No. S192828
(2nd Civil No. B228732)
(L.A.S.C. Case No. BS126192)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF LOS ANGELES, and DOES 1 through 50, inclusive,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,

Respondent,

ENGINEERS AND ARCHITECTS ASSOCIATION,

Petitioner and Real Party in Interest.

After a Decision by the Court of Appeal,
Second Appellate District, Division Three, Case No. B228732

REQUEST FOR JUDICIAL NOTICE

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TO THE HONORABLE JUSTICES OF THE CALIFORNIA SUPREME COURT:

CITY OF LOS ANGELES (City) in the above-captioned matter, hereby submits a Request for Judicial Notice in Support of its Answer Brief on the Merits (ABOM). The City requests that the Supreme Court take judicial notice of the following documents:

1. Los Angeles City Attorney Opinion No. 85-28 (July 26, 1988).
2. Los Angeles City Charter sections 262, 291 and 320.
3. E-mail exchange between Robert Aquino, Executive Director of the Engineers and Architects Association (Association) and Errol Griffin, Senior Labor Relations Specialist, Office of the City Administrative Officer, regarding the City's request that the Association agree to consolidate emergency furlough grievances.

This Request for Judicial Notice is pursuant to the Rules of Court 8.252(a) and 8.520(g), as well as Evidence Code sections 452, 453, and 459.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

THIS COURT MAY TAKE JUDICIAL NOTICE OF THE FORMAL AND PUBLISHED OPINIONS OF THE CITY OF LOS ANGELES CITY ATTORNEY

A court is required to take into account such matters as may have been judicially noticed. *(SKF Farms v. Superior Court (Hummingbird Inc. RPI)* (1984) 153 Cal.App.3d 902; *Bohrer v. San Diego County* (1980) 104 Cal.App.3d 155.)

California Evidence Code section 452 provides that Judicial Notice may be taken of

> (b) Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States.
>
> (c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States. ¶...¶
>
> (h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

The Opinions of the Los Angeles City Attorney (Opinions) are published in response to the official requests of City managers and elected officials for legal opinions. The Opinions are publically

available[1] and are issued to assist City managers in the performance of their official duties. Like the opinions of the Attorney General, the Opinions are not controlling, but are entitled to consideration in the determination of legislative intent. (*Travis v. Board of Trustees of the California State Univ.* (2008) 161 Cal.App.4th 335, 344-345; *Henderson v. Board of Education* (1978) 78 Cal.App.3d 875, 883, fn. 4 ("As an aid in the determination of legislative intent, the courts give great weight to Attorney General opinions."); see also *Orange County Employees Assn., Inc. v. County of Orange* (1993) 14 Cal.App.4th 575, 582 (Attorney General opinions entitled to consideration because Legislature was presumably aware of the Attorney General's interpretation.).)

This Court has previously taken judicial notice of a city attorney's opinion under Evidence Code section 452(b), as part of the legislative history. (*Evans v. City of Berkeley* (20056) 38 Cal. 4th 1, 9, fn. 5.) Here, the Opinions "are not reasonably subject to dispute and are capable of immediate and accurate determination" and therefore should also be judicially noticed under Evidence Code section 452(h).

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[1] The attached copy came from the Los Angeles County Law Library.

II.

THIS COURT MAY TAKE JUDICIAL NOTICE OF THE LOS ANGELES CITY CHARTER

The Court may take judicial notice of the Los Angeles City Charter (Charter) under Evidence Code section 452(b). Association has already asked this Court to take judicial notice of some provisions of the Charter, as well as the City's Employee Relations Ordinance (Los Angeles Administrative Code §§ 4.800, *et seq),* and Decision U-214 of the City's Employee Relations Board. (See Association's Motion for Judicial Notice filed on September 26, 2011, "3RJN".) The City does not oppose these requests. The Charter sections attached to this Request for Judicial Notice are provisions cited in the ABOM, which were not attached to Association's request.

III.

THIS COURT MAY TAKE JUDICIAL NOTICE OF THE E-MAIL EXCHANGE BETWEEN ASSOCIATION AND THE CITY

This Court should also take judicial notice of the e-mail exchange between Association's Executive Director, Robert Aquino, and the City's labor negotiator, Errol Griffin. This exchange was

attached to the City's Reply Brief to the Court of Appeal, and was relied upon in that court's opinion. (Slip Op. p. 9, fn. 8.) Like the Opinions, this e-mail exchange is not reasonably subject to dispute, and should be judicially noticed pursuant to Evidence Code section 452(h).

IV.

JUDICIAL NOTICE SHOULD BE GRANTED BECAUSE THE NOTICE REQUIREMENTS OF EVIDENCE SECTION 453 ARE MET

It is mandatory that a trial court take judicial notice of facts falling within the ambit of Evidence Code section 452 because Evidence Code section 453 provides:

> The trial court shall take judicial notice of any matter specified in Section 452 if a party requests it and:
>
> (a) Gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and
>
> (b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter. ...

