

League of California Cities

“The Dividing Line Between Council Leadership and Management”

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About the Authors

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THE DIVIDING LINE BETWEEN COUNCIL LEADERSHIP AND MANAGEMENT

As a new city council member, you will undoubtedly find yourself dealing with issues that you never once had given a second thought, let alone an initial thought. You will also find yourself working and interacting with city management on a variety of issues, such as labor relations and employee discipline. In some instances, the interactions will be harmonious, while in others, they will be contentious. The following presents a broad overview of some of the issues that both create and cross the dividing line between council leadership and city management.

I. ROLES AND RESPONSIBILITIES

Although a city council and city management both constitute “management” for which a city can be held liable, each plays a different role in managing a city. Understanding that difference can go a long way toward reducing, if not eliminating, potential conflicts with city management.

CHARTER VERSUS GENERAL LAW CITIES

As set forth in the Government Code, cities in California are defined as either “charter cities” or “general law cities.” A city is a “charter city” when it is organized under a charter.¹ The city’s charter is “the equivalent of a local constitution. It is the supreme organic law of the city, subject only to conflicting provisions in the federal and state constitutions and to preemptive state law.”²

For charter cities, the authority and powers of the city council and other city officials, whether elected or appointed, will be contained in the city charter. As such, it is important that you familiarize yourself with your “local constitution” so there is no confusion as to which office or body has the power and authority to take certain actions.

In contrast, a “general law city” is one which is organized under the general law of California.³ As such, a general law city only has those powers which the state legislature has expressly conferred upon it, or which are either necessarily incident to those express powers or essential to the declared object and purposes of the city. Those powers, and the

restrictions on those powers, are set forth in detail in Title 4 of the Government Code.

While the following illustrates how the state legislature has provided for the government of “general law cities,” the Government Code also allows such cities to pass ordinances whereby duties imposed on one office can be transferred to another office so they can best meet the needs of their city.⁴

MAYOR

City mayors are either elected by the general public or selected by the city council.⁵ In general law cities, the mayor is a member of the city council and has all the powers and duties of a member of the city council.⁶ Pursuant to the Government Code, the mayor may:

- C sign warrants drawn on the city treasurer;
- C sign written contracts and conveyances made or entered into by the city;
- C sign all instruments requiring the city seal.⁷

However, if the city council so chooses, it can pass an ordinance allowing an officer other than the mayor to sign the documents above.⁸

The mayor may also administer oaths and affirmations, take affidavits and certify them, and acknowledge executions of all instruments executed by the city.⁹

In cities where the mayor is elected by the public, the mayor, with the approval of the city council, makes all appointments to boards, commissions, and committees, unless otherwise specifically provided by statute.¹⁰

CITY COUNCIL

The city council is the legislative body of a city.¹¹ The city council has the authority to pass a resolution fixing the compensation of all appointive officers and employees.¹² While appointed officers and employees hold office at the pleasure of the city council, a city will be still be precluded from dismissing an appointed officer or employee in violation of public policy.¹³

The city council appoints the chief of police, and may appoint a city attorney and other subordinate officers or employees as it deems necessary.¹⁴

If the offices of city clerk is appointive rather than elective, the city council has the responsibility to make the appointment unless it passes an ordinance vesting the appointing power in the city manager.¹⁵

The city council also has the authority to pass ordinances that do not conflict with the federal and state constitutions, and federal and state laws.¹⁶ It can also make the appointments to all regular and ongoing boards, commissions, and committees.¹⁷

CITY MANAGER

In general law cities which have elected a “city manager” form of government, the city manager’s powers and duties are defined by the ordinance establishing the city manager position.¹⁸ Appointed by the city council, the city manager is essentially a city’s chief executive officer/administrative officer.¹⁹

CITY ATTORNEY

The city attorney provides legal advice to the city council and administers the city’s legal affairs.²⁰

CITY CLERK

Like the Mayor, a city clerk can be either appointed or elected to the position.²¹ If appointive, the city council has the authority to make the appointment.²² The city clerk has the responsibility for keeping accurate records for the city, including records of all ordinances passed by the city council.²³ As such, the city clerk is a city’s official record-keeper. The city clerk maintains custody of the city seal, and also has the authority to administer oaths and affidavits.²⁴

II. RESTRICTIONS ON COUNCIL'S INTERACTION WITH MANAGEMENT

One of the first things to keep in mind as you assume your duties and responsibilities as a city council member, is that there is very likely a law, rule, regulation, or ordinance that in some way controls or dictates the action that you take as either an individual council member, or as part of the council as a whole. While there is little that is certain in this world, you can be assured that ignoring or circumventing the established protocol will almost always have consequences.

