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January 19, 2012

Bernhard Rohrbacher, Supervising Regional Attorney
Public Employment Relations Board
Los Angeles Regional Office
700 North Central Avenue, Suite 200
Glendale, CA 91203


Re: San Diego Municipal Employees Association v City of San Diego
Unfair Practice Charge No.

Dear Mr. Rohrbacher:

Please find enclosed an original plus one copy of the unfair practice charge by San Diego Municipal Employees Association v. City of San Diego with the proof of service.

Please call me if you have any questions concerning this letter.

TOSDAL, SMITH, STEINER & WAX


Fern M. Steiner

cc: MEA



STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD
UNFAIR PRACTICE CHARGE

DO NOT WRITE IN THIS SPACE: Case No: _____ Date Filed: _____

INSTRUCTIONS: File the original and one copy of this charge form in the appropriate PERB regional office (see PERB Regulation 32075), with proof of service attached to each copy. Proper filing includes concurrent service and proof of service of the charge as required by PERB Regulation 32615(c). All forms are available from the regional offices or PERB's website at www.perb.ca.gov. If more space is needed for any item on this form, attach additional sheets and number items.

IS THIS AN AMENDED CHARGE? YES NO

1. CHARGING PARTY: EMPLOYEE EMPLOYEE ORGANIZATION EMPLOYER PUBLIC¹

a. Full name: San Diego Municipal Employees Association
b. Mailing address: 9620 Chesapeake Drive, Suite 203, San Diego, Ca. 92123
c. Telephone number: 619-264-6632
d. Name, title and telephone number of person filing charge: Michael Zucchet, General Manager, 619-264-6632
e. Bargaining unit(s) involved: (1)Professional (2)Supervisory (3)Technical and (4) Administrative Support and Field Service

2. CHARGE FILED AGAINST: (mark one only) EMPLOYEE ORGANIZATION EMPLOYER

a. Full name: City of San Diego
b. Mailing address: 1200 Third Avenue, Suite 1316, San Diego, Ca. 92101
c. Telephone number: 619-236-6313
d. Name, title and telephone number of agent to contact: Scott Chadwick, Human Resources Director, 619-236-6313

3. NAME OF EMPLOYER (Complete this section only if the charge is filed against an employee organization.)

a. Full name:
b. Mailing address:

4. APPOINTING POWER: (Complete this section only if the employer is the State of California. See Government Code section 18524.)

a. Full name:
b. Mailing address:
c. Agent:

¹ An affected member of the public may only file a charge relating to an alleged public notice violation, pursuant to Government Code section 3523, 3547, 3547.5, or 3595, or Public Utilities Code section 99569.

5. GRIEVANCE PROCEDURE

Are the parties covered by an agreement containing a grievance procedure which ends in binding arbitration?

Yes No

6. STATEMENT OF CHARGE

a. The charging party hereby alleges that the above-named respondent is under the jurisdiction of: (check one)

- Educational Employment Relations Act (EERA) (Gov. Code sec. 3540 et seq.)
- Ralph C. Dills Act (Gov. Code sec. 3512 et seq.)
- Higher Education Employer-Employee Relations Act (HEERA) (Gov. Code sec. 3560 et seq.)
- Meyers-Milias-Brown Act (MMBA) (Gov. Code sec. 3500 et seq.)
- Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (TEERA) (Pub. Utilities Code sec. 99560 et seq.)
- Trial Court Employment Protection and Governance Act (Trial Court Act) (Article 3; Gov. Code sec. 71630 – 71639.5)
- Trial Court Interpreter Employment and Labor Relations Act (Court Interpreter Act) (Gov. Code sec. 71800 et seq.)

b. The specific Government or Public Utilities Code section(s), or PERB regulation section(s) alleged to have been violated is/are:
PERB Regulation 32604 +

c. For MMBA, Trial Court Act and Court Interpreter Act cases, if applicable, the specific local rule(s) alleged to have been violated is/are (*a copy of the applicable local rule(s) MUST be attached to the charge*):
MMBA 3502, 3503, 3504 and 3505

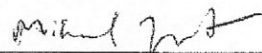
d. Provide a clear and concise statement of the conduct alleged to constitute an unfair practice including, where known, the time and place of each instance of respondent's conduct, and the name and capacity of each person involved. This must be a statement of the facts that support your claim and *not conclusions of law*. A statement of the remedy sought must also be provided. (*Use and attach additional sheets of paper if necessary.*)
See Attachment