This motion and these documents provide Association and this Court with more than sufficient notice, in that the hearing on the Petition for Review is not yet scheduled, and Association has the

opportunity to deal with these issues in its Reply Brief. Evidence Code section 459 provides that a reviewing court "shall" take judicial notice of any matter which may be judicially noticed under Evidence Code section 452. Here, as shown above, the documents may all be noticed under Evidence Code section 452.

V.

CONCLUSION

Based on the foregoing, the City of Los Angeles respectfully requests the Supreme Court take judicial notice of the above listed documents.

DATED: December 12, 2011

Respectfully submitted,

CARMEN A. TRUTANICH, City Attorney
ZNA PORTLOCK HOUSTON, Senior Assistant City Attorney
JANIS LEVART BARQUIST, Deputy City Attorney
JENNIFER MARIA HANDZLIK, Deputy City Attorney

By _____
JANIS LEVART BARQUIST
Deputy City Attorney

Attorneys for Petitioner City of Los Angeles

LOS ANGELES CITY ATTORNEY'S OFFICE.

OPINIONS

MAY 1984 - DECEMBER 1985

ATTACHMENT 1

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OPINION NO. 85-28

JUL 26 1988

OPINION RE:

CITY COUNCIL AUTHORITY TO ESTABLISH BINDING GRIEVANCE ARBITRATION FOR EMPLOYEES OF PROPRIETARY DEPARTMENTS

Keith Comrie
City Administrative Officer
300 City Hall East
200 North Main Street
Los Angeles, California 90012

Dear Mr. Comrie:

This opinion is written in response to your letter inquiring into the feasibility of introducing binding employee grievance arbitration for employees of the City's proprietary departments; namely, the Departments of Airports, Harbor, Water and Power, Library, Recreation and Parks, and Pensions, and the City Employees' Retirement System. You refer to a provision of the City's Employee Relations Ordinance ("ERO"), Los Angeles Administrative Code ("LAAC") §§ 4.800 et seq., §4.865(a)(4), which currently provides for "advisory" arbitration of unresolved grievances of employees of these departments and arbitration of a "final and binding" nature for unresolved grievances involving "all other City departments." You pose questions which we restate as one:

QUESTION

May the City Council, subject to the meet and confer process and without the approval of the heads of the proprietary departments, provide for binding arbitration of unresolved grievances of employees of the City's proprietary departments?

ANSWER

No.

COMMENT

Summary

Given the distribution of municipal authority by the Charter and the nature of the grievance process outlined in the ERO, the authority to agree to binding arbitration of unresolved grievances is vested exclusively with the heads of the proprietary departments.

Indeed, the Council lacks such authority over the non-proprietary departments as well. So long as grievances are defined to concern matters over which the departments and not the Council have Charter authority, the Council cannot require any department to send unresolved grievances with respect to those matters to binding arbitration. In this respect and to this extent, LAAC §4.865(a)(4) is invalid. A recommendation to the Council to repeal such provision would be concurred in by this office. But the Council has the authority (to be exercised through the meet and confer process) to require City departments -- including the proprietary ones -- to establish internal grievance procedures and even to submit unresolved grievances to advisory arbitration. The Council's lack of operational authority over the departments is mirrored by the departments' inability under the Charter to control the economic authority of the Council. While the Council cannot require the departments to agree to binding grievance arbitration, all City departments -- including the proprietary ones -- are free to do so. A department's approval of a memorandum of understanding ("MOU") containing such a provision supplies the necessary legal authority under the Charter.

The conclusion set forth above does not break new ground. On five occasions between 1970 and 1975, this office gave written legal advice concerning the extent to which and the manner in which the City could agree to binding grievance arbitration. In four communications issued prior to 1973, the office opined that (a) the Council could not agree to binding arbitration because to do so would usurp operational authority vested in the departments by the Charter and (b) in any event, binding arbitration represents an impermissible delegation of

authority. In an opinion issued in 1975, the office reversed the latter conclusion due to a California Supreme Court decision of the previous year. The authority of the departments to agree to binding arbitration was acknowledged. In its recognition of the limits of the Council's power over the departments, the opinion we render today is substantially consistent with those earlier communications.

The issue, therefore, is not whether the City can agree to binding grievance arbitration; it clearly can. The question before us is a narrow one that asks only to what extent may the Council require the departments (including the proprietary departments) to agree to binding grievance arbitration where the grievances concern departmental, rather than Council, conduct.

Historical Background

A. The Advent of the Meet and Confer Process in California Local Government

Our first point of reference is the Charter of the City of Los Angeles, the provisions of which allocate managerial authority among various bodies and officers. The City's current Charter dates from 1925, see 1925 Cal.Stats., p. 1024, and amendments to that instrument have occurred from time to time since then. The organization of local government employees in California, including those of this City, was not authorized until relatively recently. The current legislative authority for collective employee activity at the local level is the Meyers-Milias-Brown Act ("MMBA"), California Government Code §§ 3500 et seq., enacted in 1968, 1968 Cal.Stats., ch. 1390, effective January 1, 1969.

