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STATE OF CALIFORNIA EDMUND G. BROWN JR., Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

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April 20, 2012

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

RE: *San Diego Municipal Employees Assn. v. Superior Court (City of San Diego and Public Employment Relations Board)*; Court of Appeal Case No. D061724; San Diego Superior Court Case No. 37-2012-00092205

Dear Honorable Justices of the Court of Appeal:

In response to the request from the Court dated April 12, 2012, Real Party in Interest Public Employment Relations Board (PERB or Board) respectfully provides the following information to assist the Court with its determination of above-entitled matter.

## I. FACTUAL AND PROCEDURAL BACKGROUND

Most of the relevant factual and procedural history of this case may be found in PERB'S opposition to the ex parte applications by which the City of San Diego (City) sought and obtained the order quashing administrative subpoenas and staying PERB's administrative proceedings that is at issue in this writ proceeding. (Exh. 85 at pp. 2134-2143.)[1] Additional procedural details may be found in the brief PERB filed in support of its ex parte application for an order shortening time for a motion to quash the City's discovery requests on March 11, 2012 (Exh. 46 at pp. 963-969), in the preliminary opposition PERB filed as to a similar ex parte application by which the City had earlier sought to quash the administrative subpoenas and stay the administrative proceedings (Exh. 63 at pp. 1337-1343), and in the Petition for Writ of Mandate filed by the San Diego Municipal Employees Association (MEA) on April 11, 2012 in the instant case (Petition at pp. 10-34).

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[1] All citations to the record are to the tabbed and consecutively paginated volumes of Petitioner's Exhibits filed in support of the Petition for Writ of Mandate on April 11, 2012. For the sake of clarity and convenience, we will use the shorthand "Exh." for the relevant tab number, followed by specific Bates-stamped page numbers as appropriate.

## II. PERB'S STATUTORY FRAMEWORK AND ITS EXCLUSIVE INITIAL JURISDICTION OVER UNFAIR PRACTICE CHARGES

PERB is a quasi-judicial administrative agency initially created by the California Legislature through the enactment of Government Code section 3541 for the purpose, *inter alia*, of promoting harmonious and cooperative labor relations between California's public sector employers and their employees. By statute, PERB is vested with exclusive initial jurisdiction to interpret and administer the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq. [MMBA]). The MMBA is a comprehensive statute governing labor relations for local governmental agencies and their employees—including the City and its employees in bargaining units represented by the MEA.

Although claimed violations of the MMBA were originally brought in Superior Court, in 2001 the Legislature explicitly vested PERB with exclusive initial jurisdiction over alleged violations. Government Code section 3509, subdivision (b), now provides that "[a] complaint alleging any violation of [MMBA] shall be processed as an unfair practice charge by the board. *The initial determination as to whether the charge of unfair practice is justified ... shall be a matter within the exclusive jurisdiction of the board.*" (Emphasis added.) The California Supreme Court and Courts of Appeal have repeatedly affirmed that PERB has *exclusive* initial jurisdiction to interpret and administer the provisions of the MMBA with respect to local governments and their employees, including whether an unfair practice charge is justified and, if so, what remedies are most appropriate to effectuate the purposes of the Act. (*City of San Jose* (2010) 49 Cal.4th 597, 605-606 [*City of San Jose*]; *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1077 [*Coachella*]; *International Association of Firefighters, Local 230 v. City of San Jose* (2011) 195 Cal.App.4th 1179, 1208-1209 [*IAFF Local 230*]; see also, *San Diego Teachers Assn. v. Superior Court of San Diego County* (1979) 24 Cal.3d 1, 10-12 [*San Diego Teachers*].)

One of the "key provisions" of the MMBA is its meet-and-confer requirement, which requires the governing bodies of local agencies to "meet and confer [with employee representatives] in good faith regarding wages, hours, and other terms and conditions of employment." (*IAFF Local 230, supra*, 195 Cal.App.4th at p. 1210.) The California courts have also repeatedly affirmed that PERB—as the expert public sector labor relations agency—is vested with authority to determine in the first instance whether a party's conduct constitutes a failure to meet and confer in good faith. (*Ibid.*; *City of San Jose, supra,* 49 Cal.4th at p. 606; *San Diego Teachers, supra,* 24 Cal.3d at pp. 12-14.)