DECLARATION

I declare under penalty of perjury that I have read the above charge and that the statements herein are true and complete to the best of my knowledge and belief and that this declaration was executed on January 18, 2012
(Date)

at San Diego, California
(City and State)

Michael Zucchet
(Type or Print Name)


(Signature)

Title, if any: General Manager

Mailing address: 9620 Chesapeake Drive, Suite 203, San Diego, Ca. 92123

Telephone Number: () 619-264-6632

6. d. Attachment to PERB charge

I. General Overview: Statewide Consequences Associated With City of San Diego's Refusal to Bargain Over "Comprehensive Pension Reform" Ballot Initiative

As one of six recognized employee organizations in the City of San Diego ("City"), Charging Party San Diego Municipal Employee Association ("MEA") is the recognized employee organization for 3,800 City employees in four bargaining units: (1) Professional, (2) Supervisory, (3) Technical, and (4) Administrative Support and Field Service. In this status, MEA and the employees it represents have all of the rights afforded by California's MMBA. These rights include the opportunity for a good faith meet and confer process under Government Code section 3505 on all matters within the scope of representation defined in Section 3504, including but not limited to wages and pensions.

This Charge addresses an MMBA issue of critical importance to MEA and its members with far-reaching consequences for all public employees and their recognized employee organizations throughout the state. With clear precedent in place related to the obligation of public employers to meet and confer over matters within the scope of representation *prior* to placing an initiative on the ballot seeking voter approval to amend or revise a City Charter (*People ex rel Seal Beach Police Officers Association v City of Seal Beach* ["Seal Beach"] (1984) 36 Cal 3d 591, 602), the City has refused to meet and confer with MEA over a so-called "Comprehensive Pension Reform" ("CPR") ballot initiative headed to the June 2012 ballot because City claims that it is a "citizen's initiative" *not* "City's initiative." (See MEA's letters dated July 15, 2011, August 10, 2011, September 9, 2011, September 16, 2011, and October 5, 2011, and City's responses attached as Exhibit 1A, B, C, D, E, F, G and H.)

However, as the evidence shows, this so-called "citizen's initiative" is merely a sham device which City's "Strong Mayor" has used for the express purpose of avoiding City's MMBA obligations to meet and confer. As City's CEO and Chief Labor Negotiator, this Mayor has used his City-paid time, resources, power, prestige, visibility and "good offices" to inspire, write, negotiate, endorse, and sponsor the proposed "citizen's initiative" which he has described as his "legacy as Mayor." In fact, the primary motivation for City's Mayor to use this subterfuge of a "citizen's initiative" to dodge City's meet and confer obligations was this same Mayor's prior experience in 2007 with ballot initiatives styled as Propositions B and C which related to pensions and managed competition. ULP proceedings before PERB arose out of the Mayor's meet and confer with MEA over these ballot initiatives and led to a finding that the City had violated the law. (See PERB Case No. LA-CE-352-M) Having publicly lamented the delays and frustrations associated with this prior process, City's Mayor essentially vowed "never again."

If the Mayor's course of conduct with regard to this CPR ballot initiative passes muster under this State's MMBA, the death knell will toll on the MMBA as an effective means to assure that this State's public employees have a voice at the bargaining table, through their recognized employee organizations, in addressing pensions and other mandatory subjects of bargaining before they appear on a ballot for voter approval. The City of San Diego must not be permitted to provide every other public employer in California with a blueprint for defeating the important legislative objectives defined decades ago in the MMBA.

II. Applicable Legal Principles

The MMBA imposes a duty on public employers to provide notice to a recognized employee organization and an opportunity to meet and confer over changes in wages and the terms and conditions of employment. This obligation exists whether the change would be a change in the Memorandum of Agreement, the City Charter, an ordinance or any other mechanism. *Before* an amendment to or revision of a City Charter affecting matters within the scope of representation may lawfully be placed on the ballot, a public employer is required to meet and confer with the affected recognized employee organizations. *People ex rel Seal Beach Police Officers Association v City of Seal Beach* (Seal Beach) (1984) 36 Cal 3d 591, 602.