The avowed purposes of the MMBA were to "promote full communication between public employers and their employees" by introducing a "reasonable method of resolving disputes" regarding the terms and conditions of employment and "to promote the improvement of personnel management and employer-employee relations" by permitting employees to be represented in such matters by organizations of their choosing. See California Government Code §3500. True to its intent, the MMBA concerns itself with the recognition of employee organizations, see, e.g., §§ 3502, 3503, and meeting and conferring in good faith concerning wages, hours, and other terms and conditions of

employment. See, e.g., §§ 3504, 3505, 3505.1, 3505.2.[1]/ No mention is made of dispute resolution machinery (e.g., a grievance procedure) for resolving disputes not involving problems encountered in the meet and confer setting. The MMBA does provide in §3507 that a "public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of an employee organization or organizations for the administration of employer-employee relations under this chapter. . . ."

B. Adoption and Amendment of the ERO

It was from this statutory base that the ERO was enacted by Los Angeles City Ordinance No. 141,527, effective March 5, 1971. The stated purpose of the ERO was set forth at its beginning:

> "It is the purpose of this chapter to establish policies and procedures for the administration of employer-employee relations in City government, the formal recognition of employee organizations and the resolution of disputes regarding wages, hours and other terms and conditions of employment." ERO §4.800.

As with the MMBA, the ERO provisions are devoted chiefly to the formation and recognition of bargaining units and representatives, see, e.g., §§ 4.820, 4.822, and the process of and problems encountered in the meet and confer process. See, e.g., §§ 4.830, 4.840, 4.845, 4.850, 4.855, 4.857, 4.859, 4.860. The ERO went beyond the MMBA, however, in §4.865, which

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[1]/The obligation to "meet and confer in good faith" requires representatives of City management and City employee organizations "personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation. . . ." Section 3505. The "scope of representation" is defined to "include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." Section 3504.

is entitled "Grievance Procedure for Recognized Employee Organizations." The provision begins:

> "The management representative principally responsible for meeting and conferring with a recognized employee organization shall meet and confer with the representatives of such employee organization to develop a grievance procedure for employees in the representation unit, to be incorporated into any memorandum of understanding reached by the parties. Such grievance procedure shall apply to all grievances, as defined in §4.801 of this Code, shall provide for arbitration of all grievances not resolved in the grievance procedure, and shall conform to the following standards. . . ." Section 4.865 (a).

Except for the two sworn police bargaining units,[2/] "grievance" is defined in §4.801 as:

> "Any dispute concerning the interpretation or application of a written memorandum of understanding or of departmental rules and regulations governing personnel practices or working conditions. An impasse in meeting and conferring upon the terms of a proposed memorandum of understanding is not a grievance."

Excepting the two sworn police bargaining units, the management rights provision of the ERO, §4.859, states that the exercise of the rights therein set forth "does not preclude employees or their representatives from consulting or raising grievances about the practical consequences that decisions on these matters may have on wages, hours, and other terms and conditions of employment."

2/By Los Angeles City Ordinance No. 161,037 (effective March 27, 1986), the scope of the grievance procedure as set forth in the ERO was superseded by the terms of the MOU for the Police Officers, Captain and Above representation unit. Ordinance No. 161,882 (effective December 29, 1986) amended the ERO so as to permit the Police Department to narrow the scope of the grievance procedure for the Police Officers, Lieutenant and Below representation unit. Neither ordinance affected employees assigned to the proprietary departments.

One of the "standards" of the grievance procedure required by the ERO is set forth at §4.865(a)(4):

> "With respect to grievances involving the Departments of Airports, Harbor, Water and Power, Library, Recreation and Parks, Pensions and City Employees' Retirement System, the decision of the arbitrator shall be advisory only. With respect to grievances involving all other City departments, the decision of the arbitrator shall be final and binding on the parties. . . ."

As originally enacted in 1971, the ERO (inclusive of the grievance arbitration provision) applied only to City departments "under the budgetary control of the Mayor and City Council." ERO (former) §4.875. In 1973 employees of the proprietary departments were brought under the ERO by an amendment to §4.875, with §4.865 being amended to read as set forth above so as to provide for only advisory grievance arbitration for these departments. These amendments were accomplished by enactment of Los Angeles City Ordinance No. 144, 462, effective March 1, 1973.

C. <u>City Attorney Advice on the Legality of Binding Arbitration</u>

The original ERO was not approved as to form and legality pursuant to Council rule (see former rule 59, current rule 38) by this office because of our view that the binding arbitration provision was unlawful. In a report to the City Council of November 20, 1970 (contained in Council File No. 141,050), we stated on page 3:

> "We have not approved the attached draft of ordinance because we are of the opinion that §4.865 is invalid insofar as it requires the submission of grievances to binding arbitration. As the Personnel Committee was informed by this office at its meeting held September 16, 1970, there are two separate and distinct reasons for this opinion. <u>First</u>, the Charter devolves upon certain Boards and officers of the City plenary authority over specified matters, and the Council is not empowered to enact legislation in derogation of this authority. <u>Second</u>, we believe