When an unfair practice charge is filed with PERB by either an employer or an employee organization, it is assigned to a Board agent in the General Counsel's office, who must determine whether the facts as alleged state a prima facie case, and whether the charging party is capable of providing admissible evidence in support of the

allegations. (*Kings In-Home Supportive Services Public Authority* (2009) PERB Decision No. 2009-M; see also Gov. Code, §§ 3514.5, 3541.5 & 3563.2; PERB Regulations, § 32620, subd. (b)(5).)[2] Although the respondent must be given an opportunity to state its position, the Board agent *must* issue an administrative complaint if the allegations and evidence in the charge—which must be signed by the charging party or its agent under penalty of perjury—are sufficient to establish a prima facie case. (PERB Regulations, §§ 32620, subds. (b)(4), (b)(7) & 32640, subd. (a); see also *Lazan v. County of Riverside* (2006) 140 Cal.App.4th 453, 460 [*Lazan*].)

Where there is a dispute about the factual allegations in the charge, they *must* be accepted as true and the matter *must* be resolved through the administrative process. (*County of Inyo* (2005) PERB Decision No. 1783-M.) In processing a charge, the Board agent does not make credibility determinations, and resolution of any factual conflicts must be left to an administrative law judge ("ALJ"), who makes findings after a formal hearing. (See *Golden Plains Unified School District* (2002) PERB Decision No. 1489.) The Board agent does not judge the ultimate merits of the dispute. (*Service Employees International Union, Local 221* (2008) PERB Decision No. 1982 [a determination by the Board agent that the charging party has alleged sufficient facts to state a prima facie case and thus cause for issuance of a complaint is not a determination that an unfair practice has been committed].)

In the formal administrative hearing before the ALJ, both the charging party and the respondent have the right to subpoena, call, examine, and cross-examine witnesses, and to introduce documentary and other evidence. (PERB Regulations, § 32180.) The General Counsel's office does not represent the charging party or participate in the formal hearing in any way. (*Id.*, § 32178 [charging party must prove an unfair practice complaint by a preponderance of evidence].) Nor does the General Counsel's office advise the ALJ in his or her decision-making process or advise the Board itself if the ALJ's decision is appealed to the Board.

Ultimately, the parties have the option of contesting the ALJ's recommended decision to the PERB Board, which reviews both the factual record and the legal arguments and makes a final decision. (PERB Regulations, §§ 32300, 32320.) While a final decision of the Board is subject to review by the District Court of Appeal (Gov. Code, § 3509.5, subds. (a), (b)), the courts have repeatedly confirmed that the expertise and specialized knowledge of quasi-judicial labor agencies such as PERB, and the need for judicial uniformity in labor relations, entitle agencies such as PERB to great deference. (See *Paulsen v. Local No. 856 of Int'l Brotherhood of Teamsters* (2011) 193 Cal.App.4th 823, 830; *San Mateo City School Dist. v. PERB* (1983) 33 Cal.3d 850, 856 [superseded on other grounds by Ed. Code, § 45113].) Thus, PERB's expertise in labor relations

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[2] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

and its exclusive jurisdiction to adjudicate violations of the MMBA make it appropriate for PERB not only to determine in the first instance whether an unfair practice complaint should issue, but also to ensure that the necessary administrative proceedings are conducted and that a sufficient factual record is developed to allow the Board to resolve any dispute as to an alleged violation of the MMBA in a final decision, and, ultimately, to allow for meaningful judicial review of its decision.

In addition to PERB's authority to make the initial determination whether an unfair practice charge is justified, it has also been given statutory authority to petition a court for appropriate temporary relief or restraining order to halt alleged unfair practices, and to take any other action the Board deems necessary to discharge its powers and duties and otherwise to effectuate the purposes of the MMBA. (Gov. Code, §§ 3509, subd. (a); 3541.3, subds. (j), (n); PERB Regulations, § 32450 et seq.) PERB's petition for injunctive relief must meet the standards enunciated in *Public Employment Relations Board v. Modesto City School District* (1982) 136 Cal.App.3d 881 [*Modesto*]), which requires PERB to establish that: (1) it has "reasonable cause" to believe that an unfair practice has been, or may be, committed; and (2) injunctive relief is "just and proper." (*Id.* at p. 895.) Under the "reasonable cause" prong, PERB need only establish that the grounds on which it believes an unfair practice has been committed are neither insubstantial nor frivolous. (*Id.* at p. 896.) PERB need not show probability of success on the merits or establish that an unfair practice has in fact been committed. In fact, the merits of the case are not to be determined by PERB *or* the courts on a request for injunctive relief. (*Ibid.*)

## III. PERB RETAINS ITS EXCLUSIVE INITIAL JURISDICTION TO INTERPRET AND ADMINISTER THE MMBA.

PERB's opposition to the City's ex parte applications to quash the administrative subpoenas and stay the administrative proceedings also describes PERB's initial exclusive jurisdiction to interpret the MMBA and adjudicate alleged violations. (Exh. 85 at pp. 2140-2144.) PERB summarizes the principal points it made to Judge Vargas as follows:

### A. Exhaustion of Administrative Remedies Requires That a Respondent's Factual and Legal Arguments Be Presented in the Administrative Proceedings.