The City of San Diego is governed by a “Strong Mayor” form of governance. City’s “Strong Mayor” is Jerry Sanders who serves as City’s Chief Executive Officer and Chief Labor Negotiator. Article XV of the City Charter establishes the Mayor’s authority as the City’s Chief Executive Officer and Chief Negotiator under both the Meyers-Millias-Brown Act (“MMBA”) and the City’s Employee-Employer Relations Policy 300-6, to determine, in the best interest of the City, the appropriate salary and other economic proposals to make at the start of and during the course of labor negotiations with the City’s six employee organizations when conducted in good faith as the law requires. The Mayor initiates the MMBA mandated meet and confer process with the City’s recognized employee organizations. The Mayor directs the activities of the City’s Human Resources or Labor Relations Office. The Mayor hires outside labor counsel to conduct the required meet and confer with the recognized employee organizations.

While PERB has held that an employer has the right to “express its views on employment related matters over which it has legitimate concerns in order to facilitate full and knowledgeable debate,” (*Rio Hondo*) employer speech that goes beyond mere expression of opinion or communications of existing facts, but instead advocates or solicits a course of action, is not subject to free speech protections. *State of California (Department of Transportation)* (1996) PERB Decision No. 1176-S (*CalTrans*). Thus, the City as the employer is prohibited from engaging in negotiations over matters within the scope of representation with persons or groups other than the exclusive representative as occurred here. *Rio Hondo Community College District* (1980) PERB Decision No. 128 (*Rio Hondo*).

In determining whether or not the City has committed an unfair labor practice in violation of the MMBA, PERB will consider the actions of all officials and representatives acting on behalf of the City. The City of San Diego attempted to raise free speech rights as a defense in 2010 in *San Diego Firefighters, Local 145, I.A.F.F. v City of San Diego (Office of the City Attorney)* 2010 PERB Decision No. 2103-M. In that case, the City – through the City Attorney – advocated a course of action in circumvention of the exclusive representative, or otherwise used the communication to commit an unfair labor practice. In this case the City – through the actions of Mayor Jerry Sanders – has committed an unfair labor practice in violation of MMBA sections 3502, 3503, 3504 and 3505 and PERB Regulation 32604. *Rio Hondo, supra*; *CalTrans, supra*; and *Office of the City Attorney, supra*.

III. The “CPR” Ballot Initiative Directly and Substantially Affects the Pension Benefits, Wages and Voting Rights of Current MEA-Represented Employees

On or about April 4, 2011, “San Diegans for Comprehensive Pension Reform,” filed a notice with the San Diego City Clerk of their intent to circulate a petition within the City of San Diego for the purpose of amending the City’s Charter. The Notice was signed by Catherine (April) Boling, T. J. Zane and Stephen B. Williams. (Attached as Exhibit 2). The proposed Charter Amendment is entitled “Proposition – Charter Amendment/Comprehensive Pension Reform for San Diego” and is known as “CPR.”

If approved the amendment would add multiple new provisions to the current City Charter and amend others. The proponents expressly state that the purpose and intent of all the amendments taken together is to affect “employee compensation and benefits” and to do so in a comprehensive and far-reaching manner. As can be seen from a review of the CPR, it proposes to change retirement from a defined benefit plan to a defined contribution plan for all new hires except for police; to change what is “pensionable” compensation; to freeze salaries for five years, on top of the existing three year freeze; to eliminate pensions even if vested for individuals convicted of certain felonies; eliminate voting rights of city employees as retirement system members; and to set a pre-determined limitation on any initial bargaining proposals being presented to MEA and other recognized employee organizations.

IV. In 2008, City’s Former City Attorney Cautioned That the Conduct of Mayor Sanders In Support of a Pension-Related Ballot Initiative to Amend City’s Charter Would Require “Meet and Confer” Due to Agency Principles

In addition to the Mayor’s actions in thwarting the MMBA by negotiating the provisions of the CPR ballot initiative with a small group of private persons, City Attorney Jan I. Goldsmith became a visible supporter of the CPR ballot initiative when joining Mayor Sanders and the proponents in a press conference on the City concourse during normal business hours in April 2011 – under the CPR banner! (See April 2011 photo in news article by Voice of San Diego posted July 13, 2011) on City concourse (Attached as Exhibit 3.) During media coverage of the initiative, he then offered his *legal opinion* that the CPR initiative “does provide pension relief within legal parameters.” (See attached Exhibit 6B-8). While the City Attorney asserts that he continues to have the rights of a private citizen, City Charter section 40 expressly provides that: “The (City) attorney and his or her deputies shall devote their full time to the duties of the office and shall not engage in private legal practice during the term for which they are employed by the City.” Thus, his opinion about the initiative’s “legality” when impacting pension benefits is readily understood as the legal opinion of the “City.” The City Attorney as City Attorney also issued an opinion concerning the base compensation component of CPR on January 10, 2011 (Attached as Exhibit 4).