> that under the present state of the law, the submission of grievances to binding arbitration by a third party would result, in many instances, in an unlawful delegation of authority.
>
> "The Charter provides in numerous instances that general managers of departments shall perform certain specified duties which require the exercise of discretion. For example, general managers have the power to appoint, discharge, suspend, transfer and issue instructions to their respective employees. [Charter Sections 80; 109 (c)]. Except where subject to instructions of a board of commissioners, general managers have full and complete discretionary authority over these matters. In the exercise of their discretion on these matters (within legal limits) they are not subject to the instructions of the Council or any third party. The proposed ordinance, by reason of its definition of 'grievance' and by reason of the provisions of §4.859 which allow employees to raise grievances about the practical consequences of the exercise of management rights on wages, hours and other terms and conditions of employment, would purport to require managers to abdicate their power and authority to make the final decision on many of these matters, which, under the Charter, they alone have the power to resolve.
>
> "Even if general managers were not given plenary authority to appoint, discharge, suspend, transfer and issue instructions to their employees, we are of the opinion that the provision requiring binding arbitration would necessarily result in an unlawful delegation of authority." (Emphasis in original).

A letter of December 8, 1971 from this office to Water and Power Commissioner John W. Luhring (contained in Council File No. 141,050), was prompted by a request from the Engineers & Architects Association to the Board of Water and Power Commissioners that the Board "adopt the terms and conditions" of the ERO so as to make the ERO applicable to the Department and its employees. Letter at 1. We pointed out in the letter that

since our 1970 report, the only relevant judicial decision of which we were aware was one from the Orange County Superior Court supportive of the office's approach in the 1970 report. Id. at 5-6. We again concluded that the binding arbitration provision of the ERO was unlawful. Id. at 6.

At approximately the same time, this office orally advised the Board of Pension Commissioners that it could not submit employee grievances to binding arbitration. At the request of the Board's President, the Council's Personnel Committee requested our opinion on the extent to which personal liability of Board members could flow from adopting a binding grievance program in view of our earlier advice as to its illegality. We concluded that Board members "could" be held liable for costs and awards of binding arbitration. 91 Ops. L.A. City Atty. 33, 35 (May 23, 1972). It is to be kept in mind that such advice addressed a circumstance wherein a City board was considering the consequences of making expenditures in direct contravention of the advice of its legal counsel.3/ The problem was not with the internal grievance procedures, id., at 36-37; but rather, with the delegation of authority which binding arbitration of grievances not resolved internally entails. Id. at 37.

On December 21, 1972 this office issued an opinion to the Personnel Committee on whether the ERO could be lawfully amended so as to embrace the proprietary departments. 92 Ops. L.A. City Atty. 258. Consistent with our 1970 report, we stated that the ERO provisions "which require binding arbitration regarding unresolved employee grievances are contrary to certain provisions of the Charter and so are invalid." Id. at 259. Hence, those provisions could not be extended to the proprietary departments. We stated, however, that otherwise the ERO was lawful and could be extended to the proprietary departments. Id.

3/Until the California Supreme Court's decision in Stanson v. Mott, 17 Cal.3d 206, 130 Cal.Rptr. 697, 551 P.2d 1 (1976), government officials were strictly liable personally for expenditures later determined to be unauthorized. See id. at 226. Stanson established a new standard under which such officials were responsible for exercising "due care" in making expenditures. The court stated that one of a number of factors to be taken into account in determining whether "due care" was exercised is whether the expenditure was made in contravention of legal advice. See id. at 227.

In 1973 the Council adopted Ordinance No. 144, 462, which made proprietary departments and their employees subject to the ERO with the proviso that grievance arbitration as to these departments was to be advisory only. A report dated March 4, 1973 from the City Administrative Officer to the Council's Personnel Committee (contained in Council File 141,050 S-5, Part 1) indicates that the Council had relied on advice from this office that advisory arbitration could be required.

In response to a question asking whether binding grievance arbitration procedures could be included in an MOU involving police officer employees, this office on July 24, 1975 gave an affirmative answer. 98 Ops. L.A. City Atty. 280. We noted that the then recently decided case of Fire Fighters Union v. City of Vallejo, 12 Cal.3d 608, 116 Cal.Rptr. 507, 526 P.2d 971 (1974), had resolved the doubts about the validity of binding arbitration from a delegation of charter authority standpoint in favor of its legality. The court in that case noted the "strong public policy in California" supportive of resolving employee disputes through arbitration and found no problem with the delegation in that case of issues unresolved in the meet and confer process so long as the arbitrators stayed within the bounds of the charter. Id. at 622 & n. 13. In our opinion we stated:

> "The City Council provided for arbitration of unresolved employee grievances in the City's Employee Relations Ordinance. We have concluded that delegation of authority to arbitrators in grievance matters is lawful. Moreover, memoranda of understanding which include provisions for binding arbitration of grievances have been entered into by the various City departments and have been approved by the City Council. In our opinion, those provisions are valid." 98 Ops. L.A. City Atty. at 282.

