Office of the City Attorney

Date: October 13, 2021

To: Police Accountability Board

From: Office of the City Attorney

Re: **Obligation to Meet and Confer under the Meyers-Milias-Brown Act**

- Meyers-Milias-Brown Act

The Meyers-Milias-Brown Act ("MMBA") requires public employers to meet and confer in good faith with employee representatives about matters that fall within the scope of representation. A public employer's duty to bargain under the MMBA arises under two circumstances: (1) when the decision itself is subject to bargaining, and (2) when the effects of the decision are subject to bargaining, even if the decision, itself, is nonnegotiable." (*El Dorado County Deputy Sheriff's Assn. v. County of El Dorado* (2016) 244 Cal.App.4th 950, 956.)

- Scope of Representation

The scope of representation includes all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment. (Gov. Code § 3504.)

- Decision Bargaining

The California Supreme Court[1] has devised a three-part test to determine whether an employer's fundamental managerial or policy decision is subject to bargaining:

  - (1) Does the action have "a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees." If not, there is no duty to meet and confer.

  - (2) Does the "significant and adverse effect arise from the implementation of a fundamental managerial or policy decision"? If not, there is a duty to meet and confer.

  - (3) If both factors (1) and (2) are present, the action "is within the scope of representation only if the employer's need for unencumbered decision making in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question." In

[1] (*Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 630.)

> balancing the interests, a court may also consider whether the "transactional cost of the bargaining process outweighs its value."

- Effects Bargaining

Even if a management decision is not itself subject to bargaining, the employer may nevertheless still need to negotiate over the "effects" of such a decision. For example, "although 'an employer has the right unilaterally to decide that a layoff is necessary, [it] must bargain about such matters as the timing of the layoffs and the number and identity of employees affected.'" (*Claremont*, 39 Cal.4th at pp. 633–34.)

- PERB vs. the Courts—the forum in which an unfair practice charge is litigated

The Public Employment Relations Board (PERB)—a quasi-judicial administrative agency charged with administering the MMBA—has taken a very expansive view of the duty to meet and confer. Courts have historically taken a less expansive view of the duty to meet and confer, particularly in the context of managerial or policy decisions. In 1999, however, the Legislature vested exclusive jurisdiction with PERB over most types of unfair practice charges under the MMBA. PERB's decisions are still subject to judicial review by extraordinary writ to the Court of Appeal, but the courts must defer to PERB's interpretation of the MMBA unless it is clearly erroneous.

- Timing for meeting and conferring varies based on whether decision or effects bargaining applies

    - Decision Bargaining - As to those managerial decisions for which the City must meet and confer over the decisions themselves, it should be done before a firm decision is made—in most cases, passage by the governing body. If the policy is subject to decisional bargaining—that is, the decision itself is subject to meet and confer—then the employer cannot "reach its decision without first providing advance notice of the proposed change to the employees' union and negotiating in good faith at the union's request, until the parties reach an agreement or a lawful impasse."

    - Effects Bargaining - As to those managerial decisions for which the City must only meet and confer over effects, it can do so after passage/endorsement by the Council but before implementation.

    - Exceptions - There are two different types of exceptions to the foregoing timing rules for meeting and conferring:

        (i) an emergency exception which can relieve an employer of the obligation to engage in *decisional bargaining* before making the decision; and
        (ii) an exception that permits an employer to begin implementing a decision over which it has no obligation to meet and confer (but for

which it has an *obligation to bargain over the effects*) before completing the meet and confer process.

Neither exception entirely relieves and employer of the obligation to meet and confer. Rather, they simply permit employers in very limited circumstances to meet and confer later than the law would otherwise require.