Date: January 8, 2008

Item No. 19
File No. 07092

SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST*

- [x] **Complaint by: Patrick Monette-Shaw vs BOS and DHR**
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Completed by: Frank Darby **Date:** January 2, 2008

***This list reflects the explanatory documents provided**

~ Late Agenda Items (documents received too late for distribution to the Task Force Members)

** The document this form replaces exceeds 25 pages and will therefore not be copied for the packet. The original document is in the file kept by the Administrator, and may be viewed in its entirety by the Task Force, or any member of the public upon request at City Hall, Room 244.

CITY AND COUNTY OF SAN FRANCISCO

OFFICE OF THE CITY ATTORNEY

DENNIS J. HERRERA
City Attorney

ERNEST H. LLORENTE
Deputy City Attorney

DIRECT DIAL: (415) 554-4236
E-MAIL: ernest_llorente@ci.sf.ca.us

MEMORANDUM

December 27, 2007

Patrick Monette-Shaw v. Board of Supervisors and the Human Resources Department (07092)

COMPLAINT

THE COMPLAINANT ALLEGES THE FOLLOWING FACTS:

On November 17, 2007, Patrick Monette-Shaw reviewed the Board of Supervisors Meeting Agenda for November 20, 2007 and noted that Agenda item 24 listed

> Closed Session- Conference with the City's Human Resources Director: Motion that the Board of Supervisors convene in closed session with the City's Human Resources Director, or her designated representative, pursuant to Government Code section 54957.6 and San Francisco Administrative Code Section 67.10(e) regarding a potential charter amendment to address the cost and funding of retiree medical benefits.

COMPLAINANT FILES COMPLAINT:

On November 18, 2007, Patrick Monette-Shaw filed a complaint against the Board of Supervisors and the Human Resources Department alleging violations of the Public Meeting Requirements Sunshine Ordinance and the State Brown Act for the scheduling of a closed session.

THE RESPONDENT AGENCIES RESPOND:

On December 11, 2007, Frank Darby who for this case represented the Board of Supervisors did not contest jurisdiction by the Task Force.

On December 11, 2007, Jennifer Johnston, the representative of the Department of Human Resources acknowledged that the Task Force has subject matter jurisdiction but stated that DHR had no control over the Board of Supervisors meeting and that the HRD Director was called as a witness to present information and had no part in the conduct of the meeting.

APPLICABLE STATUTORY SECTIONS:

1. Sunshine Ordinance Section 67.10 which deals with permitted topics in closed sessions of policy bodies.
2. State Government Code Section 54957.6 which deals with the permitted topics of salaries, salary schedules or fringe benefits in closed sessions of policy bodies.

APPLICABLE CASE LAW:

Attorney General's Opinions:

57 Ops Atty Gen 209 (prohibition against board of supervisors' meeting in executive session to review and decide on position it will take on meeting and conferring with representatives of employee organization, without use of designated representative; propriety of the board's appointing from its membership members to act as its designated representative with whom it may meet and confer in executive session).

61 Ops Atty Gen 1 (A "meet and confer" session held pursuant to Government Code, § 3505 between representatives of a county employee association and representatives of the board of supervisors, is not required to be open to the public. There is no legal requirement that the employee representative be allowed to tape-record the session. Such matter appears to be one to be settled between both sides in establishing "ground rules" for the session).

61 Ops Atty Gen 323 (Government Code § 54957.6 was not intended as blanket authorization for executive sessions to discuss any an all "meet and confer" subjects, but only for those specified therein, including salaries, salary schedules or compensation paid in the form of fringe benefits. However, where these specified matters are inextricably entwined with bargaining on other "meet and confer" matters, executive sessions will be permitted with respect to all related matters being considered).

85 Ops Atty Gen 77 (A county board of education may not meet in closed session under the "labor negotiations exception" of the Ralph M Brown Act to consider the salaries or compensation paid in the form of fringe benefits to certificated or classified employees of the county superintendent of schools).

ISSUES TO BE DETERMINED

1. FACTUAL ISSUES

A. Uncontested Facts:

The parties agree to the following facts:

- The Board of Supervisors conducted a public meeting.
- The Board's agenda listed an item for closed session.
- Patrick Monette-Shaw read the agenda item and sent a letter of concern to the BOS and HRD expressing concern about the item going into closed session.
- At the meeting in question, the BOS went into closed session.

B. Contested facts/ Facts in dispute:

The Task Force must determine what facts are true.

i. Relevant facts in dispute:

Whether or not the agenda item is the topic referred to in Sunshine Ordinance Section 67.10(e) and State Government Code Section 549567.6

Whether the Human Resources Department is responsible for the closed session?

QUESTIONS THAT MIGHT ASSIST IN DETERMINING FACTS:

- What role did the HRD have in the BOS meeting?

2. LEGAL ISSUES/ LEGAL DETERMINATIONS:

- **Did the BOS violate the Sunshine Ordinance or the State Brown Act?**
- **Did the HRD violate the Sunshine Ordinance or the State Brown Act?**
- **What sections of the Sunshine Ordinance and/or Brown Act were violated? (Sunshine Ordinance Section 67.10 or Government Code Section 54957.6)**

CONCLUSION

THE TASK FORCE FINDS THE FOLLOWING FACTS:

THE TASK FORCE FINDS THAT THE ALLEGED VIOLATIONS TO BE **TRUE OR NOT TRUE.**

Memorandum

THE CALIFORNIA CONSTITUTION AS AMENDED BY PROPOSITION 59 IN 2004 PROVIDES FOR OPENNESS IN GOVERNMENT.

Article I Section 3 provides:

a) The people have the right to instruct their representative, petition government for redress of grievances, and assemble freely ton consult for the common good.

b)(1) The people have the right of access to information concerning the conduct of the people's business, and therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protect by the limitation and the need for protecting that interest.

3) Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.

4) Nothing in this subdivision supersedes or modifies any provision of this Constitution, including the guarantees that person may not be deprived of life, liberty, or property without due process of law, or denied equal protection of the laws, as provided by Section 7.

5) This subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings or public bodies that is in effect on the effective date of this subdivision, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records.

6) Nothing in this subdivision repeals, nullifies, supersedes, or modifies protections for the confidentiality of proceedings and records of the Legislature, the Members of the Legislature, and its employees, committee, and caucuses provided by Section 7 of Article IV, state law, or legislative rules adopted in furtherance of those provisions: nor does it affect the scope of permitted discovery in judicial or administrative proceedings regarding deliberations of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses.

Memorandum

ATTACHED STATUTORY SECTIONS FROM CHAPTER 67 OF THE SAN FRANCISCO ADMINISTRATIVE CODE (THE SUNSHINE ORDINANCE) UNLESS OTHERWISE SPECIFIED

Section 67.1 addresses Findings and Purpose

The Board of Supervisors and the People of the City and County of San Francisco find and declare:

(a) Government's duty is to serve the public, reaching its decisions in full view of the public.

(b) Elected officials, commissions, boards, councils and other agencies of the City and County exist to conduct the people's business. The people do not cede to these entities the right to decide what the people should know about the operations of local government.

(c) Although California has a long tradition of laws designed to protect the public's access to the workings of government, every generation of governmental leaders includes officials who feel more comfortable conducting public business away from the scrutiny of those who elect and employ them. New approaches to government constantly offer public officials additional ways to hide the making of public policy from the public. As government evolves, so must the laws designed to ensure that the process remains visible.

