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April 24, 2012

Court of Appeal
Fourth Appellate District, Division One
750 B Street, Suite 300
San Diego, CA 92101

Re: *San Diego Municipal Employees Association (MEA) v. The Superior Court*
[PERB and City of San Diego, Real Parties In Interest]
Court of Appeal Case No. D061724
San Diego Superior Court Case No. 37-2012-00092205-CU-MC-CTL
Petitioner MEA's Reply to City's Informal Response

Dear Justices:

Petitioner MEA submits this short Reply to the City of San Diego's informal response to its Writ Petition filed and served in the late afternoon yesterday, April 23, 2012.

The City's response dodges the central jurisdictional issue addressed in MEA's Writ Petition. In fact, the City avoids any mention at all of Government Code section 3509, subdivision (b) establishing PERB's exclusive initial jurisdiction in this matter or the case law uniformly honoring PERB's legislatively-mandated role under the MMBA. [See *City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 605-606; *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Board* (2005) 35 Cal.4th 1072, 1077; *International Association of Firefighters, Local 230 v. City of San Jose* (2011) 195 Cal.App.4th 1179, 1208-1209.]

Instead, repeating its theme from below, the City's response asserts in conclusory fashion that "any administrative hearing would be a charade" and that "PERB has already decided its position in this case." The City simply ignores the actual statutory scheme and the PERB Regulations which inform all of PERB's activities when responding to an unfair practice charge (or a request for injunctive relief) whether filed by an *employer* or a *union*. [See PERB's Informal Response filed 4/23/12, repeating the points PERB made below.]

Under the circumstances, the City's insistence on this erroneous portrayal of PERB's actions in this case – despite the actual facts and law – must be seen as a deliberate litigation strategy (as well as a public relations ploy as noted in MEA's Writ). Surely, the City's bare assertions about a "charade" and "futility," by themselves, are inadequate to excuse the City from exhausting its

administrative remedy – and they are equally inadequate to justify an unlawful shifting of jurisdiction over MEA's unfair practice charge from PERB to the Superior Court's busy docket.

Contrary to the City's assertion, the Superior Court did *not* have "inherent power" or "discretion" to interfere with PERB's statutory jurisdiction to determine the merits of MEA's unfair practice charge based on a full evidentiary record adduced in an administrative hearing. PERB's jurisdiction has been clearly and unequivocally established under Government Code section 3509. The Superior Court's denial of a pre-election remedy in response to PERB's request for injunctive relief does not, as a matter of law, enlarge the Superior Court's jurisdiction by displacing PERB from its proper role as an expert administrative state agency.

MEA petitioned this Court for relief because the Superior Court's Order is unlawful and in excess of the Superior Court's jurisdiction. The issue is *not* whether the Superior Court "abused its discretion" as the City asserts; rather, the point is that the Superior Court *did not have discretion* to enter the Order it did and this Order denies MEA the right to proceed to an administrative hearing on *its* unfair practice charge. This Order is a direct injury to MEA as a recognized employee organization under the MMBA and to the current and future City employees MEA represents. It is MEA, not PERB, which has the burden of proving that a violation of the MMBA occurred in connection with the City's handling of this alleged "citizen's initiative" calling for "Comprehensive Pension Reform" by Charter amendment. Under the statutory scheme and the case law interpreting and applying it, the determination regarding this unfair practice charge must be made by PERB. The application of the *Seal Beach* case (where a reconciliation between constitutional election rights and the MMBA was also required) – whether by analogy or otherwise to the facts of this case – is for PERB to determine in the first instance and an appellate court to address (if at all) on review. This is the fundamental and undeniable nature of the statutory scheme and no exception has been carved out for the City of San Diego or its pension-related controversies when the MMBA – and thus PERB – are implicated.

The City cites several cases for the proposition that Judge Vargas had *discretion* to enter the Order he did at City's urging because he properly exercised his inherent power as a trial judge to order PERB to stop its administrative proceedings. Yet not a single cited case supports this argument. In quoting at length from *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953 at page 7 of its response, the City stops short of the key point the *Rutherford* court made as follows: "Regardless of their source of authority, 'trial judges have no authority to issue courtroom local rules which conflict with any statute' or are 'inconsistent with law." *Id.* at 967.

Nor does the court's acknowledgment when addressing a statute of limitations issue in *Adams v. Paul* (1995) 11 Cal.4th 583 (which the City cites at page 7), that trial courts have inherent authority to stay legal malpractice suits and hold them in abeyance (if necessary) until underlying related suits are resolved, have any rational relationship to the jurisdictional issue here. While the City has quoted a single sentence from *People v. Picklesimer* (2010) 48 Cal.4th 330, 338, at page 7 of its response, this quote is taken out of context and ignores the actual holding which defeats the City's argument. In *Picklesimer*, the court rejected the argument that Code of Civil procedure section 187 creates jurisdiction to hear a motion for *Hofsheier* relief related to mandatory lifetime

sex offender registration. The court emphasized that section 187 "does not speak to jurisdiction; it does not create jurisdiction; rather, the existence of jurisdiction is the premise for its application . . . to the extent jurisdiction to hear Picklesimer's motion is otherwise lacking, Code of Civil Procedure section 187 affords Picklesimer no comfort here."

