MEMORANDUM OF LAW

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DATE: August 14, 1989

TO: Bob Ferrier, Labor Relations Manager

FROM: City Attorney

SUBJECT: Employee Representation Issues

You have requested that this office advise you of the respective rights and responsibilities of City management and the recognized employee organization when a recognized employee organization refuses to represent an employee in an exclusively represented unit because the employee is not a dues paying member of the employee organization. You indicated the need for a formal management position on this matter because the issue is being raised at an escalating rate.

This issue is not a new one. Attached is a Memorandum of Law dated March 18, 1987, to Bruce Herring, Labor Relations Assistant which addresses this same issue. While the statutory law discussed in that memorandum has not changed, there has been a recent development in the applicable case law which sheds some additional light on this issue.

We begin this analysis with the same caveat we expressed in the attached Memorandum of Law. Generally speaking, The City of San Diego does not have standing to object to a recognized employee organization's refusal to represent a non-dues paying member of one of its bargaining units. That matter is primarily an issue between the recognized employee organization and the employee in the exclusively represented unit. We do note, however, that there may come a time when such failure by a recognized employee organization to represent members of its exclusively represented unit adversely affects the City's employee-employer relationship policy set forth in Council Policy 300-6 and disrupts the uniform and orderly methods of communication provided for in the Meyers-Milias Brown Act, Government Code section 3500 et seq. and Council Policy 300-6. While we believe that those circumstances are unlikely to occur, if they do, the City Council could at that point declare that the recognized employee organization has abandoned its

responsibilities under its memorandum of understanding and breached its agreement with the City. The Council could then proceed to decertify the exclusively recognized organization.

The facts before us now, however, are that an exclusively recognized employee organization has refused to represent non-dues paying members in its units during grievances or

employee discipline matters. It is unusual for an exclusively recognized employee organization to waive its right to represent non-dues paying members of its units because the organization in safeguarding one employee's rights is in effect protecting the entire unit. Civil Service Assn. v. City & County of San Francisco, 22 Cal. 3d 552 (1978). However, the recognized employee organization cannot be required to provide services to members of its bargaining unit that are normally provided only to members of the organization, such as legal defense, unless the organization has specifically agreed to guarantee such services to all of the employees in the bargaining unit. As we have indicated previously, there is no duty of fair representation under the Meyers-Milias Brown Act because the public employee has the right to represent him or herself as an individual in the employment relationship. Andrews v. Board of Supervisors, 134 Cal. App. 3d 274 (1982). This view was recently reinforced in Lane v. I.U.O.E. Stationary Engineers, Local 39, 89 Daily Journal D.A.R 9217 (1989). However, that court ruled that a recognized public employee organization, while not owing its members the formal duty of fair representation by virtue of exclusive representation, owes its members some duty of care where it has agreed to provide certain representative services. The court clearly stated that the duty of care may arise by virtue of a contract between the organization and its members.

Based on the above, it can certainly be argued that where a specific article in a memorandum of understanding guarantees to all employees in the bargaining unit the right to representation by the recognized employee organization, an aggrieved employee could bring an action in contract against the organization for failure to provide such representation. Under those facts, the employee has standing to sue as a third party beneficiary of the contract between the City and the recognized employee organization. This does not, however, authorized the City to take unilateral action on behalf of the aggrieve employee to enforce the employee's perceived rights under the memorandum of understanding.

We also note that Government Code section 3506 prohibits employee organizations from discriminating against any employees who elect to refuse to join the recognized employee organization.

While there are no California cases on point, a reading of Thompson v. Brotherhood of Sleeping Car Porters, 316 F. 2d 191 (1963) supports the proposition that a recognized employee organization must fairly and without discrimination represent all employees in its bargaining unit. There is no authority in the statute for the public employer to enforce this right on behalf

of the employee. Therefore, if an employee believes that the exclusively recognized employee organization has violated this section, he or she may seek an appropriate legal remedy as an individual.

In those unique situations where a member of a bargaining unit has been refused representation by the recognized employee organization and requests to be represented in a grievance or disciplinary matter by a competing employee organization, it is not advisable to permit such representation until you have received a specific written waiver from the recognized employee organization of its right to be the employee's exclusive representative under the applicable memorandum of understanding.

In summary the recognized employee organization is the exclusive bargaining agent for employees in its recognized units for the purposes of meeting and conferring under the Meyers-Milias Brown Act. The organization's rights and obligations to represent non-dues paying members in its recognized units during grievances and disciplinary procedures are set forth in its memorandum of understanding. If a non-dues paying member of the recognized employee organization believes that his or her rights under the memorandum of understanding have been violated, he or she may desire to bring legal action against the recognized employee organization. Absent conditions that lead The City of San Diego to believe that a major breach or abandonment of the memorandum of understanding has occurred, The City of San Diego should not interfere in the dispute between the recognized employee organization and those non-dues paying members in the bargaining unit. Last but not least, the City should not take any action that can be interpreted by a recognized employee organization as a breach of that organization's right to exclusive representation of the bargaining unit pursuant to the memorandum of understanding.

JOHN W. WITT, City Attorney
By
John M. Kaheny
Chief Deputy City Attorney

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Attachment
ML-89-82