargaining unit employees. In *Lincoln Unified School District*, PERB Dec. No. 465 (1984), another EERA decision involving the use of volunteers, PERB similarly focused on the effect on current unit employees. In *Lincoln*, bus drivers lost overtime opportunities when the district unilaterally decided to use volunteers to drive for school band weekend trips. Because the district had a severe shortage of funds, the school secured volunteer drivers to reduce the cost of band trips. PERB held that the district committed an unfair labor practice when it unilaterally transferred work from bargaining unit members to volunteers, which was a matter within the scope of representation since it reduced the opportunity for overtime pay. In *Lincoln*, the drivers suffered no loss of regular, full-time work; the band trip driving affected only potential overtime to unit members; nevertheless, because it reduced the opportunity to earn overtime pay, which related to wages and hours, it was negotiable. Notably, PERB recognized that the district could have lawfully discontinued the trips entirely based on costs, and then the Band Boosters (a group of parents, relatives, and friends of band members) might have arranged independently for volunteer drivers. This would have allowed the district to lawfully obtain the same goal; instead, the district continued to provide bus service and unilaterally transferred the work from paid workers to volunteers, which was held to be an unfair labor practice.

Based on *San Diego Adult Educators* and the related cases discussed above, if the City's decision to terminate bargaining unit work is made independently of the decision to have the work subsequently performed by volunteers, there is no duty to meet and confer on the fundamental decision to cease providing services, although there is a duty to negotiate the effects. If, however, the City decides to contemporaneously replace bargaining unit work with those of volunteers, it must provide the opportunity to meet and confer over the decision and effects of contracting out the work to volunteers.

III. THE DECISION TO SUPPLEMENT CITY FORCES WITH VOLUNTEERS WHEN THERE IS NO TRANSFER OF BARGAINING UNIT WORK IS NOT SUBJECT TO MEET AND CONFER.

As recognized and discussed in the Report, the City uses volunteers across the City to assist the City's workforce in enhancing services to the public. Volunteers in the City are neither intended to supplant current vacant positions nor take on current position responsibilities to produce budgetary savings. City Council Report 11-070 (May 4, 2011). As previously discussed, a public agency's action falls within the scope of representation under the MMBA if it has a significant effect on the wages, hours, or working conditions of bargaining unit employees. *Building Material*, 41 Cal. 3d at 660. As such, the City's current use of volunteers to supplement, but not supplant, bargaining unit work is not subject to meet and confer because there is no significant and adverse effect on the wages, hours, and working conditions of bargaining unit

employees. Any proposal to use volunteers to supplement or enhance City services, however, should be separately analyzed and reviewed to determine whether there would be any adverse effects to affected bargaining units, and a corresponding duty to meet and confer under the MMBA.[4]

CONCLUSION

In general, the decision and effects of contracting out or transferring bargaining unit work to reduce labor costs are subject to meet and confer under the MMBA. As such, if the City decides to replace existing bargaining unit employees with outside workers or volunteers for financial reasons, the City must provide notice to the affected employee organizations and the opportunity to negotiate both the decision and the effects. The City is not, however, subject to meet and confer over the fundamental management decision to eliminate services, *i.e.*, a layoff, although it must negotiate over the effects. Although the service may be subsequently resurrected through the use of outside workers or volunteers, that decision must not be made contemporaneously with the decision to reduce or eliminate the services without providing the opportunity to meet and confer over the decision. Additionally, the use of volunteers to supplement, but not supplant, bargaining unit work is not subject to meet and confer where there is no significant and adverse effect on the wages, hours, or working conditions of the bargaining unit employees. As in most situations, the City's duty to meet and confer will depend on the specific circumstances of each case, and each proposal should be analyzed and evaluated on a case by case basis.

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[4] Any proposal to utilize outside forces, including volunteers, to provide City services traditionally performed by the City's classified employees, should also be reviewed in the context of San Diego Charter section 117(c), which authorizes the employment of an independent contractor to provide City services instead of classified employees when conditions and procedures are met. *See* Op. City Att'y 2009-2 (Oct. 8, 2009) for further discussion on this matter.