

**Office of  
The City Attorney  
City of San Diego**

**MEMORANDUM  
MS 59**

**(619) 236-6220**

**DATE:** July 19, 2018

**TO:** Honorable Council President and Members of the City Council

**FROM:** City Attorney

**SUBJECT:** Collective Bargaining Requirements Related to Proposed Ballot Measure by Women Occupy San Diego to Amend the San Diego Charter to Establish a Commission on Police Practices

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This Memorandum follows the July 11, 2018 vote of the City of San Diego (City)'s Rules Committee to forward a proposed San Diego Charter (Charter) amendment, presented by Women Occupy San Diego (WOSD Proposal), to the full San Diego City Council (Council) for consideration. The Rules Committee reviewed the WOSD Proposal, in accordance with Council Policy 000-21, which establishes the procedures to allow members of the public, as well as City officials, agency representatives, and others, to submit proposed ballot measures to the Council for consideration.

**I. THE CHARTER AMENDMENT PROCESS UNDER COUNCIL POLICY 000-21 IS DISCRETIONARY.**

The Charter can only be amended by a majority vote of the City's electors voting on the proposal. Cal. Const. art. XI, § 3(a). A proposed Charter amendment may be placed on the ballot by the Council or through the citizens' initiative process, which requires the gathering of signatures on initiative petitions. Cal. Const. art. XI, § 3(b); SDMC §§ 27.1001-27.1051. The proponents of the WOSD Proposal are requesting that the Council place their measure on the ballot.

Under Charter section 11.1, the Council has the nondelegable legislative power to decide whether it will place proposals presented to it, in accordance with Council Policy 000-21, on a future Municipal Special Election ballot. This legislative action is discretionary, not ministerial, meaning the Council has a choice whether to proceed with the WOSD Proposal. *See Boling v. Public Employment Relations Bd.*, 10 Cal. App. 5th 853, 873, *rev. granted* 398 P.3d 572 (Cal. 2017). To proceed, the Council must act by a majority vote. The Council's determination is affected by a number of considerations, including budgetary concerns and compliance with applicable state law.

**II. IN CONSIDERING PROPOSED CHARTER AMENDMENTS IMPACTING A RECOGNIZED EMPLOYEE ORGANIZATION'S SCOPE OF REPRESENTATION, THE COUNCIL MUST ENSURE COMPLIANCE WITH THE MEYERS-MILIAS-BROWN ACT.**

At the July 11, 2018 Rules Committee meeting, this Office advised the Rules Committee that, prior to placement of the WOSD Proposal on a future ballot, the Council must ensure compliance with the Meyers-Milias-Brown Act (MMBA), at California Government Code (Government Code) sections 3500 through 3511, the state law governing collective bargaining binding on the City, as a public agency employer.<sup>1</sup>

The California Supreme Court has held that, under the MMBA, a city council is required to meet and confer with a recognized employee organization before it proposes charter amendments which affect matters within a recognized employee organization's scope of representation. *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach*, 36 Cal. 3d 591, 602 (1984). In the seminal *Seal Beach* case, the Supreme Court stated: "The MMBA requires such action and the city council cannot avoid the requirement by use of its right to propose charter amendments." *Id.* See also *City of Palo Alto v. Public Employment Relations Bd.*, 5 Cal. App. 5th 1271, 1299-1300 (2017) (there is no conflict between the MMBA and a city council's power to propose charter amendments; the city still retains the ultimate authority to determine if the proposed charter amendment should proceed).

Under the MMBA, the scope of representation includes wages, hours, and other terms and conditions of employment. Cal. Gov't Code §§ 3504, 3505. The MMBA distinguishes between matters within the scope of representation, which are mandatory subjects of bargaining, and fundamental managerial or policy decisions, which are not subject to bargaining. See Cal. Gov't Code § 3504; *Claremont Police Officers Ass'n v. City of Claremont*, 39 Cal. 4th 623, 630-32 (2006).

However, even if a fundamental managerial or policy decision is involved, the City still must determine whether it has a duty to provide notice and opportunity to its recognized employee organizations to identify and negotiate any impacts of the managerial decision that trigger bargaining, prior to implementation of the managerial decision. This type of bargaining is referred to as impacts or effects bargaining. See *International Ass'n of Fire Fighters, Local 188, AFL-CIO v. Public. Employment Relations Bd.*, 51 Cal. 4th 259, 277 (2011) (a public employer must give its recognized employee organizations an opportunity to bargain over the implementation of a managerial decision that impacts working conditions); *Vernon Fire Fighters v. City of Vernon*, 107 Cal. App. 3d 802, 822 (1980) (the city must give "reasonable written notice" to a recognized employee organization of any proposed legislative action "directly relating to matters within the scope of representation").