We next answered the question of whether approval of an MOU containing a binding arbitration provision would expose either the Chief of Police or the members of the Board of Police Commissioners to personal liability. We first pointed out that, in effect, the ERO itself recognizes that the head of the department is the "determining body" for approval of MOU provisions as to which the department has jurisdiction. See id. at 283. We stated that the Board, and the Chief acting under

the Board's instructions, was a determining body on the "departmental grievance procedure." Id. We then stated:

> "Thus, there is a specific authority for the Board of Police Commissioners and the Chief of Police to act in approving a memorandum of understanding containing a provision for the binding arbitration of unresolved grievances, and no personal liability, on the theory that the Commission or the Chief acted pursuant to an unlawful delegation of authority, would attach."

This history sets the stage for the following analysis.

Binding Grievance Arbitration is a Permissible Delegation of Governmental Authority

We see from the history of the ERO that this office in 1975 revised its position taken in the 1970 report on the delegation issue, based on the California Supreme Court's decision in the Vallejo case in 1974. Vallejo sanctioned arbitration expressly provided for in the municipal charter -- a point that was made in San Francisco Fire Fighters v. City and County of San Francisco, 68 Cal.App.3d 896, 903, 137 Cal.Rptr. 607 (1st Dist. 1977). We now know, however, that the issue was more definitively answered by the Supreme Court in 1979 when it decided Taylor v. Crane, 24 Cal.3d 442, 155 Cal.Rptr. 695, 595 P.2d 129. That case concerned the legality of a binding grievance arbitration provision similar in its breadth to that contained in the ERO's definition of "grievance" in §4.801. See 24 Cal.3d at 448 n. 7. Among the legal issues raised was the question of delegation of authority. The court found no impermissible delegation because: (a) there was no total abdication of the city manager's discretion as initial discipline remained with that officer and (b) the authority delegated was "subject to adequate judicial safeguards," the court citing, among other authorities, the provisions of a statute, California Code of Civil Procedure §1286.2, which establishes as the exclusive grounds for vacating an arbitration award five circumstances going to the jurisdiction, integrity, and fairness of the arbitration proceeding. See 24 Cal.3d at 452. The court stated:

> "The power to set the terms and conditions of public employment is broader and more intrusive

> upon the functions of city government than the arbitrator's authority in this case to resolve an individual grievance. Grievance arbitration does not involve the making of general public policy. Instead, the arbitrator's role is confined to interpreting and applying terms which the employer itself has created or agreed to and which it is capable of making more or less precise." Id. at 453.

Delegation of authority, therefore, does not present a problem in establishing binding arbitration of unresolved employee grievances.

Government Bodies and Officers May Delegate Only Those Powers, Duties, and Functions Entrusted to Them

Your question raises a different issue; namely, which parts of City government have authority to agree to binding arbitration over which matters. We begin with the seemingly obvious proposition that one can delegate only a power that one possesses. The leading authority in support of this notion is San Francisco Fire Fighters v. City and County of San Francisco, 68 Cal.App.3d 896, 137 Cal.Rptr. 607 (1st Dist. 1977), which addressed the validity of a grievance arbitration provision of an MOU for firefighters. The provision applied to the "terms and conditions of employment" as established by the rules and regulations of the fire department. Id. at 898. The MOU had been approved by the mayor, board of supervisors, and fire commission. Id. The MOU also established binding arbitration for unresolved nondisciplinary grievances. Id. at 900. The court noted the division of authority in the San Francisco Charter among the mayor, board of supervisors, and commissions. The charter expressly placed the fire department under the "management" of the fire commission, §3.540, and among the duties of the fire commission as a city commission was to "prescribe reasonable rules and regulations" for operating the department. Section 3.500(a). See 68 Cal.App.3d at 899. The Court of Appeal recognized the fire commission's authority in the matter when it stated at page 902:

> "Here the Charter expressly confides the formulation of the fire department's rules and regulations covering terms and conditions of employment to the fire commission. And patently,

> the City's mayor and board of supervisors whose authority is derived from the Charter may not reasonably, or as a matter of law, have authority to do an act, or make an agreement, in derogation of the Charter."

While the court held the MOU provision invalid as an improper delegation of authority,[4/] it recognized that the power was in the fire commission. Id. at 903-904. In Taylor v. Crane, the California Supreme Court read the charter of the City of Berkeley in the same fashion:

> "[Charter art. VII, §28(c)] provides that the city manager shall have the power '[t]o exercise control over all departments, divisions and bureaus of the City Government and over all appointed officers and employees thereof.' This provision vests control over city employees in the city manager as opposed to the city council or other city officials." 24 Cal.3d at 452 (emphasis original).

The Distribution of Managerial Authority by the Charter of the City of Los Angeles

The matter thus transforms itself into which boards, public bodies, and officers of Los Angeles City government have authority to delegate to an arbitrator the resolution of particular kinds of grievances. Our inquiry turns to the manner in which managerial authority is distributed by the Los Angeles City Charter.