(d) The right of the people to know what their government and those acting on behalf of their government are doing is fundamental to democracy, and with very few exceptions, that right supersedes any other policy interest government officials may use to prevent public access to information. Only in rare and unusual circumstances does the public benefit from allowing the business of government to be conducted in secret, and those circumstances should be carefully and narrowly defined to prevent public officials from abusing their authority.

(e) Public officials who attempt to conduct the public's business in secret should be held accountable for their actions. Only a strong Open Government and Sunshine Ordinance, enforced by a strong Sunshine Ordinance Task Force can protect the public's interest in open government.

(f) The people of San Francisco enact these amendments to assure that the people of the City remain in control of the government they have created.

(g) Private entities and individuals and employees and officials of the City and County of San Francisco have rights to privacy that must be respected. However, when a person or entity is before a policy body or passive meeting body, that person, and the public, has the right to an open and public process.

Section 67.10 provides:

A policy may, but is not required to, hold closed sessions:

> e.) With the City's designated representatives regarding matters within the scope of collective bargaining or meeting and conferring with public employee organizations when a policy body has authority over such matters.

THE CALIFORNIA RALPH BROWN ACT IS LOCATED IN THE STATE GOVERNMENT CODE SECTIONS 54950 ET SEQ. ALL STATUTORY REFERENCES, UNLESS STATED OTHERWISE, ARE TO THE GOVERNMENT CODE.

Section 54957.6 provides:

> a.) Nothwithstanding any other provision of law, a legislative body of a local agency may hold closed session with the local agency's designated representatives regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits of its represented and unrepresented employees, any other matter within the statutorily provided scope of representation..
>
> However, prior to the closed session, the legislative body of the local agency shall hold an open and public session in which it identifies its designated representatives.
>
> Closed sessions of a legislative body of a local agency, as permitted in this section, shall be for the purpose of reviewing its position and instructing the local agency's designated representatives.
>
> Closed sessions, as permitted in this section, may take place prior to and during consultations and discussions with representatives of employee organizations an unrepresented employees.
>
> Closed sessions with the local agency's designated representative regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits may include discussion of an agency's available funds and funding priorities, but only insofar as these discussions relate to providing instructions to the local agency's designated representative.
>
> Closed session held pursuant to this section shall not include final action on the proposed compensation of one or more unrepresented employees.
>
> For the purposes enumerated in this section, a legislative body of a local agency may also meet with the state conciliator who has intervened in the proceedings.

BOARD of SUPERVISORS

City Hall
1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco, CA 94102-4689
Tel. No. (415) 554-5184
Fax No. (415) 554-5163
TDD/TTY No. (415) 554-5227

December 31, 2007

Honorable Members, Sunshine Ordinance Task Force
c/o Frank Darby, Jr., Administrator
Office of the Clerk, Board of Supervisors
Room 244, City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

RE: Complaint No. 07092
Patrick Monette-Shaw v. Board of Supervisors and Department of Human Resources

Dear Task Force Members:

The Board of Supervisors (the "Board") and the Department of Human Resources ("DHR") submit this response to the above-entitled complaint. In our view, the complaint is without merit. Accordingly, we respectfully ask the Task Force to dismiss the complaint.

Introduction

The complaint essentially alleges that the Board unlawfully went into closed session at its November 20, 2007 meeting to confer with the Director of Human Resources (the "Director") regarding a potential Charter amendment to address the cost and funding of retiree medical benefits. The complaint presents two basic questions. First, was it appropriate for the Board to go into closed session? Second, was the agenda item properly noticed? In addition, the complaint presents a jurisdictional issue, which we address at the end of this letter.

The Closed Session Did Not Violate The Brown Act Or Sunshine Ordinance

The Brown Act recognizes that a legislative body may go into closed session to confer with its designated representative regarding the "salaries, salary schedules, or compensation paid in the form of fringe benefits of its represented and unrepresented employees ...." (Cal. Gov. Code sec. 54957.6(a).) Similarly, the Sunshine Ordinance recognizes that a policy body may go into closed session to confer with its designated representative "regarding matters within the scope of collective bargaining or meeting and conferring with public employee organizations when a policy body has authority over such matters." (S.F. Admin. Code sec. 67.10(e).)

Under the law, the City has a legal obligation to meet and confer with employee representatives over a possible amendment to the City Charter that would change the rules governing retiree medical benefits. As indicated, the Board convened a closed session on November 20th pursuant to the closed session provisions of the Brown Act and Sunshine Ordinance to consult with the Director over ongoing meet and confer discussions with the City's labor unions regarding

potential Charter amendments to address the cost and funding of retiree medical benefits. Pursuant to Section 11.100 of the City Charter, the Director is responsible for meeting and conferring with employees or their recognized employee organizations on behalf of the Mayor and in consultation with the Board regarding salaries, working conditions, benefits and other terms and conditions of employment. After the City, through the Director, met and conferred with the City's labor unions, at the December 11, 2007 meeting of the Board two Charter amendments regarding retiree medical benefits were introduced for possible placement on the November 2008 ballot (legislation file numbers 071673, cosponsored by Supervisors Peskin, Mirkarimi, Sandoval, and Ammiano, and 071663, cosponsored by the Mayor and Supervisor Elsbernd).

The complaint asserts that the Board's decision to convene a closed session was unlawful, arguing that the aforementioned closed session provisions do not apply because retiree benefits are not a matter within the scope of collective bargaining since they are set by City Charter—not through the City's labor agreements. Although Mr. Monette-Shaw is correct that most of the City's labor agreements are not scheduled to expire until 2009 and that retiree medical benefits are set by Charter rather than by labor agreement, he is incorrect that the City need not meet and confer with its unions regarding retiree health care benefits.

Under the Meyers-Milias-Brown Act ("MMBA"), the City is required to meet and confer with the unions representing its employees concerning potential charter amendments within the scope of representation as defined in the MMBA. Cal. Gov. Code Sec. 3505. (Relevant portions of the MMBA are attached.) 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 . . . ." (Cal. Gov. Code sec. 3504.) Thus, meet and confer is required for matters involving "wages, hours and other terms and conditions of employment."

Retiree medical benefits currently are provided to City employees, and a charter amendment affecting those benefits thus involves terms or conditions of employment. In *People ex rel. Seal Beach Police Officers Assoc. v. City of Seal Beach* (1984) 36 Cal. 3d 591, the California Supreme Court held that these meet and confer requirements are applicable to proposed charter amendments. A governmental entity must meet and confer with unions representing its employees "before it propose[s] charter amendments which affect matters within their scope of representation." (*Id.* at 602.) A copy of the *Seal Beach* decision is attached. Thus, the City has a duty to meet and confer with the unions pursuant to *Seal Beach;* further, the Board has ultimate authority over whether to place a charter amendment on the ballot. Therefore, the Board's decision to convene a closed session under the Brown Act and Sunshine Ordinance for the purpose of reviewing the City's position and instructing the Human Resources Director on the matter was lawful.

The Agenda Item Notice Did Not Violate The Brown Act Or Sunshine Ordinance

The agenda item notice, which was drafted by the City Attorney's Office, was legally proper. The notice stated:

> Closed Session - Conference with the City's Human Resources Director. Motion that the Board of Supervisors convene in closed session with the City's Human Resources Director, or her designated representative, pursuant to Government Code section

54957.6 and San Francisco Administrative Code section 67.10(e) regarding a potential charter amendment to address the cost and funding of retiree medical benefits.