Notably, it is the City Attorney’s office which has responded on City’s behalf in rejecting MEA’s demands for meet and confer over the Mayor’s CPR ballot initiative. (Ex. 1C, 1E and 1G)

However, in 2008, the prior City Attorney offered a different view when a bargaining

impasse between City and MEA related to pension plan changes resulted in a hearing before the City Council pursuant to City's Employer-Employee Relations Policy. When there were insufficient City Council votes to impose the Mayor's "last, best and final" offer related to a new pension plan, Mayor Sanders reacted with anger and frustration – suggesting that he would lead an initiative to accomplish the changes he sought at the ballot box with voters' approval.

Former City Attorney Michael Aguirre addressed the prospect of a *Mayoral*-sponsored "citizen initiative" in a Memorandum dated June 19, 2008, entitled "Pension Ballot Measure Questions." (Attached as Exhibit 5). Noting the Mayor's rights and responsibilities under the Strong Mayor Charter provisions to represent the City regarding labor issues and negotiations, including employee pensions, he wrote:

While (the Mayor) does have the right to initiate or sponsor a voter petition drive (see Government Code section 3203), such sponsorship is legally considered as acting with apparent governmental authority, and will require the Mayor to meet-and-confer with the labor organizations over a voter initiative pension ballot measure that he sponsors. . . . The Mayor has ostensible or apparent authority to negotiate with the employee labor organizations over any ballot measure he sponsors or initiates, including a voter-initiative. The *City*, therefore, would have the same meet-and-confer obligations with its unions over a voter-initiative sponsored by the Mayor as with any City proposal implicating wages, hours, or other terms and conditions of employment. (Exhibit 5, p. 9)

With a change in City Attorney in December 2008 – and in view of the current City Attorney's open support for the CPR initiative – a "new" legal analysis has apparently taken hold to provide "cover" for the Mayor's activities and to lead the charge in rejecting MEA's demands to the City for meet and confer as required under the MMBA.

V. City's Course of Conduct, Through Its "Strong Mayor" Jerry Sanders, Violates MMBA

Although the CPR is being held out as a "citizen's initiative," the evidence is clear that the Mayor has spearheaded the entire CPR project from its inception. He engaged in private negotiations with a small group of representatives from the Chamber of Commerce, conservative Lincoln Club and "taxpayer" advocates, to determine what would be in the CPR relating to pensions, wages and other terms and conditions of employment. The fact of these negotiations was chronicled in the media. (See articles attached as Exhibit 6B-6, 9, 11, 12, 14, 16; 6C-3; 6E-1 and 6F-1) Indeed, Mayor Sanders spoke openly of "concessions" he had to make during these negotiations (with persons and groups *to the exclusion of MEA and other recognized employee organizations*) in order to be unified behind a single proposition or ballot initiative to put before the voters for "comprehensive pension reform." For example while new sworn police officers would continue to have a modified defined benefit plan, all new fire fighters would be forced into a defined contribution plan.

On November 19, 2010 a media alert was put out by the Office of the Mayor entitled "Mayor Jerry Sanders Fact Sheet." (Attached as Exhibit 7) It states that "The mayor also

announced he will place an initiative on the ballot that would eliminate defined benefit pensions for new hires, instead offering them a 401(K)-style, defined contribution plan similar to those in the private sector.” The alert went on to state that “Sanders and Councilmember Kevin Faulconer will craft the ballot initiative language and lead the signature-gathering effort to place the initiative on the ballot.” The text of what was written in the media alert also appeared on the City of San Diego web site in the news center for the Office of the Mayor (Attached as Exhibit 8)

All communications and publicity relating to the CPR refer to Jerry Sanders as “Mayor Jerry Sanders.” On January 12, 2011, during his legally-required “State of the City” address, he stood on a stage behind a podium bearing the City’s seal and promised that he and the City Attorney “will soon bring to voters an initiative to enact a 401k-style plan.” He assured listeners that he and the City Attorney “would be acting in the public interest” but added the caveat that they would be doing this “as private citizens.” (The transcript of the speech is attached as Exhibit 9) The press advisory about this address, written and distributed by the Mayor’s City-paid staff, touted that the “Mayor lays out vigorous agenda for 2011” for the City, including “his ballot initiative to replace pensions with a 401k-type plan for most new city hires.” (The advisory is attached as Exhibit 10). The initiative had not been finalized at this time.