"The Council, except as otherwise in this Charter provided, is the governing body of the City." Charter §22. Charter §35 provides that "[e]xcept as otherwise in this charter specifically provided, the Council shall have full power to pass ordinances upon any subject of municipal control, or to carry

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[4/]The arbitration provision provided that the arbitrator could decide grievances concerning what the terms and conditions of employment should be. Id. at 898. The court recognized that this was a delegation of the fire commission's power to adopt "rules and regulations." Id. at 901. Taylor v. Crane distinguished the case as involving delegation of a "general policymaking power." 24 Cal.3d at 453 (emphasis deleted).

into effect any of the powers of the City." Among the Council's express powers, except with respect to departments with control of their own funds, are those to "provide . . . suitable quarters, equipment and supplies," "create the necessary positions" beyond those provided in the Charter, and supply the "necessary funds" for operations for departments that do not control their own funds. Charter §33. The proprietary departments provide these things under separate Charter authority. See Charter §§70(a), 86. The Council is the salary setting body for all officers and employees of the City whose salary is not set or otherwise provided for in the Charter, including those in the proprietary departments. See Charter §§33, 66. Salaries are set by ordinance, Charter §33, thereby invoking the veto authority of the Mayor, see Charter §§29-30, although MOUs, being contracts authorized by the MMBA as interpreted in Glendale City Employees' Assn. v. City of Glendale, 15 Cal.3d 328, 334-340, 124 Cal.Rptr. 513, 540 P.2d 609 (1975), have, in recent years at least, been adopted by the Council as contracts and thereafter their economic terms have been implemented by ordinance.

The Charter creates departments, some of which are headed by a board of commissioners, see Charter §70(a) and (b), and others of which, see Charter §70(c), are headed by a general manager. The §70(a) departments, along with the City Employees' Retirement System, are included among those having "control of their own special funds" and "control of definite revenue or funds." See Charter §§70(a), 503.

Department heads -- boards or general managers, depending on the department, Charter §77 -- are given authority by Charter §78 (a) "to supervise, control, regulate and manage the department" and (b) "to make and enforce all necessary and desirable rules and regulations" for exercising the power conferred upon their respective departments by the Charter. Such authority is given subject to (a) the provisions of the Charter, (b) "such ordinances of the city as are not in conflict with the grants of power made to each such department of the city government elsewhere in this charter," and (c) so as not to restrict the exercise of the "police power of the city" by ordinance. The boards "shall have such additional powers and perform such other duties as may be granted or imposed elsewhere in this charter, or by ordinance not in conflict with the provisions of this charter." Charter §78. Charter §80 sets forth the powers and duties of general managers. These

administrative powers include the powers of appointment, discipline, and transfer of employees. See §80(a)(2), (b)(3). Elsewhere in the Charter are set forth more specific powers and duties of the City departments. The provisions applicable to the Department of Water and Power, for example, are set forth in Art. XXII (§§218-229.1).

The Charter thus clearly provides for a distribution of powers between the Council (or Council and Mayor), on the one hand, and the departments, on the other. With some exceptions, the economic authority resides in the Council (or Council and Mayor) and operational authority in the departments. This division was recognized in the ERO provision concerning the manner in which MOUs are to be approved:

> "APPROVAL OF MEMORANDUM OF UNDERSTANDING
>
> (1) Memorandums of understanding on matters concerning which the City Council is the determining body shall become effective when approved by the City Council. Where an ordinance is required to effectuate the Memorandum, it shall become effective upon the effective date of the ordinance.
>
> (2) Memorandums of understanding on matters concerning which the head of a department or office is the determining body or official shall become effective when approved by such body or official." ERO §4.870(c).

The Grievance Process Established by the ERO is Directed Toward Questioned Actions of the Departments, not the Council

Applying these principles to the matter at hand, we again examine the pertinent part of the ERO's definition of "grievance" in §4.801:

> "Any dispute concerning the interpretation or application of a written memorandum of understanding or of departmental rules and regulations governing personnel practices or working conditions. An impasse in meeting and conferring upon the terms of a proposed memorandum of understanding is not a grievance."

Grievances as defined thus fall into two classifications: (a) those that claim violation of certain departmental rules and regulations and (b) those that claim violation of MOU provisions. This second category itself consists of two components: (1) MOU provisions over which the department has approval authority and (2) MOU provisions over which the Council has approval authority. See ERO §4.870(c).

Since 1977 Charter §66, ¶1 has provided:

> "The City Council shall, by ordinance, fix the salaries of all officers and employees of the City, including those officers and employees provided for in departments having control of their own definite revenue and funds, whose salaries are not fixed or otherwise provided for by this Charter."

Under this grant of authority the Council could permit the bringing of grievances concerning the amount of salary received by an employee under the applicable MOU and require that unresolved grievances of this kind be sent to binding arbitration. But in adopting the ERO, the Council did not go this far. This is so because ERO §4.801's definition of grievance must be read in conjunction with the "standards" the ERO mandates for grievance procedures adopted in MOUs, set forth in ERO §4.865. These standards expressly refer to:

1. Informal discussion with "the employee's immediate supervisor," §4.865(a)(1),(3), and
2. Binding arbitration for grievances "involving" most "departments" and advisory arbitration for grievances "involving" the proprietary departments. §4.865(a)(4).

This procedure thus contemplates consideration and review of the employee's grievance by the department in which the employee is working. If grievances were intended to challenge actions of the Council, departmental consideration and review doubtless would not have been utilized. Therefore, the ERO does not contemplate a grievance process to contest the largely economic decisions over which the Council has authority.