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<sup>1</sup> A proponent of the WOSD Proposal, Andrea Renee St. Julian, submitted a legal memorandum dated July 13, 2018, to this Office and the City Councilmembers, challenging this Office's advice on the City's obligations under the MMBA related to the WOSD Proposal. This Office's memorandum is intended to provide additional detail and explanation following our advice at the July 11, 2018 Rules Committee meeting.

The California Public Employment Relations Board (PERB), the state agency responsible for enforcing the MMBA, has held that the MMBA requires the City to provide reasonable notice and an opportunity to bargain reasonably foreseeable impacts of a managerial decision before the City may implement the decision. *County of Santa Clara*, PERB Dec. No. 2321-M (2013). *See also Rio Hondo Comm. College Dist.*, PERB Dec. No. 2313-E (2013); *Trustees of the California State University*, PERB Dec. No. 2287-H (2012).

A union's duty to request impacts or effects bargaining arises upon an employer's providing notice and an opportunity to bargain. *County of Santa Clara*, PERB Dec. No. 2321-M (2013). Implementing a non-negotiable decision that has foreseeable effects on mandatory subjects of bargaining without providing an employee organization reasonable notice and an opportunity to bargain constitutes an unfair labor practice. *Id.* Further, acting in good faith under the MMBA requires the City to meet with its recognized employee organizations to clarify whether an area of impact is within the scope of representation, if there is a dispute. *City of Palo Alto*, 5 Cal. App. 5th at 1308-09 (citing PERB cases).

Once a Charter amendment is advanced to the ballot and approved by voters, only voters can later amend it; the legislative body has no authority to alter it, if necessary, as a result of any required meet and confer process. Therefore, the City must comply with the MMBA before the Council places a measure on the ballot. *See City of Palo Alto*, 5 Cal. App. 5th at 1299 (stating that consultation in good faith on a proposed Charter amendment under Government Code section 3507, which is similar to conferring in good faith under Government Code section 3505, must occur *before* the city decides how the pertinent issue should be resolved).

### **III. THE CITY MUST GIVE TWO OF ITS RECOGNIZED EMPLOYEE ORGANIZATIONS REASONABLE NOTICE AND OPPORTUNITY TO IDENTIFY AND BARGAIN ANY NEGOTIABLE IMPACTS OF THE WOSD PROPOSAL PRIOR TO ITS PLACEMENT ON A FUTURE BALLOT.**

The WOSD Proposal seeks to amend the Charter by repealing Charter section 43(d), which authorizes the Mayor and Council to establish a community review board on police practices, and replacing it with a new Charter section 41.2, which establishes a commission on police practices as an independent commission, with specified duties and powers. The proposed commission has broader investigatory powers than the existing community review board on police practices.<sup>2</sup>

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<sup>2</sup> The proposed duties include the duty to investigate all deaths resulting from interactions with San Diego Police Department (Department) officers and all officer-involved shootings. The proposed duties also include the duty to receive, review, and evaluate all complaints against Department officers and to report quarterly to the Mayor and Council. The proposed powers include reviewing, evaluating, and investigating all complaints against Department officers; reviewing and evaluating the policies, procedures, practices, and actions of the Department; and retaining or employing independent investigators to conduct investigations and analysts to evaluate the policies, procedures, practices, and actions. The proposed commission also has the power to subpoena civilian witnesses, which may include civilian employees of the Department or non-employee citizens; the power to make recommendations to the Department on the discipline of individual officers against whom complaints have been made or on whom the proposed commission has conducted an investigation; the power to review and evaluate the administration of discipline arising from sustained complaints and other matters; and any additional powers established by ordinance of the Council.

The proposed commission would have the power to conduct independent investigations of certain types of police-related incidents whether or not a complaint is filed. The commission would also have the power “to make recommendations to the Police Department of the City of San Diego on the discipline of individual officers against whom complaints have been made or on whom the Commission has conducted an investigation.” WOSD Proposal, at § 41.2(3)(F).

A decision to discipline officers “for just cause” is a management right, as stated in Article 9 of the City’s Memorandum of Understanding (MOU) with the San Diego Police Officers Association (SDPOA). San Diego Resolution R-309613 (Apr. 22, 2015) (approving the MOU). The MOU also expressly states that it is an agreed-upon management right of the City “to determine the mission of its constituent departments, commissions, and boards.” *Id.* Therefore, it is our view that the decision to seek voter approval of the proposed commission on police practices as described in the WOSD Proposal is a management right under the MMBA.