Notice was put out by the Office of the Mayor and the Office of the City Attorney that they would be discussing “pension reform” on January 14, 2011, at City Hall. (Attached as Exhibit 11). E-mails related to media strategy and pension reform were circulated amongst City paid-staff on City equipment during City work time (Attached as Exhibit 12).

The Mayor’s City-paid press staff used the pension reform ballot initiative to increase the Mayor’s national media profile. On January 11, 2011, Communications Director for the Office of the Mayor, Darren Pudgil, wrote to Fox News: “as the attached article from *Bond Buyer* demonstrates, the City of San Diego is a national leader in pension reform. We’re eliminating pensions as we know them and putting in place a 401-k plan like the private sector. My boss San Diego Mayor Jerry Sanders is available any time to come on the Factor to talk about what he’s doing here in San Diego....Just let me know.” (Attached as Exhibit 13). The *Bond Buyer* article notes that Mayor Jerry Sanders “has proposed a plan to move all new employees from a defined benefit plan to a 401(k)-style program similar to those common in the private sector, termed a defined contribution plan, a strategy that only a handful of municipalities have adopted.”

The Mayor’s City-paid press staff also handled media questions regarding the ballot initiative (Attached as Exhibit 14), including questions about a quote by TJ Zane, a CPR proponent, about a conversation “that perhaps started the ball rolling, that as I understand it, the Mayor had made to Bill Lynch [Lincoln Club Vice Chair] to ask for the Lincoln Club’s help in getting to a singular initiative. It may have been a direct request on the mayor’s part to Lincoln Club leadership to facilitate as intermediaries.” The Mayor’s City-paid press staff also addressed a second TJ Zane quote relating to the fact that the “city’s unions were not involved” in any discussions relating to CPR.

Mayor Sanders formed a fund raising committee “San Diegans for Pension Reform” (ID 1334711). The contact person *and* treasurer for the Mayor’s committee is CPR proponent April Boling. As documented on the required Form 460 filed 7/6/11 (attached as Exhibit 15), during

the period from 4/1/11 through 6/30/11, Mayor Sanders' committee donated monetary and non-monetary support to the Comprehensive Pension Reform for San Diego (ID 1335733) as follows: \$41,000 in monetary support; \$9,970 in non-monetary support in the form of research; \$38,046.49 in non-monetary support in the form of legal services. The total value of support for this short time period was \$89,016.49. Mayor Sanders hired the attorneys who wrote the proposition for pension reform to his specifications. When faced with a competing proposition being advocated by other persons and groups, *Mayor Sanders personally negotiated* the terms of the CPR ballot initiative which is now headed to the June 2012 ballot. (See articles attached as Exhibit 6) Media accounts recite Mayor Sanders' description of CPR as his "legacy as Mayor." (Exhibit 6B-5) or a measure that would create a national model (Exhibit 6B-6; 6F-1)

Attached is a picture of Mayor Sanders in April 2011, during City work time – standing at a City podium – where he announced his negotiated compromise on the CPR initiative while surrounded by other persons and groups, *including the "citizen" proponents of CPR* (TJ Zane and April Boling), representatives of the San Diego County Taxpayers Association, the Lincoln Club, other business organizations, *and City Attorney Jan Goldsmith*. (Attached as Exhibit 3)

Events related to the ballot initiative were regularly discussed at "staff pre-briefs" with the Mayor in the Mayor's office at City Hall. The meetings were attended by more than a dozen key City staff members (Staff Pre-Brief notices are attached as Exhibit 16) Staff discussion topics include "Pension Reform Press Conference" and "Pension Reform Financial Analysis." These meetings involving City-paid staff took place during City-paid work hours in the building at the center of City government.

On September 7, 2011, CityBeat published an article quoting from an e-mail sent by Darren Pudgil, the Mayor's Communications Director and a *full-time, paid City employee*, explaining why the Mayor was bringing the ballot measure forward "as a private citizen - not as mayor." "If Mayor Sanders had authored the initiative, he'd have been legally obligated to meet with the city's labor unions - which is exactly what happened in July 2008. While he wouldn't have had to accept the unions' counter-proposals, he'd at least have to entertain them. The mayor took this route because the public deserves the right to decide a measure of this magnitude and importance." (Exhibit 6A-2, emphasis added.)