The Council Can Require Departments to Establish a Grievance Process, but the Council Cannot Require Departments to Submit Unresolved Grievances to Binding Arbitration

Council authority does not extend to matters over which the departments have exclusive control under the Charter. In this regard, Council assertion of authority over the grievance procedure in its internal stages itself is not a problem. The Council has the power under Charter §§15, 32, and 78 to place additional duties upon the City's departments not inconsistent with their respective powers, duties, and functions under the Charter. Requiring departments to entertain complaints from employees at various departmental levels is not a burden antagonistic to the managerial prerogatives of the departments under the Charter. Similarly, a requirement that unresolved grievances go to advisory arbitration by a third party neutral does no violence to departmental authority. It is only with the requirement that unresolved grievances go to an arbitrator for "final and binding" resolution that problems first appear.

The Council can, therefore, through the meet and confer process require City departments to establish internal grievance procedures and to submit unresolved grievances to advisory arbitration, but it lacks authority to send unresolved grievances involving departmental conduct to binding arbitration. The departments are free to establish grievance procedures that do not conflict with procedures required by ordinance for matters within their jurisdiction through the meet and confer process and have exclusive authority to agree to have unresolved grievances sent to an arbitrator for binding resolution.

This conclusion holds for the proprietary departments, as well as for those under the budgetary control of the Council. As stated above, requiring an internal grievance procedure and advisory arbitration does not derogate a department's managerial authority and hence may be required of any department by the Council. Although these requirements may have an incidental cost to them, the imposition of such incidental cost upon the proprietary departments does not equate to the Council's expenditure of the funds under the control of those departments. In this regard, twenty-one years ago we opined that the Council could require the Department of Water and Power to pay from the Power Revenue Fund the cost of collecting an electrical users tax imposed by the Council upon

the Department's electric service customers. We found such cost to be an "incidental burden" properly regarded as a necessary expense of operating the electric works. 77 Ops. L.A. City Atty. 220, 223 (1967). The costs incurred in processing grievances and submitting unresolved grievances to advisory arbitration are likewise incidental administrative costs properly borne by the proprietary departments.

Very truly yours,

JAMES K. HAHN, City Attorney

By Fred Merkin

FREDERICK N. MERKIN
Senior Assistant City Attorney

FNM:ml
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OFFICIAL CITY OF LOS ANGELES CHARTER™

[Administrative Code]

www.lacity.org

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Sec. 262. Approval of Demands on Treasury.

(a) The Controller shall, prior to approval of any demand, make inspection as to the quality, quantity and condition of services, labor, materials, supplies or equipment received by any office or department of the City, and approve before payment all demands drawn upon the Treasury if the Controller has adequate evidence that:

(1) the demand has been approved by every board, officer or employee whose approval is required by the Charter or ordinance;

(2) the goods or services have been provided, except that advance payment may be authorized by ordinance for specified categories of goods and services;

(3) the payment is lawful;

(4) the appropriation for the goods or services has been made;

(5) the prices charged are reasonable;

(6) the quantity, quality and prices correspond with the original specifications, orders or contracts; and

(7) any additional criteria established by ordinance have been satisfied.

(b) Notwithstanding subsection (a), the Controller shall delegate to the various offices and departments the duties of inspection of goods and services and approval of demands, in accordance with methods for inspection and approval established by the Controller, but the Controller may suspend the authority delegated pursuant to this subsection upon a finding of abuse of that authority or on a determination that the office or department lacks adequate controls to exercise that authority properly. In the event of suspension of the authority delegated pursuant to this subsection, the Controller shall assist the office or department to achieve adequate controls and standards prior to reinstatement of that authority to the office or department.

(c) The Controller shall withhold approval of any demand, in whole or in part, if there is a question as to whether it is improper, illegal, or unauthorized, and immediately file a report with the Mayor and Council stating the objections to the demand. The Council shall promptly consider the report and may overrule or sustain the objections of the Controller.

(d) The Controller shall keep a record of all demands on the Treasury approved by the Controller and of all demands to which objections have been made and overruled.

Sec. 291. Powers and Duties.

The Director shall have the power and duty to:

(a) keep the Mayor and the Council advised of the condition, finances and future needs of the City, and make recommendations as are appropriate;

(b) assist in the preparation of the annual budget in accordance with policies prescribed by the Mayor;

(c) develop work programs and standards required in the proper planning of the budget;

(d) prepare reports on revenue and costs and, throughout the year, conduct studies and investigations that will assist in the preparation of the budget;

(e) assist the Council in the review of the proposed budget;

(f) assist the Mayor and Council in the consideration of any appropriations subsequent to the adoption of the budget, as set forth elsewhere in the Charter;

(g) plan and direct a system of budgetary administration to assure the proper and effective expenditure of funds;

(h) subject to the approval of the Mayor, prescribe rules and standards governing the matters under the jurisdiction of the Office of Administrative and Research Services with which all officers and departments of the City must comply;

(i) furnish the Mayor or Council aid, information or recommendation as requested in writing by the Mayor, the Council, or Council Committee; and

(j) perform other duties assigned to the office in the Charter.

