

*The Association Of Building, Mechanical
And Electrical Inspectors Of The
City of San Jose*

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January 15, 2008

San Jose City Council
200 East Santa Clara St.
San Jose, CA 95113

Re: Proposed Council Policy on Labor Negotiation Guidelines

Dear Councilmember:

The Association of Building, Mechanical and Electrical Inspectors has been following the development of the City Manager's proposal regarding labor negotiation guidelines with keen interest. Since we had serious concerns regarding the legality of the proposal, we requested a legal opinion from our bargaining unit's attorney. The legal offices of Wylie, McBride, Platten and Renner specializes in labor law and represents several of the city's bargaining units, in addition to ABMEI.

The enclosed opinion describes the constitutional and legal precedents that may be compromised if the City Manager's proposal is adopted.

Maintaining our right to advocate or discuss issues with Councilmembers is crucial to the overall process of employer/employee relations.

Sincerely,



Tom Brim
President
Association of Building, Mechanical and Electrical Inspectors

January 14, 2008

Tom Brim
ABMEI
200 East Santa Clara Street
Bldg Dept.2nd Floor
San Jose, CA 95113

**Re: City of San Jose – Proposed Policy
Council Labor negotiations Guidelines**

Dear Tom:

This letter is sent in response to your inquiry as to whether the City of San Jose's proposed Council Policy on Labor Negotiations Guidelines contains any legal problems or areas of concern. After reviewing the policy and conducting some legal research, we have concluded that the proposed policy constitutes an impermissible infringement of the constitutional rights of City of San Jose employees.

Citizens, including public employees, have the right to lobby or petition their elected leaders. This right flows from the First Amendment right to free speech and it includes the right to meet individually with elected officials, not just the right to speak in a public forum. Furthermore, the right does not disappear for public employees simply because the topic may include the wages, hours or terms and conditions of employment. Thus, the City Manager's assurances that the draft policy does not restrict public employees from making comments during the open forum sessions of City Council meetings does not transform an otherwise impermissible restriction into one that passes constitutional muster.

It is well established law that the First Amendment protects speech by public employees when that speech involves matters of public concern. (*Waters v. Churchill* (1994) 114 S. Ct. 1878) It also is well-established that the wages, hours and terms and conditions of public employees is a matter of public concern. Thus, the City cannot unilaterally prohibit its public employees from talking to individual City Council members or other elected officials about negotiations or any other topic. While an elected official is free to decide individually that he or she will not meet with an individual or a group of individuals about a particular topic (such as labor negotiations), the public entity cannot

unilaterally impose that rule. Doing so effectively prohibits a public employee from petitioning his or her elected representative.

Of course, a public employer does have some powers to regulate the speech of its employees. Generally, whether a particular restriction is constitutionally permissible is determined by the application of a balancing test. (*Pickering v. Board of Education* (1968) 391 U.S. 563, 574) Once it is established that the speech in question is a matter of public concern, the interests of the employee as a citizen, commenting upon matters of public concern, must be balanced against the interests of the public entity, as employer, in promoting the efficiency of the public services it performs through its employees. (*Pickering v. Board of Education* (1968) 391 U.S. 563, 568) The ultimate issue – whether the speech is protected – is a question of law. (*Gray v. County of Tulare* (1995) 32 Cal. P. 4th 1090, 38 Cal. Rptr. 2d 317, 323)

Here, the balance lies in favor of the free exercise of speech by the employees because the benefits of the proposed restrictions to the City do not outweigh the interest of the employees in their right to the exercise of free speech. An overly broad restriction of speech is an impermissible restriction – and this restriction is clearly overly broad as well as unnecessary. Pursuant to the Meyers-Milias Brown Act, the City has a right to insist that contract negotiations take place at the bargaining table between the designated representatives of the City and the designated representatives of the various bargaining unit employees. (See Cal. Gov. Code § 3501 et seq.) The City also has the right to insist that the employee representatives (e.g., the various Unions) refrain from attempts to negotiate directly with the City Council or with individual City Council members. However, the City's proposed policy goes beyond these permissible restrictions. It does not stop at simply prohibiting attempts to circumvent the City's designated bargaining team by bargaining directly with individual Council members, the Mayor or Council staff. Instead, it crosses the line and attempts to prohibit all speech, including simple discussion, explanation or advocacy.

This wholesale prohibition against discussions with individual Council members or staff is not necessary in order to protect the integrity of the bargaining process. To the contrary, discussions between the City's bargaining unit employees and the City's elected officials can enhance the bargaining relationship and expedite the process. Simply put, the City's proposed restrictions are not needed in order to promote the efficiency of its services or even the efficiency of its negotiations or labor relations. Indeed, having employee representatives or advocates talk to individual Council members and explain to them the employee perspective often results in better communication between the City and its employees, in more efficient labor relations and in quicker settlement of contracts. As long as the discussions do not become attempts at direct negotiations, the discussions are constitutionally permissible.

Interestingly, the City Manager's January 3 memorandum to the City Council appears to acknowledge that there is a difference between the impermissible "negotiations" it wants

to prevent and legitimate "discussions about proposals." Yet, the City Manager proposes banning both because it can be "difficult" to distinguish between the two. Fortunately for public employees, mere "difficulty" is not sufficient reason to infringe upon a citizen's constitutional rights.

Finally, the proposed policy is disturbing in that it requires that City Council members, the Mayor and Council staff report to the City Manager when "any contact is made by a bargaining unit representative or persons acting on their behalf regarding ongoing negotiations." Thus, this reporting requirement suggests that the City will "keep tabs" on employees who allegedly violate the policy and, more seriously, attempt to unjustifiably discipline such employees for violating City policy (since the City's general position is that a violation of any City policy is grounds for discipline). Furthermore, the proposed policy effectively restricts not only the speech of public employees but of any person (including non-employees). Accordingly, the proposed policy could subject the City to lawsuits by the both City employees and members of the general public for infringement of First Amendment rights.

In sum, the City's proposed policy is unconstitutionally overbroad. If the City must have a rule, it should be a simple one: Individual Council members, the Mayor and Council staff may not engage in direct negotiations with the various bargaining units and their members, unless authorized to do so by the City's designated negotiator(s).

I hope this letter adequately answers the concerns you raised. Please do not hesitate to contact me if you have further questions on this matter.

Sincerely yours,

CAROL L. KOENIG