



THE BAR ASSOCIATION OF SAN FRANCISCO

2020 OFFICERS AND BOARD OF DIRECTORS

Stuart C. Plunkett
President

Marvin K. Anderson
President-Elect

Mary McNamara
Treasurer

Vidhya Prabhakaran
Secretary

Alexis A. Amezcua
Cristine Soto DeBerry

Jamie L. Dupree
Terrance J. Evans

Holly Gaudreau
Steven A. Hirsch

Erick C. Howard
Charles H. Jung

Sebastian Kaplan
David Kelly

Miriam Kim
Lisa P. Mak

Phyra McCandless
David Otsuka

Peggy Otum
Karen Scarr

Ragesh Tangri
Erica Villanueva

BARRISTERS CLUB OFFICERS

Kelly Matayoshi
President

Jessica Ryland
President-Elect

Anjali Kulkarni
Treasurer

Lindsey Mignano
Secretary

EXECUTIVE DIRECTOR AND GENERAL COUNSEL

Yolanda M. Jackson

July 9, 2020

Mr. Norman Yee

President

San Francisco Board of Supervisors

City Hall, Room 244

1 Dr. Carlton B. Goodlett Pl.

San Francisco, CA 94102

Dear Mr. Yee:

The Bar Association of San Francisco's Criminal Justice Task Force ("BASF-CJTF"¹) writes to you concerning the City Attorney's reported advice that your proposed amendment to the City Charter ("Amendment" or "Yee Amendment") concerning staffing levels at the San Francisco Police Department ("SFPD") must—even before being submitted to the voters—be negotiated with the San Francisco Police Officers' Association ("SFPOA").

As the drafter, you are aware of the Amendment's nature—simple, straightforward, and democracy in action. The Amendment would require the Police Department every two years to submit to the Police Commission a report and recommendation regarding police staffing levels, require the Police Commission to consider the report and recommendation when approving the Police Department's proposed budget, and remove any minimum police staffing level that arguably is required by the current City Charter.

In order to be considered by voters in San Francisco's Consolidated General Election on November 3, 2020, the Yee Amendment must be placed on the ballot by July 21, 2020. Otherwise, the City Charter cannot be so amended until 2022. We are concerned that the SFPOA will abuse an opportunity to meet-and-confer to delay the Yee Amendment from making the ballot in time, thereby silencing voters.

Following the death of George Floyd and national and local protests, there is extraordinary public demand for a reexamination of SFPD's staffing and fundamental responsibilities. Permitting SFPOA to delay passage of the Amendment will tie the City's hands in regards

¹ The Bar Association of San Francisco represents 7,500 members and is the largest legal organization in Northern California dedicated to criminal justice reform. In 2015, BASF established the Criminal Justice Task Force, consisting of judges, prosecutors, public defenders, law enforcement, private defense counsel, civil liberties advocates, and others, to advance systemic reforms in San Francisco.

to police staffing for two more years, and virtually guarantee that the Mayor, the Supervisors, the Police Commission, and the Chief do not deliver reforms that San Francisco expects.

Moreover, and as set forth below, we respectfully disagree that a meet-and-confer process with SFPOA is legally required or appropriate under the circumstances. Instead, the Yee Amendment is a classic managerial matter not subject to bargaining as a matter of law and policy.

I. The Yee Amendment does not at this time change police staffing levels; it directs the Chief to submit a report re: staffing levels and the Police Commission to consider that report, without an artificial minimum staffing level.

The Yee Amendment does *not* cut police staffing levels at this time. Instead, it puts in place a process to evaluate staffing levels. It requires the Chief to analyze staffing levels and submit a report to the Police Commission, and requires the Police Commission to consider the Chief's report. It eliminates the artificial "minimum" staffing level of 1,971 officers, and instead simply allows that Chief's report on staffing, and the Police Commission's consideration of that report, to proceed.

The Yee Amendment will not necessarily result in any reduction in police forces. At present, there is no live controversy over which to meet and confer with SFPOA, as there are at least three conditions that have to materialize before there is any potential reduction in staffing. First, in order for there to be a potential reduction in staffing, the voters would have to approve the Yee Amendment in the November 3, 2020 election; if they do not approve it, there is no change via the Yee Amendment and no impact on SFPOA nor the staffing levels. Second, even if the voters approve the Yee Amendment in the election, the Chief would have to submit a report that recommends cuts in staffing, or else there is no impact on staffing traceable to the Yee Amendment. Third, the Police Commission would have to accept such a recommendation to reduce staffing², and then exercise its independent discretion to approve a budget that includes staffing reductions, in order for there to be an adverse impact on staffing.

Thus, the Yee Amendment itself does not result in any reduction in staffing, and there is no live controversy with SFPOA that could conceivably be subject to meet and confer and/or arbitration, at least unless and until the Police Commission moves to implement staffing reductions through the budget process.

² The Yee Amendment expressly states that the Police Commission need *not* accept or adopt any recommendation made by the Chief.

II. Even if the Yee Amendment were to be interpreted as putting forth a live controversy by potentially reducing staffing levels, a decision to reduce staffing levels, which is not driven by labor costs, is a classic managerial decision not subject to meet and confer bargaining.