This notice provided a meaningful description of the agenda item because it is sufficiently clear and specific to alert a person of average intelligence and education whose interests are affected by the item that he or she may have reason to attend the meeting or seek more information on the item. (S.F. Admin. Code sec. 67.7(b).) Any current City employee or union representing City employees, any retiree, any prospective City employee -- indeed, any City resident or taxpayer of average intelligence and education -- was put on notice of the general subject of the agenda item -- a discussion with the City's Human Resources Director of a potential Charter amendment to address the cost and funding of retiree medical benefits.

While the wording of the notice for this agenda item does not precisely follow the standardized form wording for a closed session that is specified in the Brown Act or Sunshine Ordinance, the law does not require such exactitude in closed session notices. Rather, the standardized form notices for closed sessions that are provided in the Brown Act and Sunshine Ordinance are intended to function as "safe harbor" provisions. That is, an agenda item notice that precisely conforms to these provisions is per se legal. But it is also correct that an agenda item notice that provides substantially the same information is lawful, even if it does not follow verbatim the prescribed format.

The Attorney General's manual, *The Brown Act: Open Meetings for Local Legislative Bodies* (2003) explicitly makes this point. Because of the Attorney General's important role in interpreting the Brown Act, courts may rely on this manual as an aid in ascertaining the meaning of the Brown Act. (*Bell v. Vista Unified School District* (2000) 82 Cal.App.4th 672, 683 n.3.) The manual, which may be found on the Attorney General's website at www.ag.ca.gov/publications/ (listed under "Open Meetings" topic) states:

> In order to assist legislative bodies in preparing agendas for closed session meetings, the Legislature enacted section 54954.5 which establishes a model format for closed-session agendas. *Use of the model format is strictly voluntary on the part of the body.* However, substantial compliance with the model format assures the legislative body that it will not be found in violation of the agenda requirements of section 54954.2. Substantial compliance with the model format in section 54954.5, therefore, provides a "safe harbor" from liability under the Act's agenda requirements. Substantial compliance is satisfied by including the information contained in the model format, irrespective of the form in which it is ultimately presented. (Sec. 54954.5.)

The Brown Act: Open Meetings for Local Legislative Bodies (2003) at 22 (emphasis added). The same reasoning would apply to the Sunshine Ordinance.

Here, the notice for the closed session specifically identified the topic of the closed session -- a possible Charter amendment to address the cost and funding of retiree medical benefits. The notice specifically identified who the Board would confer with in closed session -- the City's Human Resources Director, who is the designated labor negotiator for the City, or her designee. And the notice specifically identified the provisions in the Brown Act and Sunshine Ordinance pursuant to which the closed session would be held -- the provisions regarding meeting with the

City's representative for purposes of labor negotiations and meet and confer. The notice more than adequately informed the public about the nature and purpose of the closed session.

The Complaint Does Not State A Violation By DHR

For the reasons stated above, the closed session did not violate the Brown Act or Sunshine Ordinance. Thus, the Task Force should dismiss the complaint on the merits. In addition, the complaint raises a jurisdictional question vis-à-vis DHR. We recognize that the Complaint Committee has recommended in favor of finding jurisdiction as to DHR, but respectfully raise the issue anew, to avoid any suggestion of waiving it.

The power to hold a closed session lies with the body that decides to go into closed session. It does not lie with any other board or commission, much less a department. Section 67.10(b) of the Sunshine Ordinance begins, "A *policy body* may, but is not required to, hold closed sessions ..." (Emphasis added.) Similarly, Section 54957.6(a) of the Brown Act begins, "Notwithstanding any other provision of law, a *legislative body* of a local agency may hold closed sessions ..." (Emphasis added.)

The plain language of both laws compels the conclusion that this complaint is not properly directed against DHR, which is not a policy body or a legislative body. (Cal. Gov. Code sec. 54952 (definition of "legislative body"); S.F. Admin. Code sec. 67.3(d) (definition of "policy body").) DHR has no power to convene a closed session of the Board -- or, for that matter, of any other board or commission. DHR did not decide, and could not have decided, that the Board go into the closed session that is the subject of the complaint. The mere fact that DHR participated in the closed session does not mean that it bears legal responsibility for the closed session.

For this reason, apart from the merits, the Task Force should dismiss the complaint against DHR. However, it is unnecessary for the Task Force to resolve this jurisdictional issue, because the complaint fails on the merits.

Conclusion

The Task Force should dismiss the complaint against the Board and DHR. The Board lawfully held the closed session that is the subject of the complaint.

Respectfully submitted,

Angela Calvillo
Clerk of the Board of Supervisors

Jennifer Johnston
Chief of Policy, Department of Human Resources

36 Cal.3d 591; 205 Cal.Rptr. 794, 685 P.2d 1145 [Aug. 1984]

[L.A. No. 31831. Aug. 23, 1984.]

THE PEOPLE ex rel.
SEAL BEACH POLICE OFFICERS ASSOCIATION et al.,
Plaintiffs and Appellants, v.
CITY OF SEAL BEACH et al., Defendants and Respondents.

SUMMARY

Several public employee unions and some of their officers sought to invalidate three city charter amendments proposed by the city council and adopted by the city voters. The amendments concerned the terms and conditions of public employment. The complaint sought a writ of quo warranto declaring the charter amendments invalid for failure to comply with the "meet and confer" requirement (Gov. Code, § 3505) of the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.). The trial court sustained the city's general demurrer. After the relators failed to amend the complaint, the matter was dismissed. (Superior Court of Orange County, No. 276013, Luis A. Cardenas and Thomas F. Crosby, Jr., Judges.).

The Supreme Court reversed, holding that the city council was required to comply with the "meet and confer" requirement before proposing the amendments. It held that the requirement did not abridge the council's power under Cal. Const., art. XI, § 3, subd. (b), to propose charter amendments. Although the requirement encourages binding agreements resulting from the bargaining between the governing body of a local agency and the representative of public employees, the governing body of the agency retains the ultimate power to refuse an agreement and to make its own decision. It also held that Gov. Code, § 3504, did not exempt the council's conduct in proposing charter amendments concerning the terms and conditions of public employment from the "meet and confer" requirement as an "activity provided by law." In addition, the court held that the action met the requirement of Code Civ. Proc., § 1021.5, and that the relators were therefore entitled to recover attorney fees. (Opinion by Kaus, J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1a-1d) **Municipalities § 12—Charters—Amendment—Proposal by City Council—Compliance With Meyers-Milias-Brown Act—"Meet-and-Confer" Requirement: Labor § 41—Collective Bargaining—Subjects—Terms and Conditions of Public Employment.**—The city council of a charter city was required to comply with the Meyers-Milias-Brown Act's (Gov. Code, § 3500 et seq.) "meet-and-confer" requirement (Gov. Code, § 3505) before it proposed amendments to the city charter concerning the terms and conditions of public employment. The requirement did not abridge the council's power under Cal. Const., art. XI, § 3, subd. (b), to propose charter amendments. Although the statutory requirement encourages binding agreements resulting from bargaining between the governing body of a local agency and public employee representatives, the governing body retains the ultimate power to refuse an agreement and to make its own decision.

[See **Cal.Jur.3d,** Municipalities, § 51, Public Officers and Employees, § 185; **Am.Jur.2d,** Municipal Corporations, Counties, and Other Political Subdivisions, § 51.]

(2) **Labor § 41—Collective Bargaining—Subjects—Meyers-Milias-Brown Act—"Meet-and-Confer" Requirement.**—Though the "meet-and-confer" process between the governing body of a local agency and the public employee representatives, required by Gov. Code, § 3505, is not binding, it requires that the parties seriously attempt to resolve differences and reach a common ground.