However, there are procedural rules related to the disciplinary process for sworn police officers governed by California’s Public Safety Officers Procedural Bill of Rights Act, at Government Code sections 3300 through 3313, which are incorporated into the MOU, at Article 41. Further, the City has agreed to certain reporting requirements to the SDPOA when an officer is under investigation; and Article 41, paragraph J.1 of the MOU provides that, during its term, the City will not change “in any way without the mutual agreement of the Parties” any policies, practices, or procedures “which affect wages, hours, or other terms and conditions of employment and which specifically affect investigations.” *Id.* Also, Article 41, paragraph J.2. states that, during the term of the MOU, the City agrees not to implement or adopt any changes in policy or procedure, which adversely affect or diminish the procedural or substantive rights of officers contained in the MOU. *Id.*

Given that rules related to discipline are covered by the MOU and subject to bargaining, and procedural rules related to discipline are a mandatory subject of bargaining,<sup>3</sup> it is this Office’s view that the City would risk an unfair labor practice charge if it failed to give the SDPOA reasonable notice and an opportunity to bargain the impacts of the WOSD Proposal prior to the Council’s decision to place the measure on the ballot.<sup>4</sup> As explained above, a management

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<sup>3</sup> See *Vernon Fire Fighters*, 107 Cal. App. 3d at 828 (unilateral adoption of disciplinary rule without meet and confer violated the MMBA); *City of Davis*, PERB Dec. No. 2494-M (2016) (disciplinary procedures are within the scope of representation under the MMBA).

<sup>4</sup> Note, that there is nothing in SDPOA’s current MOU with the City that waives bargaining under the MMBA regarding the WOSD Proposal. A waiver of bargaining must be in language that is “clear and unmistakable.” *City of Palo Alto*, 5 Cal. App. 5th at 1304-05. Article 46, paragraph A of the MOU is an agreement between the City and SDPOA, providing that agreed-upon or established terms and conditions of employment for SDPOA members will not be “revised to adversely affect” members during the term of the MOU. Article 46, paragraph G excludes “any enactment of any Police Review Board or Commission” from this limitation on bargaining, but it also states that “the policies and procedures of this Board of Commission are subject to meet and confer to the extent required by the MMBA.” The WOSD Proposal seeks to establish a commission and specific commission policies within the Charter, including the scope of the commission’s work, mandates for external investigations of certain police conduct that may impact officer discipline, and authority to subpoena civilian witnesses, including civilian employees.

decision that impacts mandatory subjects of bargaining must be discussed with the impacted employee organizations prior to implementation of the decision. With a Charter amendment, there is no ability to address impacts, by clarifying or amending language, after the amendment is approved by voters.

The WOSD Proposal also includes provisions regarding subpoena of civilian witnesses, which may include civilian employees of the Department, who are represented by the San Diego Municipal Employees' Association (MEA). Therefore, under the MMBA, notice and opportunity to negotiate impacts should also be provided to MEA.

**IV. THIS OFFICE RECOMMENDS EXPEDITIOUS PLACEMENT OF THE WOSD PROPOSAL BEFORE THE COUNCIL SO THAT THE COUNCIL MAY DETERMINE WHETHER TO INITIATE THE REQUIRED MMBA PROCESS.**

This Office recommends that the Council President docket the WOSD Proposal before the Council, as directed by the Rules Committee, at the earliest opportunity to allow the Council to determine whether to initiate the required MMBA process. The Council, by a majority vote, must authorize initiation of the MMBA process with the SDPOA and MEA, to ensure that the City's labor negotiators have proper authority to bargain.

If the Council initiates the process, the City's labor negotiators must then give reasonable notice and opportunity to both the SDPOA and MEA to identify any impacts and complete any required bargaining before the Council can vote to place the WOSD Proposal on a future ballot. *See County of Santa Clara*, PERB Dec. No. 2321-M (2013). If there is a dispute about whether identified impacts trigger bargaining, the City must meet with its recognized employee organizations to clarify bargaining obligations. The Council risks an unfair labor practice charge if it votes to place the WOSD Proposal on the ballot before the City's obligations under the MMBA are satisfied.

The MMBA process, if authorized, must be completed by August 10, 2018 in order for the proposed Charter amendment to be considered for the November 2018 election.

MARA W. ELLIOTT, CITY ATTORNEY

By \_\_\_\_\_  
Joan F. Dawson  
Deputy City Attorney

JFD:cm

MS-2018-10

cc: Honorable Mayor Kevin L. Faulconer

Kris Michell, Chief Operating Officer

Judy von Kalinowski, Director, Human Resources Department

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