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April 26, 2012

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

Re: *San Diego Municipal Employees Association v. the Superior Court*
Court of Appeal Case No. D061724
San Diego Superior Court Case No. 37-2012-00092205-CU-MC-CTL
City's Sur-reply to Reply of Petitioner MEA

Dear Justices:

City asks this Court to accept this Sur-reply to the letter Reply of Petitioner MEA dated April 24, 2012.

First, City has not dodged the jurisdictional issue. Rather, nothing in the Court's Order staying administrative hearings until after the election specifically challenges PERB's original jurisdiction. (8 Petitioner's Exhibits ("PE") 2257.)

Second, the trial court rationale for the ruling is evident from the hearing. The transcript of the hearing on the stay shows that MEA and PERB had not provided the Judge adequate reasons for why the administrative hearings could not be put off until after the June 5, 2012, elections. (8 PE 2201-2239.) The ruling also responded to City's argument that any administrative hearing before the election would be a "circus" and interfere with the election, as the proponents of the initiative have argued in their own letter brief.

Third, City does indeed assert, with good reasons, that PERB has waived jurisdiction by filing the trial court action, and its bias toward the City made futile any attempt by City to exhaust the administrative procedures provided by PERB.

PERB, in its own letter brief, emphasized that the MMBA gives it the right to seek temporary injunctive relief to halt alleged unfair practices, though it has done so *only five times in the last seven years*, mostly to prevent strikes. Significantly, PERB and MEA totally ignore the fact that PERB sought permanent injunctive and mandamus relief in the trial court. Moreover, the PERB Complaint clearly demonstrates that it has taken an adversarial position to

the City and has lost all semblance of a "quasi-judicial" body just looking to develop a factual record.

PERB claimed in its letter brief that by bring the court action it had not made a decision that City has committed an unfair practice by failing to meet and confer with MEA before placing the Initiative on the June ballot. PERB's verified Complaint for Injunctive Relief; Verified Petition for Writ of Mandate belies this claim:

1. The Prayer (page 9-10) requests a temporary, preliminary and permanent cease and desist order against the City. In fact, the permanent order would stand the California Constitution on its head, requiring labor negotiations "regarding provisions of the Initiative or any future initiative with proposed provisions that may affect current and future bargaining unit members' wages and retirement benefits, before placing any such initiative on the ballot for any subsequent election."

[PERB is seeking a permanent order eliminating every San Diegan's constitutional right of initiative involving employment or retirement issues.]

2. PERB's Complaint is divided by headings, the first of which reads "The Dispute Between PERB and the City" (page 3).

[How can there be such a dispute and still maintain impartiality as a "quasi-judicial" agency?]

3. Paragraph 26 of the Complaint states: "By this Complaint and Petition, PERB contends that the City has engaged in conduct in violation of the MMBA by refusing to negotiate with the MBA over the provisions of the Initiative before placing it on the ballot for the June 5, 2012 election."

[In light of Judge Dato's remark that there is no law supporting PERB's position, how can PERB invoke its administrative powers to do something the law does not allow them to do?]

4. Paragraph 28 states: "PERB brings this action. . .to enforce the City's clear, present and ministerial duties under the MMBA, including the duty to negotiate in good faith with the MBA before [placing the initiative on the ballot]."

5. Paragraph 30 states: "Respondent has a clear, present and ministerial duty to negotiate in good faith with the MEA about the Initiative.. .

6. Paragraph 35 states: "The City's unlawful attempt to avoid its obligations under the MMBA is also likely to be replicated elsewhere and will cause irreparable hard to collective bargaining rights provided by California's public sector labor laws to employees of local governmental agencies statewide."

7. "If the City is allowed to proceed with its plan to present the Initiative to the electorate without having first met and conferred with the MBA and other affected employee organizations, the policy, spirit and bargaining mandates established by the Legislature and codified in the MMBA will be circumvented and thwarted."

As important as what is in the verified complaint is what is NOT in the verified complaint. Nowhere does PERB even acknowledge that 116,000 signatures were gathered to place the initiative on the ballot. The closest PERB comes to implying such a fact is on page 5, line 2, where PERB states that "the City asserts that it is a so-called 'citizens' initiative." This omission by PERB is advocacy at its worst.