(3) **Collective Bargaining § 38—Public Policy—Meyers-Milias-Brown Act—Legislative Intent.**—Although the Legislature did not intend to preempt all aspects of labor relations in the public sector by enacting the Myers-Milias-Brown Act (Gov. Code, § 3500 et seq.), an intention to permit local entities to adopt regulations which would frustrate the declared policies and purposes of the act cannot be attributed to the Legislature.

(4) **Labor § 37—Collective Bargaining—Meyers-Milias-Brown Act—Application to Charter Cities.**—The Legislature clearly intended that the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.) apply to charter cities. A public agency under Gov. Code, § 3501, subd. (b),

includes "every town, city, county, city and county, and municipal corporation, whether incorporated or not and whether chartered or not."

(5) **Municipalities § 12—Charters—Amendment—Legislature Regulation.**—A city's power to amend its charter can be subject to legislative regulation. The regulation of the charter amendment process is a matter of statewide concern governed exclusively by general laws which supersede conflicting conditions in a city and county charter.

(6) **Labor § 3—Fair Employment Practices—As Matter of Statewide Concern.**—Fair labor practices, uniform throughout the state, are a matter of the same statewide concern as workers' compensation, liability of municipalities for tort, perfecting and filing of claims, and the requirement to subscribe to loyalty oaths.

(7) **Municipalities § 18—Legislative Control—What Are "Municipal Affairs"—Compensation of Officers and Employees.**—Salaries of local employees of a charter city constitute municipal affairs and are not subject to general laws. Nevertheless, the process by which salaries are fixed is a matter of statewide concern and is subject to the "meet and confer" requirement (Gov. Code, § 3505) of the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.).

(8) **Municipalities § 47—Ordinances, Bylaws, and Resolutions—Enactment.**—The mode and manner of passing ordinances is a municipal affair.

(9) **Municipalities § 14—Legislative Control—Municipal Affairs—Charter Cities.**—There can be no implied limitations upon charter powers concerning municipal affairs.

(10) **Municipalities § 12—Charters—Amendment—Concerning Terms and Conditions of Public Employment: Labor § 41—Collective Bargaining—Subjects Bargaining—Meyers-Milias-Brown Act—"Meet-and-Confer" Requirement.**—Gov. Code, § 3504, did not exempt a charter city council's conduct in proposing charter amendments concerning the terms and conditions of public employment from the "meet-and-confer" requirement (Gov. Code, § 3505) of the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.), as an "activity provided by law."

(11) **Costs § 7—Amount and Items Allowable—Attorney Fees—Action Challenging Charter Amendments for Failure to Comply With**

Meyers-Milias-Brown Act.—An action by a police officers association seeking to invalidate three city charter amendments proposed by the city council and adopted by the voters, which concerned the terms and conditions of public employment, for failure of the council to comply with the "meet-and-confer" requirement (Gov. Code, § 3505) of the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.), was an action which met the requirement of Code Civ. Proc., § 1021.5. The police officers association was therefore entitled to recover attorney fees.

COUNSEL

George Deukmejian and John K. Van de Kamp, Attorneys General, Richard D. Martland, Assistant Attorney General, Henry G. Ullerich, Deputy Attorney General, George W. Shaeffer, Jr., Silver, Kreisler, Goldwasser & Shaeffer and Silver & Kreisler for Plaintiffs and Appellants.

David P. Clishman and Carroll, Burdick & McDonough as Amici Curiae on behalf of Plaintiffs and Appellants.

Richards, Watson, Dreyfuss & Gershon, Mitchell E. Abbott, Gregory W. Stepanicich and John W. Holbrook for Defendants and Respondents.

Ira Reiner, City Attorney (Los Angeles), Frederick N. Merkin, Senior Assistant City Attorney, Molly B. Roff, Deputy City Attorney, George Agnost, City Attorney (San Francisco), and Burk E. Delventhal, Deputy City Attorney, as Amici Curiae on behalf of Defendants and Respondents.

OPINION

KAUS, J.— (1a) The issue is whether the city council of a charter city must comply with the Meyers-Milias-Brown Act's (MMBA) (Gov. Code, § 3500 et seq.) "meet-and-confer" requirement (Gov. Code, § 3505) before it proposes an amendment to the city charter concerning the terms and conditions of public employment. We hold that the MMBA requirement must be met.

I

On March 8, 1977, the voters of the City of Seal Beach adopted three charter amendments.[1] These amendments had been put on the ballot by the

[1]The amendments affected two existing sections of the charter—912 and 913—and added a new section, 912.1. Sections 912 and 913 deal with disciplinary matters. Section 912.1 deals with strikes by public employees.

city council pursuant to its constitutional power to propose charter amendments (Cal. Const., art. XI, § 3, subd. (b)). One amendment required the immediate firing, subject to an administrative hearing procedure, of any city employee who participated in a strike; it also prohibited the city council from granting amnesty or otherwise rehiring any striking public employee.[2] The adoption of the amendments was certified by the city council on March 28, 1977, and became effective on that date.

Relators—several public employee unions and some of their officers—obtained leave to sue in quo warranto from the Attorney General.[3] A complaint was filed on September 20, 1977. It sought a writ of quo warranto declaring the charter amendments invalid by reason of noncompliance with the "meet-and-confer" requirement of Government Code section 3505.[4] It prayed that the trial court (1) issue a writ of quo warranto ordering that the amendments be stricken; (2) make an order declaring the charter additions and amendments null and void; and (3) declare that certain sections of the Charter of the City of Seal Beach remain in force as they existed before the amendments. The actions were held in abeyance by stipulation of the parties pending a final decision by this court in *San Francisco Fire Fighters* v. *Board of Supervisors* (1979) 96 Cal.App.3d 538 [158 Cal.Rptr. 145]. We eventually denied a hearing in that case.[5] The city then filed a general de-

[2]Since the substantive validity of the amendments is not before us, we do not quote or even summarize them at length. Suffice it to say that it is undisputed that they deal with "terms and conditions" of public employment.

[3]The propriety of the procedure is not questioned. (See *Oakland Municipal Improvement League* v. *City of Oakland* (1972) 23 Cal.App.3d 165, 168-169 [100 Cal.Rptr. 29].)

[4]Unless otherwise indicated, all statutory references are to the Government Code.

Section 3505 provides: "*The governing body of a public agency,* or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, *shall meet and confer in good faith regarding* wages, hours, and other *terms and conditions of employment* with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members *prior to arriving at a determination of policy or course of action.* [¶] 'Meet and confer in good faith' means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation 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 prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent." (Italics added.)

[5]We had granted a hearing in *San Francisco Fire Fighters* on March 15, 1978, and held the case for our decision in *Los Angeles County Civil Service Com.* v. *Superior Court* (1978) 23 Cal.3d 55 [151 Cal.Rptr. 547, 588 P.2d 249]. After that case was decided we retransferred *San Francisco Fire Fighters* to the Court of Appeal. We denied a hearing after that court filed its opinion.

murrer to the complaint, arguing that the city council had the absolute, unabridged constitutional authority to propose charter amendments to its electorate, which authority could not be impaired or limited by the requirements of the MMBA (Cal. Const., art. XI, § 3, subd. (b)).[6] The city's demurrer was based on the holding in *San Francisco Fire Fighters*, that San Francisco's Board of Supervisors did not have to meet and confer with employee representatives before proposing a charter amendment which, as here, concerned the terms and conditions of public employment.

The city's demurrer to the complaint was sustained and relators were given 30 days to amend. After they failed to do so, the matter was dismissed. Relators appeal.