FEDERAL LAWS

The First Amendment prohibits a council member from suppressing an employee's exercise of his or her free speech at a council meeting, unless the speech becomes disruptive or has no relation to the city or the city's business.

STATE LAWS

California Government Section 87100 prohibits public officials from using their official position to influence a governmental decision in which he knows or has reason to know he has a financial interest. Thus, a city council member cannot insist that the city manager award a city contract to the council member's relative or influence the city manager to hire a relative.

Government Code Section 54954.3(c) also prohibits the council from prohibiting speech that criticizes the policies, procedures, programs or services of the city, or the acts or omissions of the council.

CITY CHARTER

The following examples illustrate how some cities define the roles of the city council and city management.

One city charter provides that the city council has no authority to review (1) the actions of the fire and police pension commission; (2) the quasi-judicial decisions of the board of civil service commission; or (3) the individual personnel decisions of boards of commissioners other than the board of police commissioners.

That same city charter provides that the authority to make client decisions in litigation depends on whether the charter provides the council, the mayor, or a particular commission with responsibility over the subject matter. Where there is a dispute over who has the responsibility, the charter provides that the city attorney determines who is authorized to make client decisions on behalf of city.

Another city's charter provides the City Manager has the "duty" to appoint, employ, remove, promote and demote any and all officers and employees of the City," but requires the consent of the city council when the employee to be hired or discharged is a department head.

In yet another city, the charter provides that the City Manager has the broad and ultimate authority to appoint all employees, except: (1) a council-appointed officer; (2) an elected official; and (3) the principal deputy of an elected official.

Thus, as seen by these sample provisions of various city charters, a city's charter defines, establishes, and restrict the powers and authorities wielded by not only the city council, but also by other city officials.

III. PERSONNEL ISSUES

INTERACTIONS BETWEEN THE CITY COUNCIL AND STAFF

What, if any, direction and control a city council has over city staff will depend, in part, on how that issue has been addressed in either the city's charter or its municipal code. Generally, the city council has no right to either manage or direct city employees in their duties; that task usually falls to the city manager and the employee's supervisors. Should a city council stray from its prescribed role and become involved in the supervision of a city employee, that council not only demonstrates a complete disregard for the command structure of the city, it also undermines the authority of both the city manager and the supervisors within the employee's chain of command. In addition, the council may be violating either state or federal laws through such interference. Unless a city council wishes to micro-manage at such a level, it is highly recommended that a city council not interfere with matters relating to individual employees.

ACCESSING PERSONNEL FILES

As a city council member, your right to access an employee's personnel file is restricted. Employees have both constitutional and statutory rights to privacy that extend to information contained in personnel files.²⁵ As such, the city has a duty to ensure that information contained in an employee's personnel files or supervisor's desk file is not disclosed to others, including members of the city council, unless the person has a demonstrated need to know.

You do not have a "need to know" simply by virtue of your status as a member of a city council. Nor do you have a "need to know" because you received a complaint about the employee from either a constituent or another employee. Thus, while you may be a member of the city council, you have no right of access to an employee's personnel files unless the documents you wish to review have some relevance to your duties as a member of the city council.

Further, while California Labor Code Section 1198.5 provides every city employee with the right to inspect his or her own personnel records maintained by the city, and allows the city to establish procedures for such inspection, it does not provide any right of inspection to the city council.

PEACE OFFICER PERSONNEL FILES

If the personnel files to be accessed belong to a peace officer, then your ability to access those personnel files is even more restricted. Both the penal code and the evidence code provide that the personnel records of a peace officer, including any citizen complaints lodged against the officer and any related investigation of such complaints, are confidential and may not be disclosed in any criminal or civil proceeding absent strict compliance with certain procedures.²⁶

Moreover, the definition of what constitutes a peace officer's "personnel records" encompasses a far greater range of records. Pursuant to Penal Code Section 832.8, personnel records is defined as

"any file maintained under that individual's name by his or her employing agency and containing records relating to any of the following:

- (a) Personal data, including marital status, family members, educational and employment history, home addresses, or similar information.*
- (b) Medical history.*
- (c) Election of employee benefits.*

- (d) *Employee advancement, appraisal, or discipline.*
- (e) *Complaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties.*
- (f) *Any other information the disclosure of which would constitute an unwarranted invasion of personal privacy.”²⁷*

As a member of the city council, you may find yourself in a situation involving a citizen complaint against a member of the police department where you would want to review a peace officer’s personnel file so you could respond to your constituent. You may not do so. Given that the legislature has imposed strict limitations on accessing a peace officer’s personnel records, you should always speak with your city attorney before attempting to access such records.

