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Sent Via Facsimile & U.S. Mail

Linda Dittes
AFSCME Local 101
1150 North First Street, Suite 101
San Jose, CA 95112-4923

Re: *City of San Jose's Proposed Public Comment Period*

Dear Linda:

You have asked this office to provide a legal opinion regarding the City of San Jose's intention to impose a public comment/public review period for all labor agreements prior to approval by the San Jose City Council. Specifically, you have asked for my analysis of the impact such a procedure would have on the Union's collective bargaining with the City.

Public comment attendant to adoption of a labor contract by a public entity is not unheard of. While there is little authority on the topic, it is unlikely that the procedure would be found to be unlawful. However, there are very real practical problems that arise from such a procedure. The concern, from a bargaining perspective is what happens after the public comment period? Public comment periods are problematic to collective bargaining for several reasons:

- They endanger the bilateralism of collective bargaining;
- They can inadvertently result in bargaining with individuals other than the employees' exclusive collective bargaining representative; and,
- Where public comment sways official opinion, it can lead to a refusal or failure to bargain in good faith.

It should be noted that there is no requirement that a city or any other public entity's labor negotiations be open to the public. This was recognized in *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission* (1976) 429 U.S. 167, in which the U.S. Supreme Court found that although a public entity need not provide a forum for public comment or debate on proposed labor agreements, if it does, such forum becomes a "public forum" to which First Amendment guarantees attach. The Court found that First Amendment concerns outweighed restrictions placed by Wisconsin on public comment sessions conducted in relation to the consideration by a school board of negotiated labor agreement. The Wisconsin case involved an order prohibiting members of a minority union or employees' association from making demands on the school board in open session related to an agency shop provision

contained in the agreement being considered. The court held that the First Amendment protected the dissident organization's speech, even though in labor negotiations the organization would have had no say or involvement.

Along this line, courts have long-recognized that "there is no basis for distinguishing collective bargaining activities from political activities" in the public-sector context. *Pittsburg Unified School District, v. California School Employees Association*, (1985) 166 Cal.App.3d 875 (citing *Aboud v. Detroit Board of Education* (1977) 431 U.S. 209, 228, 257. As a result, courts have consistently held that First Amendment protections, including freedom of speech, assembly and the right to petition the government, are entitled to a high level of protection even when the activity may otherwise be considered impermissible in a traditional labor relations setting.

Therefore, in *Pittsburg* the fact that a statute provided for public comment was a factor in finding that the collective bargaining had been inserted into a public forum. As a result, union members had a First Amendment right to picket outside of the private businesses and work places of the individual members of the School Board. Similarly, the Fourth Circuit held that equal protection and First Amendment concerns are triggered when a public entity limits a union's involvement or participation in a public meeting or forum involving issues of concern to its membership, see *Henrico Professional Firefighters Ass'n Local 1568 v. Board of Sup'rs*, 649 F.2d 237 (4th Cir. 1981), and as such unions must likewise be permitted to participate in the public comment forum involving their labor agreement.

Although California courts and the PERB have found that public comment periods do not conflict with statutory collective bargaining mandates, such as the MMB Act, to the extent public comment dissuades an employer from adopting a contract negotiated by the parties, the parties must recommence collective bargaining (and presumably re-submit the resulting agreement to another public comment period). Public comment may not result in a change to the negotiated MOU, as held by PERB in a 1978 case involving an unfair labor practice charge filed by CSEA against the Placerville School District (PERB Decision No. 69, September 18, 1978). In that case PERB found that the district had failed in its duty to bargain in good faith when, as a result of a public comment period, it adopted all but one provision of a final negotiated contract. This, PERB held, was a unilateral change and impermissible.

In sum, while the "constitution does not require all public acts to be done in town meeting or an assembly of the whole"¹, when they are conducted in public, with involvement by the public, First Amendment protections attach. As the cases discussed above indicate, inserting labor negotiations into the public sphere brings with it complications that in the end may not be conducive to effective labor negotiation.

Very truly yours,



Teague P. Paterson

TPP/tg

¹ *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 445 (1915).