II

Section 3505 of the MMBA requires 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" and to "consider fully" such presentations made by the employee organizations. Section 3505.1 provides that if the representatives successfully reach an agreement, a nonbinding memorandum of understanding shall be jointly prepared.[7]

The meet-and-confer requirement means that "a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation 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 prior to the adoption by the public agency of its

[6]The full text of article XI, section 3, follows: "(a) For its own government, a county or city may adopt a charter by majority vote of its electors voting on the question. The charter is effective when filed with the Secretary of State. A charter may be amended, revised, or repealed in the same manner. A charter, amendment, revision, or repeal thereof shall be published in the official state statutes. County charters adopted pursuant to this section shall supersede any existing charter and all laws inconsistent therewith. The provisions of a charter are the law of the State and have the force and effect of legislative enactments. [¶] (b) The governing body or charter commission of a county or city may propose a charter or revision. *Amendment* or repeal *may be proposed by* initiative or by *the governing body*. [¶] (c) An election to determine whether to draft or revise a charter and elect a charter commission may be required by initiative or by the governing body. [¶] (d) If provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail." (Italics added.)

[7]Section 3505.1 provides: "If agreement is reached by the representatives of the public agency and a recognized employee organization or recognized employee organizations, they shall jointly prepare a written memorandum of such understanding, which shall not be binding, and present it to the governing body or its statutory representative for determination."

final budget for the ensuing year." (§ 3505.) (2) "Though the process is not binding, it requires that the parties seriously 'attempt to resolve differences and reach a common ground.'" (*Los Angeles County Civil Service Com.* v. *Superior Court* (1978) 23 Cal.3d 55, 61-62 [151 Cal.Rptr. 547, 588 P.2d 249], citing *Placentia Fire Fighters* v. *City of Placentia* (1976) 57 Cal.App.3d 9, 25 [129 Cal.Rptr. 126].)

The MMBA has two stated purposes: (1) to promote full communication between public employers and employees; and (2) to improve personnel management and employer-employee relations within the various public agencies. These purposes are to be accomplished by establishing methods for resolving disputes over employment conditions and by recognizing the right of public employees to organize and be represented by employee organizations. (§ 3500.) While the Legislature established a procedure for resolving disputes regarding wages, hours and other conditions of employment, it did not attempt to establish standards for the wages, hours and other terms and conditions themselves. Rather, it "set forth reasonable, proper and necessary principles which public agencies must follow in their rules and regulations for administering their employer-employee relations, . . ." (*Los Angeles County Firefighters Local 1014* v. *City of Monrovia* (1972) 24 Cal.App.3d 289, 295 [101 Cal.Rptr. 78].) Ambiguous language in section 3500 which seemingly leaves room for local legislation inconsistent with MMBA, has not been so interpreted. (3) "Although the Legislature did not intend to preempt all aspects of labor relations in the public sector, we cannot attribute to it an intention to permit local entities to adopt regulations which would frustrate the declared policies and purposes of the MMB Act." (*Huntington Beach Police Officers' Assn.* v. *City of Huntington Beach* (1976) 58 Cal.App.3d 491, 501-502 [129 Cal.Rptr. 893].) (4) Finally, the Legislature clearly intended that the MMBA apply to charter cities: a public agency under section 3501, subdivision (c) includes "every town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not."

(1b) The simple question posed by this case is whether the unchallenged constitutional power of a charter city's governing body to propose charter amendments may be used to circumvent the legislatively designed methods of accomplishing the goals of MMBA.

III

Seal Beach argues that the meet-and-confer requirement of the MMBA is incompatible with the charter amendment provisions contained in article XI, section 3 of the California Constitution. (See fn. 6, *ante*.) It contends that

the central issue in this case is whether the Legislature may, by statute, restrict or qualify a right or power expressly reserved to a charter city by the Constitution. It points out—correctly—that this issue was squarely decided in its favor in *San Francisco Fire Fighters* v. *Board of Supervisors, supra,* 96 Cal.App.3d 538.

Article XI, section 3, subdivision (b), of the California Constitution does, of course, give the governing body of a charter city the right to propose charter amendments to the electorate; *San Francisco Fire Fighters* held that this right could not be abridged by the Legislature and that therefore the MMBA meet-and-confer requirement could not be enforced. The court stated that "[w]e discern . . . a clear purpose that when a county's, or city's, governing body shall find it to be in the public interest to propose a specific charter amendment for adoption by the electorate, it shall have the absolute and untrammeled right and duty to do so. Just as clearly appears a corollary intent that such charter amendment proposals, or the decision whether they be made at all, shall not be the product of bargaining and compromise between the public entity's representatives, and others." (*San Francisco Fire Fighters, supra,* 96 Cal.App.3d at p. 548.)

It is a truism that few legal rights are so "absolute and untrammeled" that they can never be subjected to peaceful coexistence with other rules. Thus in *Los Angeles County Civil Service Com.* v. *Superior Court, supra,* 23 Cal.3d at pages 65-66, we reconciled a charter provision which mandated that civil service rules be amended only after public hearings, with the meet-and-confer provisions of the MMBA, although under article XI, section 3, subdivision (a) the charter provision superseded all "inconsistent" laws. "We conclude that the meet-and-confer requirement can coexist with the charter-mandated hearing. We see no reason why the commission's integrity as a neutral administrator of the merit system would be jeopardized by its participating in bargaining sessions with union and management representatives." (*Id.* at pp. 65-66.)

The city, however, claims that the MMBA cannot be harmonized with its constitutional right to propose charter amendments. First, it asserts that any regulation which affects this right is invalid. Under this argument, the city's power to amend its charter is so absolute that it is irrelevant that a legislative enactment which purports to affect it, does not actually conflict with this power. **(5)** The law, however, is that a city's power to amend its charter can be subject to legislative regulation. (*District Election etc. Committee* v. *O'Connor* (1978) 78 Cal.App.3d 261, 267 [144 Cal.Rptr. 442].) That case squarely held that "the regulation of the charter amendment process is a matter of statewide concern governed exclusively by general laws which

supersede conflicting provisions in a city and county charter." (*Id.* at p. 267.) **(1c)** Thus, the argument that the procedure for putting charter amendments on the ballot is sacrosanct and immune to legislative control has already been rejected. We agree with the holding in *District Election*, which makes this an a fortiori case: in *District Election* there was an actual conflict between a state statute—section 34459 of the Government Code—and the relevant charter provision concerning the number of signatures required to put an amendment on the ballot through the initiative process.[8] Section 3505 is, of course, far less intrusive. Cities function both as employers and as democratic organs of government. The meet-and-confer requirement is an essential component of the state's legislative scheme for regulating the city's employment practices. By contrast, the burden on the city's democratic functions is minimal.

Second, the city claims that any attempt to harmonize the meet-and-confer process with the procedure for proposing charter amendments rests on a misguided effort "to transmogrify this case into one involving 'pre-emption' of local regulations dealing with matters of statewide concern." We disagree. We are fully aware that the dichotomy to which the city refers—state preemption v. municipal affair—would, as such, become relevant only if relators had mounted an attack on the power of the city to enact the substance of the three charter amendments. As already noted (see fn. 2, *ante*), they have not done so. Yet there is an undeniable parallel between the issue in this case and issues which our courts face in connection with various aspects of the MMBA on an almost daily basis: to what extent is a constitutional grant of power so absolute, that it must remain totally unaffected by even the most vital legislative concerns? On this question the cases in which legislative enactments confront the municipal "home rule" rights of charter cities and counties (Cal. Const., art. XI, § 5) are indeed instructive.