On September 14, 2011, the Chairman of the San Diego Regional Chamber of Commerce sent a "Message from Mayor Jerry Sanders" via e-mail to its members emphasizing the "importance of (their) involvement in the Comprehensive Pension Reform initiative (CPR)." The note is signed by "Mayor Jerry Sanders," advocates support for CPR, and urges actions to be taken to sign the initiative petition and to volunteer and contribute to the signature gathering effort. Mayor Jerry Sanders ends his appeal by stating "This is your opportunity to help put San Diego on a sustainable fiscal path for the future. Please join me and countless others, including your Chamber leaders, as we complete the job of getting this critical ballot measure qualified." (Attached as Exhibit 17). This E-mail from the Chamber and the Message by Mayor Jerry Sanders also appeared in the OB Rag, an Ocean Beach local paper. (Attached as Exhibit 18).

On November 9, 2011, Pudgil tweeted "Look for mayor on the morning shows today making pitch for his pension reform initiative, now headed for June ballot. Many people to

thank.” (Attached as Exhibit 19). In each instance, Pudgil was describing what his boss Mayor Sanders was doing to promote the CPR ballot initiative – and Pudgil himself was doing so as a paid City employee.

On December 7, 2011, CityBeat reported that “pension-reform proponents chose to go the citizen-initiative route in order to avoid negotiating with the unions that represent city employees.” Mayor Sanders was then quoted as saying “You do that so that you get the ballot initiative on that you actually want...Otherwise we’d have gone through meet-and-confer [negotiations], and you don’t know what’s gonna go on at that point through the meet-and-confer process.” (Ex. 6A-5)

In the wake of MEA’s repeated demands and City’s repeated refusals to meet and confer over the CPR ballot initiative, Mayor Sanders just delivered his legally-required 2012 “State of the City” address on January 11, 2012. On this occasion, he did not directly discuss CPR. When MEA’s General Manager Michael Zucchet asked Mayor Sanders during a pre-speech briefing on January 10, 2012, if he intended to include remarks about pension reform, Mayor Sanders chuckled and said he would not be doing so because he would be “on a stage behind a podium with the City’s seal on it.” Yet this is precisely where he stood – at a podium bearing the City seal – on January 11, 2011, when he delivered his legally-required “State of the City” address as Mayor a year ago announcing his intent to “bring to voters an initiative to enact a 401k-style plan.” (See Exhibit 7.) And this is where he stood again in April 2011, on the City concourse outside City Hall during City work time – at a City podium displaying the City seal with *City Attorney Jan Goldsmith* at his side and the CPR banner displayed – advocating for CPR in the company of its “citizen” proponents – TJ Zane and April Boling, as well as other private citizens with whom he had “negotiated” over CPR’s terms. (See Exhibit 3)

VI. City Has Justified Its Refusal to Bargain By the Fiction of a “Citizens’ Initiative” and By Misplaced Attention on the City Council *Not the Strong Mayor*

In rejecting each of MEA’s several demands for meet and confer over the CPR Ballot Initiative, the current City Attorney merely emphasizes the fact that the *City Council* is *not* proposing this ballot initiative and did not act “as a body” to authorize the Mayor to use the resources and power of his office to sponsor it. As a result, the City Attorney argues that the *City’s* admitted MMBA obligations to meet and confer have never been triggered with regard to it and that the *City Council* will play a strictly ministerial role in placing Mayor Sanders’ *legacy* pension reform initiative on the ballot if it otherwise satisfies the procedural requirements set forth in the Elections Code.

However, in a Memorandum of Law issued on January 26, 2009, the current City Attorney’s Office explained the proper balance between the Strong Mayor and City Council when discharging their mutual duties under the MMBA (Attached as Exhibit 20). After noting that Mayor Sanders serves as the City’s Chief Executive Officer with the authority to give controlling direction to the administrative service of the City and to make recommendations to the City Council concerning the affairs of the City, the City Attorney’s Office had cautioned that the *City* is held to account when the Mayor violates the MMBA in connection with his distinct labor relations role under the Charter:

Notwithstanding any distinctions in the Charter's roles for the Council, the Mayor, the Civil Service Commission, and other City officials or representatives, the City is considered a single employer under the MMBA. Employees of the City are employees of the municipal corporation. See Charter § 1. The City itself is the public agency covered by the MMBA. In determining whether or not the City has committed an unfair labor practice in violation of the MMBA, PERB will consider the actions of all officials and representatives acting on behalf of the City. (Exhibit 18 p. 12)