The Meyers-Milias-Brown Act (Gov. Code Section 3500, *et seq.*; “MMBA”) sets forth California’s public sector labor law provisions. It requires that under certain circumstances a public sector employer must meet and confer and bargain with the Union-representative of a recognized bargaining unit of employees. Section 3504, requires management to bargain over matters within the “scope of [union] representation,” which 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, except, however, 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 “however” qualifier of Section 3504 (i.e., the principle that any “consideration of the merits, necessity, or organization of any service or activity provided by law or executive order” is not included in “the scope of representation”) was added by the California legislature to “forestall any expansion of the language of ‘wages, hours and working conditions’ to include more general managerial policy decisions.” *Santa Clara Cnty. Corr. Peace Officers’ Ass’n v. Cnty of Santa Clara*, 224 Cal. App. 4th 1016 (2014) (“*Santa Clara*”), quoting *Building Material & Construction Teamsters’ Union v. Farrell*, 41 Cal. 3d 651, 657 (1986) (“*Building Materials*”).

Importantly, the MMBA recognizes “the right of employers to make unconstrained decisions when fundamental management or policy choices are made.” *Claremont Police Officers Ass’n v. City of Claremont*, 39 Cal. 4th 623, 632 (2006) (“*Claremont*”), quoting *Building Materials*, at 663. Management decisions are not subject to bargaining. “To require public officials to meet and confer with their employees regarding fundamental policy decisions . . . would place an intolerable burden upon fair and efficient administration of state and local government.” *Berkeley Police Ass’n v. City of Berkeley*, 76 Cal. App. 3d 931, 937 (1977) (“*Berkeley Police*”). Notably, the case law teaches that management’s prerogative is particularly strong in cases involving police department policy matters that implicate public trust in law enforcement. *San Francisco Police Officers’ Ass’n v. San Francisco Police Comm’n*, 27 Cal.App.5th 676, 690(2018) (“*San Francisco Police*”) quoting *Building Materials*, at 664 (matters involving “the avoidance of unnecessary deadly force are of obvious importance, and directly affect the quality and nature of public services,” are not within the scope of representation); *Berkeley Police*, at 937 (creation of a citizen review panel to make disciplinary recommendations was considered “a matter of police-community relations,” such that the city’s challenged policies “constitute[d] management level decisions which are not properly within the scope

of union representation and collective bargaining”); *Claremont*, at 632-33 (racial profiling study designed to “improve relations between the police and the community” is not subject to bargaining).

Where fundamental management decisions have a significant adverse effect on wages, hours, or working conditions, the California Supreme Court has adopted a balancing test to determine whether those effects must be subject to the meet and confer requirement under the MMBA. *Claremont*, at 638; *Building Materials*, at 660. The test asks whether “the employer’s need for unencumbered decision making in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question.” *Building Materials*, at 660; *Claremont*, at 630. In performing this balancing, “a court may also consider whether the ‘transactional cost of the bargaining process outweighs its value.’” *See Building Materials; Claremont; Santa Clara*, at 1030. Delays instituted by extended bargaining and legal process should be considered a cognizable “transactional cost” to management under this analysis. *San Francisco Police*, at 764.

As an initial matter, the Yee Amendment itself has no adverse impact on wages, hours, or working conditions. As noted above, any such claim by SFPOA is premature at best. Instead, the Yee Amendment merely establishes a process by which staffing is evaluated.

Second, the Yee Amendment is a classic managerial decision about staffing, not driven by labor costs, which the courts consistently find to be *outside* of the meet and confer requirement. It replaces a minimum staffing requirement—that arguably impinges on appropriate management decision-making—with a management-driven process by which the Chief provides an executive-level assessment of staffing, operations, and the department’s public safety and legal duties, as well as a staffing recommendation for the Police Commission’s consideration in connection with the budget. Reinforcing the conclusion that it falls within management’s prerogative, the Yee Amendment is also responsive to the recent, widespread, and urgent calls from the San Francisco community for police reforms, including specifically changes to staffing levels. *See Claremont*, at 632-33; *Berkeley Police*, at 937; *San Francisco Police*, at 764.

Leading cases have explained that the decision by management to reduce staffing of public safety employees is not subject to bargaining; only the effect of that decision, *i.e.*, the manner in which those reductions occur, must be negotiated. Thus, where a City decided to layoff firefighter employees, and the Union demanded to meet and confer over the layoff decision, the court concluded that the City did *not* need to meet and confer before making that decision to lay off employees; instead, the City only was required to bargain over the way in which layoffs were to be implemented. *Int’l Ass’n of Fire Fighters v. Public Employment Relations Board I*, 51 Cal.4th 259, 264-65 (2011). Similarly, in *Santa Clara*, the County wanted to cut the Department of Corrections budget and reduce the work

schedules of corrections officers; the court found that the county was *not* required to meet and confer about the need to reduce the budget of the Department of Corrections, nor about the policy decisions to avoid layoffs by undertaking hours reductions.³ *Santa Clara*, at 1041.