The City cites three other cases in support of its theory that the Superior Court had "inherent power" to enter the Order at issue here in response to the City's *ex parte* application. None of these cases are even remotely applicable. In *Johnson v. Banducci* (1963) 212 Cal.App.2d 254, the issue involved the trial court's inherent power and discretion to receive or consider certain affidavits when determining a summary judgment motion under section 437c of the Code of Civil Procedure. In *Sole Energy Co. v. Petrominerals Corporation* (2005) 128 Cal.App.4th 187, 193, the issue involved the trial court's inherent power and discretion to treat a motion for reconsideration as a motion for a new trial when it was filed on the same day as judgment was entered following the court's grant of a motion for summary judgment. Finally, in *Lucas v. County of Los Angeles* (1996) 47 Cal.App.4th 277, the issue involved the trial court's inherent power and discretion to hear and decide a motion *in limine* on a legal issue previously raised and denied by summary judgment.

Having dodged the clear statutory authority and case law which underscores the impropriety of the Order at issue here, the City relies on irrelevant cases where the court's *inherent power* to act *within the scope of its unequivocal jurisdiction* was at issue. Here, the Superior Court simply had *no inherent power or discretion* to interfere with PERB's jurisdiction as a quasi-judicial state agency by entering an Order staying PERB's administrative proceedings and quashing subpoenas duces tecum lawfully issued and served in accordance with the relevant PERB Regulations.

As noted in MEA's Writ, MEA is entitled to proceed with an administrative hearing on its unfair practice charge before Administrative Law Judge Donn Ginoza. On February 10, 2012, the PERB Board ordered that this hearing be expedited and, thereafter, on February 28, 2012, after consultation with the parties, ALJ Ginoza set the matter for hearing on April 2nd through April 5th, 2012. The Superior Court has no jurisdiction to "review" PERB's administrative determination and directive that the hearing in this case be expedited. Nor does MEA's right to proceed to an administrative hearing require MEA to make a special showing to the Superior Court that MEA *needs* to have an administrative hearing before the election. Nevertheless, MEA has provided that justification and – ironically – the City agrees with MEA that there is a "need for prompt adjudication of these issues of important public interest, as well as local and statewide impact." (p. 11) A delay in PERB's administrative proceedings means a delay ultimately in getting these issues resolved by the expert state agency unequivocally entrusted with that initial determination. This was MEA's point below and remains MEA's point here in seeking extraordinary relief from this Court to reverse the indefinite and unlawful stay order related to PERB's administrative proceedings which was entered on March 27, 2012, which resulted in ALJ Ginoza taking the hearing off calendar "until the stay is lifted."

The City also attempts to minimize the harmful nature of the Superior Court's Order by describing it as a "*two* month stay" and not an indefinite one (p. 8) – noting that the Order sets a status conference "concerning the Stay of Proceedings on June 22, 2012." The 4-day administrative

hearing before ALJ Donn Ginoza was, of course, set to begin on **April 2, 2012**. Since the parties will not appear before Judge Vargas until this status conference set on June 22, 2012, (nearly *three* months after the administrative hearing would have begun) – and only then will the parties learn what the Superior Court intends to do with its Stay Order – there will be a much longer delay than *two months* in getting this matter to hearing (let alone *decision*) regardless of who does the math.

Moreover, since Judge Vargas' Order is *silent* as to its rationale – but clear as to its adverse impact – MEA must assume that the Superior Court granted the relief the City requested for the reasons the City urged *and reasserts* in its response letter, i.e., that PERB should *never* conduct an administrative hearing in this case to determine whether the MMBA was violated (based on a full evidentiary record) because such a hearing before ALJ Ginoza "would be a charade" and the City need not exhaust this administrative remedy. The City will certainly continue to argue this point at the Status Conference on June 22, 2012. Indeed, a denial of MEA's Writ Petition will only embolden the City to continue its misplaced but strategical attack on PERB and to urge the trial court to treat any denial of MEA's Writ Petition as this Court's tacit agreement that the Order staying PERB's administrative proceedings and quashing its subpoenas was properly entered in response to the City's *ex parte* application because the City need not exhaust its administrative remedy.

MEA respectfully urges this Court to grant the relief requested in MEA's Writ Petition.

Sincerely,

Ann M. Smith
TOSDAL, SMITH, STEINER & WAX
Attorneys for Petitioner San Diego Municipal Employees Association

Re: San Diego Municipal Employees Association v. Superior Court of the State of California, County of San Diego
Court of Appeal Case No.: D061724

PROOF OF SERVICE

I, the undersigned, hereby declare and state:

I am over the age of eighteen years, employed in the city of San Diego, California, and not a party to the within action. My business address is 401 West "A" Street, Suite 320, San Diego, California, 92101.

On April 24, 2012, I served the within document described as:

PETITIONER MEA'S REPLY TO CITY'S INFORMAL RESPONSE

via the method indicated:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 24, 2012, at San Diego, California.

Elizabeth Diaz