If the city is correct and the MMBA cannot affect the city council's constitutional power to propose charter amendments, much law concerning the impact of the act on charter cities will have to be rewritten. Article XI, section 5, subdivision (b) of the California Constitution[9] permits city charters to provide for "the constitution, regulation and government of the city

[8]Needless to say, this case does not involve the question whether the meet-and-confer requirement was intended to apply to charter amendments proposed by initiative.

[9]"It shall be competent in all city charters to provide, in addition to those provisions allowable by this Constitution, and by the laws of the State for: (1) the constitution, regulation, and government of the city police force (2) subgovernment in all or part of a city (3) conduct of city elections and (4) plenary authority is hereby granted, subject only to the restrictions of this article, to provide therein or by amendment thereto, the manner in which, the method by which, the times at which, and the terms for which the several municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal, and for their compensation, and for the number of deputies, clerks

police force," and grants "plenary authority" to provide for "the manner in which, the method by which, the times at which, and the terms for which the several municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal, and for their compensation, and for the number of deputies, clerks, and other employees that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees." What grant of power could sound more absolute? Yet in an unbroken series of public employee cases, starting with *Professional Fire Fighters, Inc.* v. *City of Los Angeles* (1963) 60 Cal.2d 276, 289-295 [32 Cal.Rptr. 830, 384 P.2d 158] and ending for the time being with *Baggett* v. *Gates* (1982) 32 Cal.3d 128, 135, 140 [185 Cal.Rptr. 232, 649 P.2d 874], it has been held that a "general law prevails over local enactments of a chartered city, even in regard to matters which would otherwise be deemed to be strictly municipal affairs, where the subject matter of the general law is of statewide concern." (*Professional Fire Fighters, supra,* 60 Cal.2d at p. 292.)[10] **(6)** Fair labor practices, uniform throughout the state, are a matter "of the same statewide concern as workmen's compensation, liability of municipalities for tort, perfecting and filing of claims, and the requirement to subscribe to loyalty oaths." (*Id.* at pp. 294-295.) With these precepts in mind, in *Professional Firefighters* we resolved a conflict between the statutory right of firemen to organize and the city's "charter provisions, ordinances and regulations" (*id.* at p. 290) in favor of the statute. In *Baggett* v. *Gates, supra,* 32 Cal.3d 128, we held it to be of no consequence that the Public Safety Officers' Procedural Bill of Rights Act (§§ 3300-3311) conflicted with and impinged on a charter city's power to determine the manner in which its employees could be removed and, generally, impinged "to a limited extent on the city's general regulatory power over the [police] department." (*Id.* at p. 138.) **(7)** **(See fn. 11)** In the same vein, in *Huntington Beach Police Officers' Assn.* v. *City of Huntington Beach* (1976) 58 Cal.App.3d 492 [129 Cal.Rptr. 893], a charter city resolution purporting to exclude work hour schedules from the meet-and-confer process was held invalid.[11]

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and other employees that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees." (Cal. Const., art. XI, § 5, subd. (b).)

[10]*Professional Fire Fighters* was, of course, decided several years before 1970 when article XI of the Constitution was recast. Section 13 of the article provides, however, in relevant part: "The terms general law, general laws, and laws, as used in this Article, shall be construed as a continuation and restatement of those terms as used in the Constitution in effect immediately prior to the effective date of this amendment, and not as effecting a change in meaning." (See also *Sonoma County Organization of Public Employees* v. *County of Sonoma* (1979) 23 Cal.3d 296, 317 [152 Cal.Rptr. 903, 591 P.2d 1].)

[11]We emphasize that there is a clear distinction between the *substance* of a public employee labor issue and the *procedure* by which it is resolved. Thus there is no question that

All these cases involved actual conflicts between state statutes and city "law." **(8, 9),** (See fn. 12) **(1d)** No such conflict exists between the city council's power to propose charter amendments and section 3505. Although that section encourages binding agreements resulting from the parties' bargaining, the governing body of the agency—here the city council—retains the ultimate power to refuse an agreement and to make its own decision. (See *Glendale City Employees' Assn., Inc.* v. *City of Glendale* (1975) 15 Cal.3d 328, 334-336 [124 Cal.Rptr. 513, 540 P.2d 609].)[12] This power preserves the council's rights under article XI, section 3, subdivision (b)—it may still propose a charter amendment if the meet-and-confer process does not persuade it otherwise.

We therefore conclude that the meet-and-confer requirement of section 3505 is compatible with the city council's constitutional power to propose charter amendments.

IV

(10) The city asserts a separate and independent ground articulated in *San Francisco Fire Fighters* as a basis for affirmance of the trial court's judgment. *San Francisco Fire Fighters* held that section 3504 provides a charter city with an express exemption from the requirements of the MMBA. Section 3504 defines the scope of representation to include "all matters relating to the 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." The court in *San Francisco Fire Fighters* stated: "[T]he Legislature enacted Government

"salaries of local employees of a charter city constitute municipal affairs and are not subject to general laws." (*Sonoma County Organization of Public Employees* v. *County of Sonoma, supra,* 23 Cal.3d at p. 317.) Nevertheless, the process by which salaries are fixed is obviously a matter of statewide concern and none could, at this late stage, argue that a charter city need not meet and confer concerning its salary structure.

[12]The logical consequence of the city's position is, actually, that the MMBA cannot be applied to charter cities at all. If a meet-and-confer session with the city council concerning contemplated charter amendments impinges on the council's constitutional power, what of salary ordinances? It is "firmly established that the mode and manner of passing ordinances is a municipal affair . . . and that there can be no implied limitations upon charter powers concerning municipal affairs." (*Adler* v. *City Council* (1960) 184 Cal.App.2d 763, 776-777 [7 Cal.Rptr. 805].) If meeting and conferring on charter amendments is an illegal limitations on the city council's power, why is the same not true of any ordinance which affects "terms and conditions of public employment?"

Code section 3504 to provide that the Meyers-Milias-Brown Act's duty to 'meet and confer' did 'not include consideration of the merits [or] necessity . . . of any . . . activity provided by law . . . .' [Fn. omitted.] In the case at bench, proposal of charter amendments deemed appropriate by San Francisco's governing body was an activity provided by the highest law of the state, i.e., its Constitution. Under section 3504 consideration of the *merits* or *necessity* of such a proposal was *expressly* exempted from the 'meet and confer' requirements of the Meyers-Milias-Brown Act." (*Id.*, 96 Cal.App.3d at pp. 548-549.)

This interpretation of section 3504, however, differs from that of other courts, commentators and of this court. First, the qualifying language of section 3504 was adopted as part of the 1968 amendments "presumably as a protection against the expanded concept of bargaining which those amendments embraced—but its meaning is far from clear" (Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719, 750.) In *Fire Fighters Union* v. *City of Vallejo* (1974) 12 Cal.3d 608, 615-616 [116 Cal.Rptr. 507, 526 P.2d 971], we concluded that the language merely indicated the Legislature's intent to "forestall any expansion of the language of 'wages, hours and working conditions' to include more general managerial policy decisions." (See also *Huntington Beach Police Officers' Assn.* v. *City of Huntington Beach, supra*, 58 Cal.App.3d 492, 503-504.) If proposing charter amendments is an activity provided by law, so is just about every aspect of employer-employee relations in the public sector. As the Court of Appeal said in this case: "Taken to its logical extreme, this argument would lead to the conclusion that all employment proposals are exempt under the qualifying language of section 3504. This result is obviously untenable."

