MEMORANDUM OF LAW

DATE: October 5, 1995

TO: Mr. Jim Bartel, Mr. Robert Burns, Mr. Don Hall, Members of the Metropolitan Transit Development Board

FROM: City Attorney

SUBJECT: Post-termination Appeal Procedures for Rodric Townsel

At the September 15, 1995 meeting of the committee designated by the Metropolitan Transit Development Board ("MTDB") to hear the appeal of Mr. Rodric Townsel from his termination of employment with MTDB on April 15, 1994, Mr. Townsel's attorney, Mr. Everett Bobbitt, Esq., raised several issues. This office represents MTDB in this matter as the result of an agreement with MTDB's General Counsel, Mr. Jack Limber. Mr. Limber was precluded from representing MTDB because of a legal conflict. This memorandum is provided to you for your consideration in resolving the following issues raised by Mr. Bobbitt.

ISSUE I.

MTDB had no authority to refer the matter of the appeal of Mr. Rodric Townsel to a designated committee of three (3) board members of MTDB.

At the regularly scheduled July 13, 1995, noticed public meeting of MTDB, the Board voted to appoint Mr. Jim Bartel, Mr. Robert Burns, and Mr. Don Hall, all members of MTDB, to a committee to hear the appeal of Mr. Townsel and to report their recommendation to the full Board at a later date. Mr. Bobbitt objected to the appointment of the committee at the designated committee's meeting of September 15, 1995, and indicated his intention to renew the objection before the entire Board when it comes time for the committee to submit its findings and recommendations to the Board for final ratification. Mr. Bobbitt cited no legal authority for his proposition. The general rule in California is that such action by the board is not an unlawful delegation of legislative authority, because the committee is only charged with providing findings and recommendations to the full board which must take final action. Young v. City of Sausalito, 189 Cal. App. 2d 768 (1961); Fichera v. State Personnel Board, 217 Cal. App. 2d 613 (1963).

ISSUE II.

The designated committee is subject to the open meeting provisions of the Ralph M. Brown Act.

The designated committee is an advisory committee composed solely of members of MTDB which are less than a quorum of the Board. It is not a standing committee with a continuing subject matter jurisdiction, or meeting schedule, fixed by charter, ordinance, resolution, or other form of action of the board. The designated committee is not a "legislative body" under the express provisions of Government Code section 54952(b), and is therefore, exempt from the other provisions of the Ralph M. Brown Act.

ISSUE III.

The designated committee and MTDB must deliberate in open session because the appellant has made a demand pursuant to Government Code section 54957.

As indicated above, Government Code section 54957 is inapplicable to the designated Committee as it is not a "legislative body" within the meaning of the Brown Act. However, Mr. Townsel is entitled to be notified personally, or by mail, twenty-four (24) hours in advance, if MTDB was to hold a closed session to hear specific charges or complaints brought against Mr. Townsel by any other person or employee. He is also entitled to request a public session if the Board is to hear such charges. Government Code section 54957 states in part as follows:

> Nothing contained in this chapter shall be construed to prevent the legislative body of a local agency from holding a closed session . . . during a regular or special meeting to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee by another person or employee unless the employee requests a public session.
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> As a condition to holding a closed session on specific complaints or charges brought against an employee by another person or employee, the employee shall be given written notice of his or her right to have the complaints or charges heard in an open session rather than a closed session, which notice shall be delivered to the employee personally or by mail at least 24 hours before the time for holding the session. If notice is not given, any disciplinary or other action taken by the legislative body against the employee based on the specific complaints or charges in the closed session shall be null and void.

Government Code section 54957.

Technically speaking, the charges against Mr. Townsel have already been heard by the general manager and the matter before MTDB is whether the decision of the general manager ought to be reversed and the matter

remanded back to the general manager because his initial decision was arbitrary, capricious or an abuse of discretion. In other words, Mr. Townsel has already been terminated by the general manager and the Administrative Code and Regulations of MTDB ("Code") only provide Mr. Townsel with a means of having that decision reversed. Stated differently, MTDB does not have the ability under its own rules to "hear specific charges or complaints brought against its employees," but only to review the actions of the general manager in terminating Mr. Townsel. MTDB is also not considering Mr. Townsel's dismissal in the sense that it is used in Section 54957 as Mr. Townsel has already been dismissed from employment with MTDB.

However, Section 54957 is not by any means an example of clear and concise legislative language. While there are no California cases interpreting this section, other jurisdictions have struggled with similar language in equivalently phrased "sunshine" law statutes. Each of the following cases was resolved by a careful consideration of each word in the statute in order to determine whether the open meeting portions of the statute applied to the hearing and/or the taking of evidence or to the deliberations of the Board. Board of Police Commissioners of the City of New Haven v. Freedom of Information Commission, 470 Atl.2d 1209 (1984); Marion County Sheriffs Merit Board v. Peoples Broadcasting Corp., 547 N.E.2d 235 (1989); Dupont Circle Citizens Assn. v. District of Columbia Board of Zoning and Judgment, 364 Atl.2d 610 (1976); Sullivan v. Northwest Garage and Storage Company, 223 Md. 544 (1960).

Mr. Bobbitt is also correct in that he has secured, in at least one nonbinding case, a decision of the San Diego Superior Court requiring open deliberations in a disciplinary hearing conducted by a civil service commission. As the matter to be decided eventually by MTDB is the appropriateness of the general manager's actions in terminating Mr. Townsel, it is probably the better view that the discussions of the general manager's actions be held in open session. However, once the discussion begins to focus on the performance of the general manager or appears to be more in the nature of a complaint against the general manager, MTDB may desire to exercise its option pursuant to Government Code section 54957 to refer the matter to a properly noticed closed session of MTDB to review the performance of the general manager.