In any given labor dispute, there may be both legal and factual disagreements about whether a violation of the MMBA has occurred. The presence of a legal dispute about the interpretation of the MMBA or the scope of its requirements is a matter within PERB's exclusive initial jurisdiction, and does not relieve a party who is the subject of an unfair practice charge of the obligation to present and fully adjudicate its position—at least initially—in the administrative forum.

As the expert agency on matters of public sector labor relations, PERB is *statutorily required* to make at least one preliminary determination in every unfair practice charge: whether the charge contains sufficient evidence and allegations to establish a *prima facie* claim that a violation of the MMBA may have occurred. (PERB Regulations, §§ 32620, subd. (b)(4), (b)(7) & 32640, subd. (a); see also *Lazan*, *supra*, 140 Cal.App.4th at p. 460.) In doing so, the General Counsel must accept as true the allegations of the unfair practice charge (*County of Inyo* (2005) PERB Decision No. 1783-M), and she did so in this case.

PERB is also occasionally called upon to exercise its administrative discretion in deciding whether, under the well established standards of *Modesto*, *supra*, 136 Cal.App.3d 881, there is both "reasonable cause" to believe that a violation of the MMBA is occurring, and also that preliminary injunctive relief is necessary to preserve the status quo or otherwise allow PERB to provide meaningful relief in the event that a violation is, in fact, established upon completion of the administrative proceedings.

While the second exercise of PERB discretion is less common, both of the above determinations are entitled to deference from the courts unless clearly erroneous, especially at the initial stages of the proceedings. (See *Paulsen*, *supra*, 193 Cal.App.4th at p. 830.) It is important to keep in mind that neither of these determinations is a determination that an unfair practice has actually been committed. (See *Service Employees International Union, Local 221* (2008) PERB Decision No. 1982 [a determination by the Board agent that the charging party has alleged sufficient facts to state a prima facie case and thus cause for issuance of a complaint is not a determination that an unfair practice has been committed]; *Modesto*, *supra*, 136 Cal.App.3d at p. 896 [in seeking injunctive relief in the courts, PERB is not required to establish that an unfair practice has been committed].) The remaining steps of the administrative process itself are available precisely to allow a neutral decision maker to hear the evidence and make findings on this point.

With few exceptions, the courts require that the administrative process be exhausted before judicial review. (3 Witkin, Cal. Procedure (2008) Actions, § 339, p. 442.) "'The exhaustion doctrine is grounded on concerns favoring administrative autonomy (i.e., courts should not interfere with an agency determination until the agency has reached a final decision) and judicial efficiency (i.e., overworked courts should decline to intervene in an administrative dispute unless absolutely necessary).'" (*Coachella*, *supra*, 35 Cal.4th at p. 1080; see also *City of San Jose*, *supra*, 49 Cal.4th at p. 609.) The doctrine precludes a judicial remedy until the administrative agency has reached a final decision. (*PERB v. Superior Court* (1993) 13 Cal.App.4th 1816, 1825.) The exhaustion requirement, which is also discussed in the related context of administrative preemption, is particularly important in the context of labor issues in order to avoid conflicting interpretations of labor law principles and also to allow a "centralized,

expert agency" such as PERB to provide "an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces so as to further the common good." (*Modesto*, *supra*, 136 Cal.App.3d at p. 893.)

Although the law recognizes an exception in cases of "futility," or where the agency's jurisdiction is implicated, neither of these exceptions apply simply because the parties disagree about the scope of the meet-and-confer obligation or the proper application of the provisions of the MMBA. If that were the case, PERB's exclusive jurisdiction would be largely eviscerated. Case law illustrates precisely the opposite: so long as the dispute involves action "*which is arguably prohibited or protected* under the MMBA," it is subject to PERB's initial exclusive jurisdiction and the administrative process must be exhausted. (See *Modesto*, *supra*, 136 Cal.App.3d at p. 894 [whether a post-impasse strike is regulated by EERA is a matter subject to PERB's initial exclusive jurisdiction], emphasis added;[3] *Paulsen*, *supra*, 193 Cal.App.4th 823 [whether a breach of the duty of fair representation constituted unfair labor practice is a matter within PERB's initial exclusive jurisdiction]; *City of San Jose*, *supra*, 49 Cal.4th 597 [whether a strike improperly includes "essential" employees is a matter subject to PERB's initial exclusive jurisdiction].)