VI

We conclude that the city council was required to meet and confer with the relators before it proposed charter amendments which affect matters within their scope of representation. The MMBA requires such action and the city council cannot avoid the requirement by use of its right to propose charter amendments.

(11) We are satisfied that relators' action meets the requirement of section 1021.5 of the Code of Civil Procedure. (*Baggett* v. *Gates* (1982) 32 Cal.3d 128, 142-143 [185 Cal.Rptr. 232, 649 P.2d 874].) They are therefore entitled to recover attorney fees.

The judgment is reversed. The trial court is directed to enter an order overruling the demurrer and to award relators an appropriate amount for attorney fees.

Bird, C. J., Mosk, J., Broussard, J., Reynoso, J., Grodin, J., and Lucas, J., concurred.

CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA
City Attorney

OFFICE OF THE CITY ATTORNEY

ERNEST H. LLORENTE
Deputy City Attorney

DIRECT DIAL: (415) 554-4236
E-MAIL: ernest.llorente@sfgov.org

December 3, 2007

Sue Cauthen, Chair
Members of the Complaint Committee

Re: Patrick Monette-Shaw v. the Board of Supervisors and the Human Resources Department (07092)

Dear Chair Cauthen and Members of the Complaint Committee:

This letter addresses the issue of whether the Sunshine Ordinance Task Force ("Task Force") has jurisdiction over the complaint of Patrick Monette-Shaw against the San Francisco Board of Supervisors and the Human Resources Department.

BACKGROUND

On November 17, 2007, Patrick Monette-Shaw reviewed the Board of Supervisors Meeting Agenda for November 20, 2007 and noted that Agenda item 24 listed

> Closed Session- Conference with the City's Human Resources Director: Motion that the Board of Supervisors convene in closed session with the City's Human Resources Director, or her designated representative, pursuant to Government Code section 54957.6 and San Francisco Administrative Code Section 67.10(e) regarding a potential charter amendment to address the cost and funding of retiree medical benefits.

COMPLAINT

On November 18, 2007, Patrick Monette-Shaw filed a complaint against the Board of Supervisors and the Human Resources Department alleging violations of the Public Meeting Requirements Sunshine Ordinance and the State Brown Act for the scheduling of a closed session.

SHORT ANSWER

Based on Complainant's allegation and the applicable sections of the Sunshine Ordinance and the California Public Records Act, which are cited below, the Sunshine Ordinance Task Force ***does*** have jurisdiction over the allegation. The allegations are covered under 67..10 and 67.8(a)5 of the Ordinance and State Government Code Section 54957.6.

DISCUSSION AND ANALYSIS

Article I Section 3 of the California Constitution as amended by Proposition 59 in 2004, the State Public Records Act, the State Brown Act, and the Sunshine Ordinance as amended by Proposition G in 1999 generally covers the area of Public Records and Public Meeting laws that the Sunshine Ordinance Task Force uses in its work.

The Sunshine Ordinance is located in the San Francisco Administrative Code Chapter 67. All statutory references, unless stated otherwise, are to the Administrative Code. Section 67.10 generally covers closed sessions and Section 67.8(a)5 covers Agenda Disclosures of Closed Sessions. Government Code Section 54957.6 generally covers Closed Sessions..

In this case, Patrick Monette-Shaw's allegations about violations of the rules regarding closed sessions bring the case within the jurisdiction of the Task Force. The Task Force will determine whether the BOS and HRD violated the Ordinance and/or the Brown Act.

<complaints@sfgov.org>
11/19/2007 03:05 PM

To <sotf@sfgov.org>
cc
bcc
Subject Sunshine Complaint

History: This message has been forwarded.

Submitted on: 11/19/2007 3:05:53 PM

Department: San Francisco Board of Supervisors and the Department of Human Resources

Contacted: All Supervisors and Micki Callahan Director of DHR

Public_Records_Violation: No

Public_Meeting_Violation: Yes

Meeting_Date: November 20, 2007

Section(s)_Violated: §67.10, §67.10(e), §67.10(e)(1), and §67.8(a)(5); CA Government Code 54957.6(a)

Description: Holding a closed session in violation of the Sunshine Ordinance and the California Government Code.

Hearing: Yes

Date: November 18, 2007

Name: Patrick Monette-Shaw

Address: 975 Sutter, Apt. 6

City: San Francisco

Zip: 94109

Phone: 415-292-6969

Email: Pmonette-shaw@earthlink.net

Anonymous:

User Data

Client IP (REMOTE_ADDR) : 172.31.2.118
Client IP via Proxy (HTTP_X_FORWARDED_FOR) :

pmonette-shaw
<Pmonette-shaw@earthlink.net>
11/18/2007 12:04 PM
Please respond to
Pmonette-shaw@earthlink.net

To "Frank Darby, SOTF Administrator" <sotf@sfgov.org>
cc Doug Comstock <dougcoms@aol.com>, Mayor Gavin Newsom <gavin.newsom@sfgov.org>, Supervisor Aaron Peskin <aaron.peskin@sfgov.org>, Supervisor Bevan Dufty
bcc
Subject Sunshine Complaint Against the Board of Supervisors and Micki Callahan, Director of DHR

November 18, 2007

Frank Darby, Administrator
Sunshine Ordinance Task Force
1 Dr. Carlton B. Goodlett Place
City Hall, Room 244
San Francisco, CA 94102-4689

Dear Mr. Darby,

Please find attached a Sunshine Complaint against the San Francisco Board of Supervisors and Micki Callahan, Director of the Department of Human Resources regarding improper scheduling of a closed session of the Board of Supervisors.

Please schedule this complaint on the agenda for the next Complaint Committee meeting.

Thank you.

Patrick Monette-Shaw

cc: Dough Comstock, Chair, SOTF


att6lycc.doc

Patrick Monette-Shaw

975 Sutter Street, Apt. 6
San Francisco, CA 94109
Phone: (415) 292-6969 • e-mail:

November 17, 2007

Frank Darby
Acting Administrator
Sunshine Ordinance Task Force
City Hall, Room 244
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

Re: Complaint Against the San Francisco Board of Supervisors and the Department of Human Resources

Complaint against which Department or Commission:
- San Francisco Board of Supervisors
- Department of Human Resources

Name of individual(s) **responsible** at Department or Commission:
- Board of Supervisors, including:
  - Supervisor Aaron Peskin, President
  - Supervisor Michela Alioto-Pier
  - Supervisor Tom Ammiano
  - Supervisor Carmen Chu
  - Supervisor Chris Daly
  - Supervisor Bevan Dufty
  - Supervisor Sean Elsbernd
  - Supervisor Sophie Maxwell
  - Supervisor Jake McGoldrick
  - Supervisor Ross Mirkarimi
  - Supervisor Gerardo Sandoval
- Micki Callahan, Director of DHR

Alleged Violation: ☐ Public Records Access ☒ Public Meeting

Sunshine Ordinance Section: §67.10, §67.10(e), §67.10(e)(1), and §67.8(a)(5); CA Government Code 54957.6(a)

Do you wish a public hearing before the Sunshine Ordinance Task Force? ☒ Yes ☐ No

---

Please describe alleged violation.

Summary

Agenda item 24 on the San Francisco Board of Supervisors November 20 agenda is deficient, and improper, for several reasons under San Francisco's Sunshine Ordinance. The agenda description read:

> **"Closed Session - Conference with the City's Human Resources Director**
> Motion that the Board of Supervisors convene in closed session with the City's Human Resources Director, or her designated representative, pursuant to Government Code section 54957.6 and San Francisco Administrative Code section 67.10(e) regarding a potential charter amendment to address the cost and funding of retiree medical benefits."