Thus, a proper legal analysis cannot begin and end with the fact that the *City Council* is *not* proposing this ballot initiative. This fact has never been in dispute. But the City Council is not empowered to act as the City's Chief Labor Negotiator under the Charter's Strong Mayor Form of Governance – the Mayor is; the City Council does not initiate the MMBA-mandated meet and confer process with this City's recognized employee organizations – the Mayor does; the City Council does not direct the activities of this City's Human Resources or Labor Relations Office – the Mayor does; the City Council does not employ outside labor counsel to conduct the required meet and confer processes in accordance with law – the Mayor does. The City Council's ability to fulfill its proper role on behalf of all residents across eight Council districts when influencing the Mayor's bargaining positions and/or in resolving any impasse at the bargaining table between the Mayor and this City's unions *depends* upon the Mayor's good faith fulfillment of his Charter-mandated role as Chief Negotiator. Where he fails to do so – as occurred here – he undermines the proper balance of power and shared governance established by the City Charter.

Moreover, *all* of Mayor Sanders' actions and activities related to this "pension reform" ballot initiative had to be undertaken for the *benefit of the City* because, if not, he would have been acting in violation of the City's Code of Conduct and Conflict of Interest policies and regulations applicable to all elected officials and City employees. (Attached as Exhibit 19) These policies unequivocally prohibit the Mayor from engaging in any activity which results in using the prestige or influence of his City of San Diego office or the City's time, facilities, equipment or supplies for his *private* advantage. Accordingly, it cannot be credibly argued that Mayor Sanders has acted as a *private citizen* with regard to his "legacy" initiative.

Finally, the course of conduct shown herein and by the attached Exhibits demonstrates that Mayor Sanders, acting in his capacity *as Mayor* and not as a private citizen, has clearly made a determination of policy *for this City* related to mandatory subjects of bargaining – and then promoted this determination using the power of his office as Mayor as well as its resources. He is universally acclaimed as one of the initiative's "chief proponents." He has initiated, formulated, funded, written, and negotiated the terms of CPR which are matters within the scope of MEA's representation of 3,800 City employees. He has done so while refusing to meet and confer with MEA and instead negotiating in private with a handful of like-minded supporters. He has repeatedly declared in oral and written statements to the public that "taxpayers simply can't afford to keep paying the staggering pension costs of city workers year after year, decade after decade," and that "this ballot measure will restore *us* to fiscal sanity, creating a system in which city workers receive retirement benefits no better and no worse than the average taxpayer footing the bill." He has reinforced these comments with grandiose reassurances that this

initiative is a “legally defensible” measure which “won’t just fix the pension system, but will transform it into a national model” while “permanently fixing the city’s budget woes.” And leaving no room for any doubt in the matter, Mayor Sanders has announced **that this initiative will be “his legacy as mayor”** – not the landmark agreements *negotiated with MEA under the MMBA* to substantially lower pension benefits for new hires in 2009 and to reform retiree health benefits in 2011.

Mayor Sanders’ indisputable activities cannot be dismissed as the simple exercise of free speech by an elected official. The ruse of a “citizen’s initiative” cannot lawfully defeat the legitimate rights of MEA and 3,800 City employees – not to mention the far-reaching anti-MMBA consequences for hundreds of thousands of Californians who work in the public sector. An unfair labor practice has occurred here and must be redressed to assure the continued vitality and uniform application of the important provisions of the MMBA at issue.

PROOF OF SERVICE

I declare that I am a resident of or employed in the County of San Diego, State of California. I am over the age of 18 years and not a party to the within entitled cause. The name and address of my residence or business is 401 West A Street, Suite 320, San Diego, California 92101-7911.

On January 19, 2012, I served the Unfair Practice Charge and Notice of
(Date) (describe document(s))

Appearance

on the parties listed below (include name, address and, where applicable, fax number) by (check the applicable method or methods):

placing a true copy thereof enclosed in a sealed envelope for collection and delivery by the United States Postal Service or private delivery service following ordinary business practices with postage or other costs prepaid;

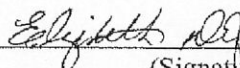
personal delivery;

facsimile transmission in accordance with the requirements of PERB Regulations 32090 and 32135(d).