With unfair practice charges that involve alleged violations of the duty to meet and confer, exhaustion of administrative remedies is particularly important. The allegations typically assert specific, critical facts and the ultimate legal conclusions may, in turn, depend on the actual facts developed in the administrative proceedings. Those proceedings allow the ALJ to develop a full factual record and to apply a legal analysis to a clear set of facts, rather than to speculative or ambiguous allegations. The ALJ may reach a conclusion in favor of the respondent and obviate further action. Even if the matter is appealed to the PERB Board, there is additional opportunity for each side to raise claims of error as to any procedural, factual, or legal, or policy matter that may be relevant to PERB's interpretation of the MMBA. Ultimately, the MMBA provides for review of PERB's determination by the Court of Appeal. However, the statutory scheme is carefully crafted to ensure that the Court will be presented not just with abstract legal arguments, but with a full factual record. If PERB's initial analysis is incorrect, there are a number of opportunities to correct it.

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[3] PERB originally had jurisdiction over unfair practice charges under the Educational Employment Relations Act ("EERA"). In 2001, this jurisdiction was expanded to include matters arising under the MMBA.

### B. PERB Does Not Relinquish Its Exclusive Jurisdiction to Adjudicate Alleged Violations of the MMBA When it Seeks Preliminary Injunctive Relief in the Courts.

Although PERB unquestionably has exclusive initial jurisdiction to use its administrative processes to adjudicate alleged violations of the MMBA when a UPC is filed by either an employer or an employee organization (Gov. Code, § 3509, subd. (b)), a question has been raised in the proceedings below as to whether PERB relinquishes that jurisdiction when it initiates an action in court in aid of its primary jurisdiction. It does not. PERB's authority to seek injunctive relief in Superior Court to preserve the status quo while the administrative process runs its course exists *in addition to* its initial and exclusive jurisdiction to administer and interpret the MMBA. (Gov. Code, § 3509, subd. (a) [incorporating powers and duties set forth in § 3541.3, subds. (j), (n)].) Action taken by PERB to seek injunctive relief is intended to preserve the integrity of the administrative process, not to circumvent it or eliminate it entirely by having the Superior Court adjudicate the underlying alleged violation of the MMBA. (See *Modesto*, 136 Cal.App.3d at p. 902 [injunctive relief may be proper to avoid having Board's final order be rendered meaningless or so devoid of force that the remedial purposes of the Act will be frustrated].)

While PERB's authority to petition a court for appropriate temporary relief "as the Board may deem necessary to discharge its powers and duties and otherwise to effectuate the purposes of the MMBA" is broad, the court's role in evaluating PERB's request for injunctive relief is more circumscribed. The court must ensure that the standards enunciated in *Modesto* are met—i.e., that PERB has "reasonable cause" to believe that an unfair practice has been or may be committed, and that injunctive relief is "just and proper." (*Modesto*, *supra*, 136 Cal.App.3d at p. 895.) However, under the "reasonable cause" prong, PERB need only establish that the grounds on which it believes an unfair practice has been committed are neither "insubstantial" nor "frivolous." (*Id.* at p. 896.) PERB need not establish that an unfair practice has in fact been committed; in fact, the merits of the case are not to be determined by PERB *or* the courts on a request for injunctive relief. (*Ibid.*) "[T]he key question is not whether PERB's theory would eventually prevail, but whether it is *insubstantial* or *frivolous*." (*Id.* at p. 897 [emphasis in original].)

Moreover, PERB cannot forfeit its jurisdiction to adjudicate the underlying unfair practice charge simply by seeking preliminary injunctive relief. PERB's administrative hearing processes and authority to seek injunctive relief are *dictated* by the law and PERB's regulations, and apply equally to employers and unions that ask PERB to seek relief in court in order to preserve the status quo pending completion of the administrative proceedings. In fact, in the past seven years, injunctive relief has only been initiated by PERB only five other times. All of those actions sought relief related to complaints initiated by local governments, mostly to prevent allegedly illegal strikes.

(PERB Annual Reports at http://www.perb.ca.gov/about/annual_reports.asp, last visited April 20, 2012; see also Exh. 85 at p. 2139, fn. 6.) If the decision to pursue preliminary injunctive relief divested PERB of its authority to adjudicate the underlying unfair practice claim, its role in enforcing the MMBA would be brought to a halt and the statutory scheme would be turned on its head.

### C. Initiation of Administrative Proceedings Is Not Evidence of "Bias" That Relieves Respondent of the Obligation to Exhaust its Administrative Remedies.