Except as provided in Section 292, the powers and duties of the Director of the Office of Administrative and Research Services set forth in this section shall not apply to the Proprietary Departments.

Sec. 320. Expenditure Programs.

Each office and department provided for in the general City budget, and the Departments of Library and Recreation and Parks to the extent that they are assisted by appropriations from the General Fund, shall have authority to expend, in the manner provided by law, the funds appropriated for its support during the ensuing fiscal year, but only in accordance with a program of planned expenditures which shall be prepared, filed and modified from time to time, as provided by law. No department, bureau, or office of the City government shall make expenditures or incur liabilities in excess of the amount appropriated therefor.

Errol Griffin - RE: Group Grievances

From: Errol Griffin
To: Aquino, Robert G
Date: 7/6/2009 4:21 PM
Subject: RE: Group Grievances
CC: calvo@eaaunion.com; Cherness, Darryl; Moody, Christopher; P, Ben; Sanchez, Richard

For purposes of clarification of my earlier response, EAA and its members either may use the form I sent you or a group grievance form already developed by a department. - EAG

>>> "Robert G Aquino" <rga@eaaunion.com> 7/6/2009 3:50 PM >>>

The whole purpose for getting a uniform enjoinder was that the form be acceptable to all department and bureaus. In your email, you were explaining that the form you sent may not be acceptable to specific departments or bureaus. While I appreciate your response, we are back at the point we started from. I guess what we will do is handle each grievance a separate issue which will require separate responses from management on each grievance, separate step meetings for each grievance, separate arbitrations for each grievance, etc.

I am instructing my staff to proceed in this manner. Thanks for trying Errol.

Bob

From: Errol Griffin [mailto:Errol.Griffin@lacity.org]
Sent: Monday, July 06, 2009 2:58 PM
To: Robert Aquino
Cc: calvo@eaaunion.com
Subject: Group Grievances

Hello Bob,

Per your request, attached are a group grievance and individual waiver form which should be accepted in all non-proprietary City Departments. This will not preclude a department from providing any of the recognized labor organizations with their own form, but these documents contain the required information needed to process a group grievance. If you are asked for any additional information, please let me know and I'll see what I can do to streamline the process. From my perspective these forms are acceptable in that they identify the issue, the organization filing, the employee's represented in the filing and the employee's waiver of right to file an individual grievance on the same subject as (s)he has filed as a part of a group grievance. Attach appropriate sheets as necessary.

These forms have not yet been provided to all City Departments.

Errol A. Griffin,
Senior Labor Relations Specialist
CAO - Employee Relations Division
City Hall East - Room 1200, M.S. #139
200 North Main Street
Los Angeles, CA 90012
(213) 978-7633 / (213) 978-7613 - FAX
Errol.Griffin@lacity.org

ATTACHMENT

PROOF OF SERVICE
(VIA VARIOUS METHODS)

I, the undersigned, say: I am over the age of 18 years and not a party to the within action or proceeding. My business address is 800 City Hall East, 200 North Main Street, Los Angeles, California 90012.

On **December 12, 2011**, I served the foregoing document(s) described as **REQUEST FOR JUDICIAL NOTICE** on all interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

[XX] BY MAIL - ( ) I deposited such envelope in the mail at Los Angeles, California, with first class postage thereon fully prepaid, or **(XX)** I am readily familiar with the business practice for collection and processing of correspondence for mailing. Under that practice, it is deposited with the United States Postal Service on that same day, at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than one (1) day after the date of deposit for mailing in affidavit; and/or

[ ] BY PERSONAL SERVICE - ( ) I delivered by hand, ( ) I caused to be delivered via messenger service, or ( ) I caused to be delivered via Document Services, such envelope to the offices of the addressee with delivery time prior to 5:00 p.m. on the date specified above.

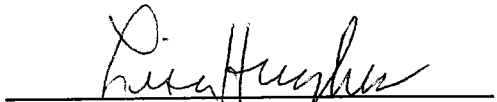
[ ] BY FACSIMILE TRANSMISSION - I caused the document to be transmitted to the offices of the addressee via facsimile machine at telephone number _____ on the date specified above at ____ ~~**a.m/p.m**~~. The document was sent by fax from telephone number (213) 978-8315 and the transmission was reported complete and without error. A true copy of the Transmission Report is attached to the mailed or personal or both proof(s) of service.

[ ] BY OVERNIGHT COURIER - ( ) I deposited such envelope in a regularly maintained overnight courier parcel receptacle prior to the time listed thereon for pick-up. Hand delivery was guaranteed by the next business day, or ( ) I am readily familiar with the business practice for collection and processing of items for overnight delivery with United Parcel Service. Under that practice, said package was deposited with the City of Los Angeles, General Services Division mailroom for collection by the United Parcel Service on that same day, at Los Angeles, California, in the ordinary course of business.

[ ] - Federal - I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

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

Executed on **December 12, 2011**, at Los Angeles, California.



LISA HUGHES

SERVICE LIST

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