ISSUE IV.

Mr. Townsel has a constitutional right to a full evidentiary due process post-termination hearing before MTDB at which time MTDB has the burden of going forward and the burden of proof.

Mr. Townsel was afforded his constitutional right to a pre-termination Skelly hearing in accordance with the Code, the California Constitution, and the United States Constitution. Once Mr. Townsel was

provided with the pre-removal safeguards of noticed written charges and an opportunity to respond, any further rights are defined by state law as articulated in the Code or MTDB's enabling legislation. Public Utilities Code section 120050 et seq. Miller v. State of California, 18 Cal. 3d 808 (1977); Hinchcliffe v. City of San Diego, 165 Cal. App. 3d 722 (1985); Hill v. City of Long Beach, 33 Cal. App. 4 1684 (1995). As Mr. Townsel was a "tenured public employee", that is an employee who could be discharged only for cause, the procedures utilized under the Code required that he be given oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the facts prior to the removal. These procedures are mandated by due process considerations. Skelly v. State Personnel Board, 15 Cal. 3d 194 (1975). To require more than this, prior to termination, would intrude to an unwarranted extent on MTDB's interest in quickly removing Mr. Townsel. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L.Ed.2d 494 (1985); however, Loudermill rested in part on the availability of some type of post-termination administrative procedure.

It should be noted that MTDB had the burden of producing the evidence at the pre-termination hearing. However, the Code does not specify a shift in the burden of proof on appeal. In fact, the Code clearly states that the former employee may only appeal the decision of the general manager to the Board. The term hearing is not used in regard to the appeal. As post-termination procedures are fundamentally a matter of state law, Mr. Townsel may argue that the post-termination procedures available to MTDB are inadequate to protect his right to due process. While it is clear that Mr. Townsel is entitled to notice of any proposed Board action, an opportunity to be heard in a meaningful manner, and to an independent decision maker, the post termination procedures which Mr. Townsel has requested are beyond the legal authority of MTDB. Unlike traditional civil service commissions, state personnel boards, or civilian police review boards, MTDB does not have the statutory authority to issue subpoenas, to compel testimony, or to administer oaths. Dibb v. County of San Diego, 8 Cal. 4th 1200 (1994). In fact, its enabling legislation and its own rules and regulations are totally devoid of any specific statutory authority for the Board to investigate personnel matters outside of reviewing the general manager's actions.

Basing an argument on cases that examine the procedural rights of civil service employees is not helpful in analyzing Mr. Townsel's situation, as he is clearly not a civil service employee. As indicated in the record, the issue of his "civil service" status was resolved in MTDB's favor by Judge Gordon Thompson, Jr., in Mr. Townsel's previous lawsuit in the United States District Court. An examination of MTDB's enabling legislation and the Code can only lead to the conclusion that MTDB employees were never intended to receive the post-termination

evidentiary hearing rights of civil service employees. Keenan v. S.F. Unified School District, 34 Cal. 2d 708 (1950).

The federal cases which have evolved since the Loudermill decision have indicated that post-termination administrative procedures can vary from a grievance type of procedure to a full evidentiary hearing depending upon the rights provided by state law. Derstein v. State of Kansas, 915 F.2d 1410 (10th Cir. 1990); Langley v. Adams County, Colorado, 987 F.2d 1473 (10th Cir. 1993); Holland v. Remmer, 25 F.3d 1251 (4th Cir. 1994); McDaniels v. Flick, 59 F.3d 446 (3rd Cir. 1995). As MTDB is without the legal authority to conduct a full evidentiary hearing, Mr. Townsel's only statutory remedy is to appeal the decision of the general manager to MTDB in accordance with the Code. However, MTDB must provide Mr. Townsel with notice, a meaningful opportunity to be heard, and a neutral decision-maker. If Mr. Townsel is unsatisfied with the decision of MTDB, or this process, he may seek his remedy in State court. It is doubtful that he will return to the United States District Court in light of Judge Thompson's previous ruling.

ISSUE V.

Mr. Townsel is entitled to a second Skelly hearing, because of the general manager's reconsideration of his termination after Mr. Townsel's acquittal at his criminal trial.

Mr. Townsel was afforded his Skelly hearing prior to his termination. The case of Skelly v. Personnel Board, deals only with the pre-termination rights of a public employee who has a vested right in his or her employment. As Mr. Townsel was no longer an employee of MTDB at the time of the conclusion of his criminal trial, he was no longer in a position to claim any additional pre-termination or post-termination procedural rights. The fact that the general manager reconsidered his earlier decision to terminate Mr. Townsel did not create in Mr. Townsel a new procedural or property right in a position he no longer retained. The rule in Parker v. Fountain Valley, 127 Cal. App. 3d 99 (1981), is inapplicable to the facts of the present case. In Parker, the employee had not yet been terminated when the appointing authority considered additional evidence and failed to give the employee an opportunity to respond prior to the decision to terminate the employee. Mr. Townsel had no statutory nor constitutional right to have the general manager reconsider his termination, and having no such right, he had no procedural safeguards available to him at that time.

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cc J. Rod Betts, Esq.

Everett L. Bobbitt, Esq.
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