Scott Chadwick
Human Resources Director
City of San Diego
1200 Third Avenue
Suite 1316
San Diego, Ca. 92101

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on January 19, 2012, at San Diego.

Elizabeth Diaz
(Type or print name)


(Signature)

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

NOTICE OF APPEARANCE FORM

CASE NAME: San Diego Municipal Employees Association


V. City of San Diego

CASE NUMBER: _____

NAME OF PARTY: San Diego Municipal Employees Association

DATE FILED: January 19, 2012

I, the undersigned party, hereby designate as my representative the person whose name and address appear below, and authorize such representative to appear on my behalf in this proceeding. This designation shall remain valid until I file a written revocation of it with the Public Employment Relations Board.


(Signature)

Michael Zucchet
(Printed Name)

General Manager
(Title)

January 19, 2012
(Date)

Ann M. Smith and Fern M. Steiner
(Name of Representative)

Attorney
(Title)

401 West A Street, Suite 320
(Mailing Address)

San Diego 92101-7911
(City) (Zip)

(619) 239-7200
(Telephone Number) (Ext)

(Board Agent: _____)

Exhibits to PERB charge

1. Demands to Meet and Confer by MEA and Responses by the City
 - 1A - First Demand to Meet and Confer by Ann M. Smith to Mayor Sanders dated July 15, 2011
 - 1B - Second Demand to Meet and Confer by Ann M. Smith to Mayor Sanders dated August 10, 2011
 - 1C - Response to Demands by City Attorney Jan I Goldsmith dated August 16, 2011
 - 1D - Third Demand to Meet and Confer by Ann M. Smith to Jan I. Goldsmith dated September 9, 2011
 - 1E - Response to Demand by Jan I. Goldsmith dated September 12, 2011
 - 1F - Response by Ann M. Smith to Jan I. Goldsmith dated September 16, 2011
 - 1G - Response by Deputy City Attorney Joan Dawson dated September 19, 2011
 - 1H - Continuing Demand to Meet and Confer by Ann M. Smith dated October 5, 2011
2. Notice of Intent to Circulate The Comprehensive Pension Reform (CPR) Initiative for San Diego dated April 4, 2011
3. April 2011 Picture of Mayor
4. Opinion Number 2011-1 "Freezing Base Compensation under the City's Retirement Plan) by the City Attorney dated January 10, 2011
5. Memorandum MS 59 "Pension Ballot Measure Questions" by the City Attorney dated June 19, 2008
6. Articles relating to CPR
 - 6A - CityBeat articles dated September 7, 2011 and December 7, 2011
 - 6B - Union Tribune articles dated March 11, 2011; March 24, 2011; April 5, 2011; June 29, 2011; July 18, 2011; July 29, 2011; December 17, 2011; January 10, 2011
 - 6C - voiceofsandiego articles dated April 6, 2011 and July 14, 2011
 - 6D - NBC San Diego dated November 19, 2010
 - 6E - KSWB dated April 6, 2011
 - 6F - KFMB dated April 5, 2011
7. Media Alert: Mayor Jerry Sanders Fact Sheet dated November 19, 2010
8. City of San Diego, Office of the Mayor web site
9. Transcript of State of the City Address January 2011 by Mayor Jerry Sanders
10. Press Release: Mayor Jerry Sanders Fact Sheet dated January 12, 2011
11. Media Advisory: Mayor Jerry Sanders and City Attorney Jan Goldsmith: "Mayor and City Attorney to Discuss Pension Reform and Litigation" dated January 14, 2011

12. City staff e-mails
13. E-mail from Mayor Sanders' Communications Director Darren Pudgil to David Tabacoff at Fox News dated January 7, 2011 including article from The Bond Buyer dated January 7, 2011
14. E-mail from Pudgil to Joe Britton CNS dated December 3, 2010 "Re: National article on Mayor Sanders' Pension Reform Efforts"
15. California Form 460 for San Diegans for Pension Reform for the period 4/1/11-6/30/11
16. Staff Pre-Briefs e-mails
17. E-mail from Vince Mudd, SD Regional Chamber of Commerce Chairman dated September 14, 2011 including "Message from Mayor Jerry Sanders"
18. OB Rag article dated September 16, 2011
19. Tweet from Pudgil dated November 9, 2011
20. Memorandum of Law from the City Attorney dated January 26, 2009 "Impasse Procedures under Strong Mayor Trial Form of Governance"
21. Code of Ethics and Ethics Training dated September 24, 2002