It was also suggested in the action below that the initiation of administrative proceedings, or related judicial proceedings in aid of administrative authority, is evidence that PERB is "biased" and that, therefore, someone other than PERB must adjudicate the alleged violations of the MMBA. If this argument were accepted and taken to its logical conclusion, PERB could never exercise its statutory authority to authorize an administrative complaint or seek injunctive relief without simultaneously losing its exclusive initial jurisdiction to adjudicate the alleged UPC that prompted it to go to court in the first place.

There is no question but that the parties to an unfair practice charge have a due process right to a fair tribunal, i.e., one in which the judge or other decision maker is free of bias for or against a party. (*Withrow v. Larkin* (1975) 421 U.S. 35, 46 [*Withrow*]; *People v. Harris* (2005) 37 Cal.4th 310, 346; *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1025 [*Haas*].) A violation of due process may be established with proof of actual bias or in a situation "in which experience teaches that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable." (*Withrow*, *supra*, at p. 47.) However, allegations of bias must be more than mere conclusions, opinions, or rumors; they must be stated with particularity. (*Independent Roofing Contractors v. California Apprenticeship Council* (2003) 114 Cal.App.4th 1330, 1339-1340.) Bias in the sense of "a crystallized point of view about issues, law, or policy" will not suffice. (*Andrews v. ALRB* (1981) 28 Cal.3d 781, 790 [*Andrews*].)

Contrary to some of the arguments made in the proceedings below, PERB does *not* act as both an advocate and the decision maker in the administrative process. The General Counsel's office does *not* prosecute the PERB complaint; that obligation rests solely with the charging party, here MEA. (PERB Regulations, § 32178 [the charging party must prove an unfair practice complaint by a preponderance of evidence].) The assigned ALJ conducts the administrative hearing and makes all necessary evidentiary rulings; neither the Board nor the General Counsel plays any role. In fact, in this case, ALJ Ginoza denied the City's Motion to Disqualify the PERB Board and General

Counsel's office on March 21, finding that no showing of bias had been made *as to him*, the sole Board agent with relevant matters pending before him. (Exh. 126.)[4]

## IV. CONCLUSION

In 2001, the Legislature made an important decision to end the practice of allowing complainants to go directly to court in cases of alleged violations of the MMBA and to instead confer upon PERB the authority to make the *preliminary* determination whether issuance of a UPC complaint is warranted, and whether *preliminary* injunctive relief is necessary while the administrative process runs its course. The Legislature thus decided that someone must make the initial determination whether there is sufficient evidence of an unfair practice to allow a complainant to proceed, and has committed that decision to PERB, acting through its General Counsel. The administrative process ensures both a neutral fact-finder and multiple opportunities for both parties to present their legal and factual arguments. PERB's *initial* evaluation is subject to change when the ALJ issues his or her proposed findings and conclusions. The ALJ's findings and conclusions are further reviewed by the full Board and, ultimately, the Court of Appeal. A disagreement about the meaning or scope of the MMBA does not entitle a respondent to avoid the administrative process, and the mere commencement of administrative proceedings cannot be considered evidence of "bias" that relieves a party of the obligation to present its claims or defenses in the administrative forum.

Respectfully submitted,

**PUBLIC EMPLOYMENT RELATIONS BOARD**
M. Suzanne Murphy, General Counsel
Wendi L. Ross, Deputy General Counsel

By:
M. SUZANNE MURPHY, General Counsel

[4] A claim of bias based on the prior employment of PERB staff is similarly misplaced. In *Andrews,* a plurality of the Supreme Court concluded that disqualification was not required absent a showing of actual bias sufficient to render a fair hearing improbable. (*Andrews*, *supra*, 28 Cal.3d at pp. 791-792.) Additionally, any claim of bias based on prior employment is simply speculative, as the General Counsel and many PERB attorneys have experience on both the labor and management side. (See http://www.perb.ca.gov/about/docs/Annual_Report_2011.pdf, at p. 7, last visited April 20, 2012.) As also noted above, the PERB attorneys involved in this case have sought injunctive relief on behalf of public entities and *against* unions far more often than the reverse. (http://www.perb.ca.gov/about/annual_reports.asp, last visited April 20, 2012; Exh. 85 at p. 2139, fn. 6.)

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Court of Appeal Case Number: D061724
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   (b) Person served:
   (i) Name: Donald R. Worley, City Attorney
   (ii) Address:
   City of San Diego
   1200 Third Avenue, Suite 1100, San Diego, CA 92101-4200

   (c) Person served:
   (i) Name: Honorable Luis R. Vargas
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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.

Date: April 20, 2012

CAMILLE E. JOHNSON

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