Details

1. **Potential Violation of Sunshine Ordinance Section 67.10**
   Sunshine Section 67.10 enumerates the permitted topics that can be discussed in closed session. There is no provision anywhere throughout §67.10 that permits conducting a closed session meeting to discuss proposed Charter amendment in the form of ballot measures to be placed before City voters. Discussing Charter amendments is not within the scope of §67.10 and other sections of the Sunshine Ordinance designed to address closed sessions. On the contrary, charter amendments are public policy issues that members of the public have a right to be informed about during open, not closed, meetings to learn why a public policy change is being considered and developed.

2. **Potential Violation of Sunshine Ordinance Section 67.10(e)**
Sunshine Section 67.10(e) states the City may hold a closed session to discuss "matters within the scope of collective bargaining"; however, retiree health care benefits are NOT subject to collective bargaining. Since retiree healthcare benefits are set by the City Charter, not benefits within the scope of collective bargaining, the City does not have a valid reasons to hold closed session discussions.

3. **Potential Violation of Sunshine Ordinance Section 67.10(e)(1)**
The Board of Supervisors can ***only*** hold closed sessions regarding contract benefits "solely ***prior to and during*** active consultation and discussions with the City's designated representatives of employee organizations [unions]." The key word here is "solely," and the City is ***not*** currently conducting on-going contract negotiations, and won't until 2009, so the Board of Supervisors proposed November 20 closed session is not happening either "prior to or during" contract talks or collective bargaining, and since there are no on-going contract talks, there is no reason to keep the City's position about a proposed ballot measure to change the City Charter a secret in a closed session.

4. **Potential Violation of Sunshine Ordinance Section 67.8(a)(5)**
The Sunshine Ordinance stipulates the format for closed meeting notices; Board of Supervisors agenda item 24 on its November 20 agenda wrongly fails to follow the format since it does not state "CONFERENCE WITH NEGOTIATOR -- COLLECTIVE BARGAINING," and the phrase "Anticipated issue(s) under negotiation: Retiree Health Care Benefits," as required by the Sunshine Ordinance and CA Government Code 54957.6. There are no current labor negotiations, as the City well knows, and labor contracts won't be negotiated until the year 2009, at the earliest. Beyond that, the City can't now hold a closed-to-the-public hearing two years in advance of contract talks, since Unions representing City employees have not even been notified this closed-to-the public hearing has been scheduled, nor have union members in SEIU Local 1021, nor other unions, been informed by their unions of any proposals to change benefits provided in the City Charter.

5. **Potential Violation of California Government Code Section 54957.6(a)**
As well, CA Government Code 54957.6(a) also states that closed sessions "may take place ***prior to and during*** consultations and discussions with representatives of employee organizations"; it further states that the closed sessions can be held to discuss an agency's [City's] available funds and funding priorities, but ***only insofar*** as these discussions relate to providing instructions to the local agency's designated representatives." Again, the City is not currently conducting contract negotiation talks, so the Board of Supervisors proposed November 20 closed session is not happening either "prior to or during" contract talks or collective bargaining, and the closed session is not to provide instructions to City labor negotiators, but to discuss a proposed ballot measure to change the City's charter.

For the reasons presented above, I ask that the Sunshine Task Force find that the Board of Supervisors and the Department of Human Resources violated the Sunshine Ordinance by proposing to hold a closed session in violation of the Sunshine Ordinance and the California Government Code. If the Board of Supervisors vote to hold this improper closed session and conducts this closed session on November 20 or on any other date, I ask that the Sunshine Task Force order the Board of Supervisors and the Department of Human Resources to immediately release the required audio recording and any written summaries of the closed session discussions by ordering them to make them public records protected by the Sunshine Ordinance.

Sincerely,

Patrick Monette-Shaw

BOARD of SUPERVISORS

City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco 94102-4689
Tel. No. 554-5184
Fax No. 554-5163
TDD/TTY No. 544-5227

December 4, 2007

Honorable Members, Complaint Committee
Sunshine Ordinance Task Force
c/o/ Frank Darby, Jr., Administrator
Office of the Clerk, Board of Supervisors
Room 244, City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

RE: Complaint No. 07092 - Patrick Monette-Shaw v. Board of Supervisors and Department of Human Resources

Dear Task Force Members:

The Board of Supervisors (the "Board") is in receipt of the above complaint. The complaint asserts that the Board of Supervisors violated the Ralph M. Brown Act and the San Francisco Sunshine Ordinance by going into closed session at its November 20, 2007 meeting pursuant to California Government Code Section 54957.6(a) and San Francisco Administrative Code Section 67.10(e) to confer with the City's Director of Human Resources or her designated representative with respect to a potential Charter Amendment to address the cost and funding of retiree medical benefits.

For purposes of the Complaint Committee hearing on December 11, 2007, and the issue of the jurisdiction of the Task Force over this complaint, we submit this letter. We reserve the right to supplement this letter with a further submission to the Task Force in the event there is a hearing on the merits of this complaint. While the complaint is lacking in merit, we acknowledge that the Task Force has jurisdiction to hear the complaint against the Board.

Respectfully submitted,

Angela Calvillo
Clerk of the Board

City and County of San Franci ›

Gavin Newsom
Mayor

Micki Callahan
Human Resources Director

Department of Human Resources

December 4, 2007

Honorable Members, Complaint Committee
Sunshine Ordinance Task Force
c/o Frank Darby, Jr., Administrator
Office of the Clerk, Board of Supervisors
Room 244, City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

RE: Complaint 07092, Patrick Monette-Shaw v. the Board of Supervisors and Department of Human Resources

Dear Task Force Members:

I write in response to the above complaint for purposes of the Complaint Committee hearing on December 11, 2007 and the issue of the Sunshine Ordinance Task Force's ("Task Force") jurisdiction over this complaint as it relates to the Department of Human Resources ("DHR"). Although we believe that the complaint lacks merit, the only issue addressed herein is that of the Task Force's jurisdiction over the complaint against DHR. We reserve the right to supplement this letter with a further submission to the Task Force in the event there is a hearing on the merits of this complaint.

The complaint asserts that the Board of Supervisors violated the Ralph M. Brown Act ("Brown Act") and the San Francisco Sunshine Ordinance ("Sunshine Ordinance") by going into closed session at its November 20, 2007 meeting pursuant to California Government Code Section 54957.6(a) and San Francisco Administrative Code Section 67.10(e) in order to confer with the Human Resources Director over a potential Charter amendment to address the cost and funding of retiree medical benefits. While it is DHR's view that the closed session was completely lawful, we believe that any legal challenge to the closed session, however unwarranted, may be properly brought against the Board of Supervisors but not DHR.

The Task Force does not have the jurisdiction to entertain the complaint against DHR since the responsibility for holding a closed session lies with the policy body or legislative body that decides to go into closed session; it does not lie with any other board, commission, department, or official. Section 67.10(b) of the Sunshine Ordinance begins, "A *policy body* may, but is not required to, hold closed sessions ..." (Emphasis added.) Similarly, Section 54957.6(a) of the Brown Act begins, "Notwithstanding any other provision of law, a *legislative body* of a local agency may hold closed sessions ..." (Emphasis added.) The plain language of both laws compels the conclusion that this complaint, though not warranted on the merits, may be properly directed to the Board of Supervisors, but not to another City department such as DHR.

Accordingly, we request that the Complaint Committee recommend to the Task Force that the Task Force lacks jurisdiction over this complaint to the extent the complaint has been brought against DHR.

Respectfully submitted,

Jennifer Johnston
Chief of Policy