CLOSED SESSION DOCUMENT REVIEW

Pursuant to the Government Code Section 54957 of the Brown Act, a city council may hold a closed session to not only consider the appointment/employment of a public employee, but also to consider the discipline, or dismissal of a public employee.²⁸ As part of the council’s consideration, you may be provided with at least a portion of an employee’s personnel file, if not the whole file.

IV. THE PUBLIC RECORDS ACT

The purpose of California’s Public Records Act (the “Act”), Government Code Section 6250 *et seq.* is to provide the public with access to information that is within the possession of public agencies, while protecting an individual’s right to privacy.²⁹ The Act’s definition of “public records” is intended to cover every conceivable kind of record that is involved in the governmental process and pertains to new forms of record keeping instruments as they are developed.³⁰

However, this right of access is not without limitation. The Act allows cities to adopt regulations setting forth the appropriate procedure to be followed when public records are available.³¹ Although you may be a member of a city council, your right of access to public records that are not directly relevant to your duties as a council member, are no different that those of any other member of the public. Accordingly, should you

wish to review public records that do not relate to your duties as a council member, you must comply with procedures established by the city for accessing such records.

V. LABOR RELATIONS IN THE PUBLIC SECTOR

As a member of a city council, you will necessarily be involved in various stages of the labor relations process. The following will provide you with a basic understanding of how labor relations are governed in cities, and will identify what type of conduct can lead to an allegation that the city has committed an unfair labor practice.

MEYERS-MILIAS-BROWN ACT (MMBA)

The Meyers-Milias-Brown Act (MMBA), Government Code Section 3500 *et seq.*, governs the labor-management relations for local governments in California, and applies to both charter and general law cities.

The MMBA is unique among labor relations laws in that it establishes general rights and obligations only, and has left the specific procedures for implementing those rights and obligations to the cities, and other local agencies. Those specific procedures, however, are subject to review and interpretation by the Public Employment Relations Board (PERB) and by the courts. Specifically Section 3507 of the MMBA authorizes cities and other local agencies to adopt “*reasonable rules and regulations after consulting in good faith*” with representatives of all its employee organizations.

Since your city has undoubtedly adopted an employee relations ordinance or resolution, it is important that you know and understand not only the rules and regulations governing employee relations for the city, but also your obligations as a member of the city council. If you have not done so yet, you should ask your city attorney to provide you with a copy of your city’s employee relations ordinance or resolution.

The MMBA protects not only the right of city employees to join employee organizations (i.e, unions), but also their rights to refuse to join or to participate in the activities of employee organizations. However, while city employees have the right to organize, they do not have the right to establish bargaining units of their own choice. As provided by Section 3507.1 of the MMBA, the city council has the discretion to determine the

appropriate bargaining units for its employees, subject to the rule of reasonableness. This reasonable standard, however, does not require the employer to determine the ultimate or most appropriate unit, only an appropriate unit. A city does not have to meet and confer when determining whether a proposed bargaining unit is appropriate under previously adopted rules and regulations. It must, however, follow those rules and regulations.

THE LEGAL OBLIGATION TO MEET AND CONFER

The obligation to meet and confer (i.e, negotiate) generally arises when either the city or one of its employee organizations requests to meet and confer, or when the city decides to change a matter within the statutory scope of representation. The MMBA defines “scope of representation” as including “all matters relating to employment conditions and employer-employee relations, including but not limited to wages, hours, and other terms and conditions of employment.” However, the scope of representation *does not* include “consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.”

THE GOOD FAITH REQUIREMENT

The MMBA requires the parties to meet and confer in good faith. Government Code Section 3505 defines the concept of “meet and confer in good faith” as 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.”

There are two general types of violations which evidence a city’s failure to comply with its good faith obligations: “per se” violations and “totality of conduct” violations. A city commits a “per se” violation when it makes a unilateral change in a mandatory subject:

- C without giving the employee organization the opportunity to bargain;

- C without exhausting its bargaining or impasse obligations; or
- C expresses an outright refusal to bargain.

In contrast, the “Totality of Conduct” standard involves consideration of various factors (i.e, context) pertaining to negotiations. The following are some of the many relevant factors which courts and labor boards have found evidence a violation of the good faith obligation:

- C Refusals to respond to proposals, or vague responses to detailed proposals.
- C Unwillingness to provide reasons for positions.
- C Going through motions of bargaining without any interest to reach agreement, i.e, “surface bargaining.”
- C Refusal to sign a written contract.
- C Bypassing the designated negotiating representative—city directly communicating proposals to unit employees.
- C Regressive proposals as negotiations continue.
- C Demanding agreement on illegal issues (“per se” violation).