Also, PERB repeatedly argues in its letter brief that all it does is determine initially whether there is a prima facie case of a violation of the MMBA. However, there never was a prima facie case when no case authority whatsoever declares a citizens' initiative subject to "meet and confer" requirements of the MMBA, even on the facts alleged.

The Supreme Court in *People ex. rel. Seal Beach Police Officers Association v. City of Seal Beach* (1984) 36 Cal. 3d 591, decided a City must meet and confer with labor unions only when the city council, the governing body, proposed a charter change. PERB, when it issued the Complaint on behalf of MEA, and now MEA, completely ignore footnote 8 to the *Seal Beach* decision, which states: "**Needless to say, this case does not involve the question whether the meet and confer requirement was intended to apply to charter amendments proposed by initiative.**" 36 Cal. 3d at 599, n.8. In twenty-eight years, the Supreme Court has never extended its *Seal Beach* holding to any citizens' initiative. No other appellate court has done so either. So, there was no "prima facie" case to begin with.

The California Constitution, art. XI, 3(b) provides two ways, and only two, to amend a charter: "Amendment or repeal may be proposed by initiative or by the governing body." No case has ever recognized a third way, or given it any legal meaning. No case interpreting the MMBA has recognized a category of "City-sponsored" or "Mayor-sponsored" initiative. It simply does not matter what the facts of city official involvement are, short of a majority of the City Council, when no case recognizes that such facts have any legal consequence.

When PERB sought a TRO in San Diego Superior Court, Judge Dato said not once, but three times, that there was no case on point. (4 PE 844:28-845:3, 845:11-14, and 846:23-25.) PERB Deputy General Counsel Wendi Ross responded to one of these "no case" comments by the Judge by saying: "We do believe that there are some cases that touch directly on this issue, including the *City of Seal Beach*, which *mandates that an employer negotiate with the exclusive representative when a ballot* ***initiative*** *impacts terms of conditions of employment.* ***We know that the Supreme Court has stated that clearly.***" (4 PE 847:3-9; emphasis added.) This is an outrageous misrepresentation to the court of the *Seal Beach* decision, particularly in light of footnote 8. There is no adequate explanation of why PERB brought its case against the City in the first place, unless PERB's General Counsel made the same gross misrepresentation of *Seal Beach* to the PERB Board itself, when that Board decided to file the Superior Court case against the City.

When you couple seeking permanent relief against the City, with allegations under penalty of perjury that City violated the MMBA, with a total lack of any prima facie case based on existing case law, and with misrepresentations about the only decision that did apply meet and confer requirements, one can only reasonably conclude that PERB long ago made up its mind that City violated the MMBA, and that City's proceeding through the administrative process would be futile.

While the trial court did not expressly adopt these City arguments, it had every legal justification in doing so, and, yes, City will continue asserting these valid arguments that PERB gave up is "initial exclusive jurisdiction."

Sincerely yours,

JAN I. GOLDSMITH, City Attorney

By Donald R. Worley

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Assistant City Attorney

DRW:slc

COURT OF APPEAL, STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

PROOF OF SERVICE

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San Diego Municipal Employees' Association v. Superior Court of the State of California, County of San Diego

4th Civil No. D061724
SDSC Case No. 37-2012-00092205-CU-MC-CTL

I, Shelley Carter, declare that:

I was at least 18 years of age and not a party to the case; I am employed in the County of San Diego, California, where the mailing occurs; and, my business address is 1200 Third Avenue, Suite 1100, San Diego, California, 92101.

I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business.

I served the foregoing **CITY'S SUR-REPLY TO REPLY OF PETITIONER MEA**, on **April 26, 2012**, by email and by sealing each envelope and placing it with for collection and mailing with the United States Postal Service, on this same day, at my business address shown above, following ordinary business practices, addressed to:

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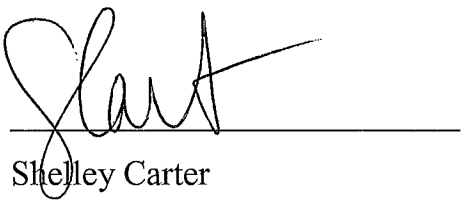
I declare under penalty of perjury and the laws of the State of California that the foregoing is true and correct. Executed on April 26, 2012, in San Diego, California.



Shelley Carter