THE NEGOTIATING PROCESS

As a member of the city council, you will play a role in determining the city’s broad negotiating objectives. However, you should not expect to participate in the actual negotiations yourself. Instead, based on the negotiating objectives that you and the other members of the city council set, the city council will provide the city’s bargaining representatives with the appropriate instructions and let them do their work. It is then up to the city’s labor negotiator and negotiating team to seek to achieve those objectives.

When it comes to labor negotiations, experience counts. Reliance on unqualified personnel to negotiate with employee organization professionals can be a costly and long lasting experience because concessions once made in negotiations are generally very difficult to undo later. Some fringe benefits may ripen into vested rights, which can almost never be negotiated away at a later date.

During negotiations, you can expect to be barraged from a number of different fronts. As a city council member, you should naturally expect the city’s labor negotiator and/or negotiating team to keep you and the council fully informed about the negotiations. You should also expect the city’s negotiators to provide you and the council with their expert advice throughout the negotiations.

However, you should also expect to field calls from union representatives. Your response to such calls will depend on a number of factors. While, it is generally recommended that you neither talk to nor meet with employee representatives about items that are “on the table” immediately prior to or during the time in which the negotiations are taking place, a situation may arise where talking about such issues would be beneficial to the city. In such a situation, you will want to make sure to speak with the city manager, the city’s labor negotiator, and the city’s legal advisor before discussing any labor issues with the union representatives so you can provide an appropriate response. Should you not consult with these offices prior to discussing a labor issue with the union, you run a risk of undermining the city’s negotiations.

As a member of the city council, you will generally also want to refrain from discussing the particulars of the negotiations with news media representatives. However, as with your dealings with the union representatives, raising an issue with the news media could also benefit the negotiations. Again, you should consult with the city manager, the city’s labor negotiator, and the city’s legal advisor about the strategy that should be taken before any information is provided to the news media.

The danger of speaking freely with either the union representatives or the news media could be substantial. Should confidential information be divulged, even innocently, prior to the formal adoption of any agreement, the city’s position will most certainly be compromised. In fact, pursuant to Government Code Section 3060 and Government Code Section 54963, should you make a premature disclosure of confidential closed session information, you could be subject to removal from office.

THE NEGOTIATED AGREEMENT AKA THE MEMORANDUM OF UNDERSTANDING

The MMBA provides for a two-way mutual bargaining process, which requires both labor and management to make a good faith effort to reach an agreement. That agreement is then memorialized in a memorandum of understanding (MOU) signed by representatives from the employee organizations and management. However, the agreement only becomes a binding contract upon approval by the city council.

CONCLUSION

As the above demonstrates, being a member of the city council does not come with an “all access” pass to everything related to the city. Both federal and state law, as well as a city’s charter, if applicable, have boundaries that restrict a city council’s interactions with city management and with city employees. Recognizing these boundaries will go a long way toward ensuring that the dividing line between council leadership and city management is not breached.

ENDNOTES

¹ Govt. Code § 34101.

² See *San Francisco Fire Fighters v. City and County of San Francisco* (1977) 68 Cal.App.3d 896, 898, 137 Cal.Rptr. 607; *Brown v. City of Berkeley* (1970) 57 Cal.App.3d 223, 231, 129 Cal.Rptr.1.

³ Govt. Code § 34102.

⁴ Govt. Code § 34004.

⁵ Govt. Code §§ 34900 to 34904, and § 36801

⁶ Govt. Code § 34903.

⁷ Govt. Code § 40602

⁸ Govt. Code § 40602.

⁹ Govt. Code §§ 40603, 40604.

¹⁰ Govt. Code § 40605.

¹¹ Govt. Code § 34000.

¹² Govt. Code § 36506.

¹³ Govt. Code § 36506; *Ball v. City Council of City of Coachella* (1967) 60 Cal.Rptr. 139.

¹⁴ Govt. Code § 36505.

¹⁵ Govt. Code §§ 36508 to 36510.

¹⁶ Govt. Code § 37100.

¹⁷ Govt. Code § 54970, *et seq.*

¹⁸ Govt Code § 34852.

¹⁹ Govt. Code § 34855.

²⁰ Govt. Code § 41801.

²¹ Govt. Code §§ 36508 to 36510.

²² Govt. Code § 36510.)

²³ Govt. Code §§ 40801, 40806.

²⁴ Govt. Code §§40811, 40814.

²⁵ Cal. Constitution, Article 1, Section 1; Govt. Code § 6254; Evidence Code §§1043- 1045; Civil Code § 56.20.

²⁶ Penal Code §§ 832.5, 832.7; Evidence Code §§ 1043-1045.

²⁷ Penal Code § 832.8.

²⁸ Govt. Code § 54957

²⁹ Govt Code § 6250.

³⁰ Govt. Code § 6252 (e)-(f).

³¹ Govt. Code § 6253.