Third and finally, even if the *Claremont* balancing test were to apply, any reasonable analysis under it comes down strongly on the side of allowing the Yee Amendment to be submitted to the voters. Time is of the essence, and unencumbered managerial decision-making is critical to preserving public trust in the City’s reform efforts and in SFPD. The Yee Amendment must be submitted within days in order to be timely placed on the November 3, 2020 ballot to the voters. Any requirement that the parties complete a meet and confer right now would be a death sentence for the Yee Amendment. Yet allowing the Amendment to be placed on the ballot still gives SFPOA plenty of time and opportunity to meet and confer—if that were to be found, down the road, to be necessary. The voters should have an opportunity to speak on the issue, and the Yee Amendment provides that opportunity.

III. The Board of Supervisors is not bound by advice from the City Attorney, nor is the City Attorney prevented from defending the Supervisors if the Supervisors take a position that is contrary to the advice.

We strongly urge you to make your own independent determination about the law and to proceed with bringing the Yee Amendment to the voters. Section 6.102 of the San Francisco City Charter sets forth the specific duties of the San Francisco City Attorney. Subdivision 4 of section 6.102 provides that the City Attorney shall: “Upon request, provide advice or written opinion to any officer, department head or board, commission or other unit of government of the City and County.” Thus, the City Attorney may frame legal options for its client agencies or elected officials (such as the Board of Supervisors), but it is a longstanding right of the recipients of such advice to decide whether to follow it.

In *O’Connell v. Behan*, 19 Cal.App. 111, 124 (1912), the Court of Appeal found that a written opinion from San Francisco’s City Attorney to the Board of Supervisors “was not

³ By contrast, in *Building Materials*, the City, in order to reduce labor costs, wanted to lay off bargaining unit workers and reassign the work to workers outside of the bargaining unit. That clearly was considered a management decision that had a significant effect on hours, and given that management’s motivation in making a staffing change was to save labor costs by taking work away from unionized workers, the Supreme Court found on balance that the employer should meet and confer with the Union. Here, there is nothing to indicate that the Yee Amendment was motivated by labor costs.

any more binding upon the respondent than it was upon the city attorney himself, and that respondent was justified in not following the city attorney's first views of the law and interpretation of the charter provisions[.]" In that case, the City Attorney went on to successfully defend the Board of Supervisors in litigation. *Id.* ("upon more mature consideration of the subject, the latter arrived at a different conclusion, and then strenuously and successfully opposed the plaintiffs' suit upon an interpretation of the law and the charter which the trial court approved and which accords with our own views.")

A similar issue resolved in *Squire v. City and County of San Francisco*, 12 Cal.App.3d 974, 979 (1970), where San Francisco's City Attorney advised the Mayor that the position of a municipal railway operators union in a wage dispute, was meritorious. The Mayor's office chose not to follow the City Attorney's advice, the union ultimately sued the city for injunctive relief, and the City Attorney went on to defend the Mayor's office. There, the Court held:

"We see nothing improper in the city attorney's action in giving the Mayor his honest advice that the city had 'no case,' nor was it improper for the city attorney to defend the city once the declaratory relief and mandamus action had been filed, for this is a duty he is required to perform under the charter. Furthermore, the record, even at the time of the attempted intervention, shows that the city attorney had advanced relevant legal defenses and was vigorously defending the lawsuit in an adversary manner."

Therefore, even if the City Attorney may privately or publicly harbor the opinion that the Board of Supervisors should meet-and-confer with the SFPOA about the Yee Amendment *before* submitting it to the Rules Committee by July 21, 2020, the City Attorney has an obligation to defend the Board's final policy decision unless it is contrary to the Canon of Ethics or plainly unconstitutional.

IV. The City should stop voluntary bargaining with SFPOA over managerial matters because doing so is contrary to the law, and has delayed and undermined reforms; instead, the City must prioritize transparency, timeliness, public input, and real and meaningful change in negotiating with SFPOA.

We appreciate that the City has long adopted an approach toward labor relations that favors voluntary, and often exhaustive, discussion of any matters that are of concern to unionized employees, regardless of whether they are within the scope of representation. We do not question the wisdom of this approach in other domains, where the considerations are very different from those presented by policing.

However, we do not believe this approach to labor negotiations with SFPOA has served SFPD, the City, or the San Francisco community, well. BASF-CJTF has been involved in police reform efforts for a number of years and has observed the meet and confer process with SFPOA delay—*by many months to years*—urgent reforms that promote public safety and reinforce public trust in SFPD. Indeed, the extensive delays instanced by negotiations with SFPOA have been a serious concern ever since the U.S. Department of Justice publicly cautioned that negotiations over SFPD’s revised use of force policy must not unreasonably delay adoption and implementation of the changes at issue. The meet and confer process with SFPOA has recently and unacceptably delayed many other key reforms, such as changes to the body camera policy, and the Department General Order on bias, just to name a few.

A new approach to negotiating police department matters with SFPOA is overdue. Full communication with the union *to the extent required by law*, and the improvement of labor-management relations, should remain important objectives of the meet and confer process. However, these cannot be the only principles guiding the City’s strategy. The City’s approach must also prioritize transparency, timeliness, and the advancement of substantive police reforms. The law supports these principles. It recognizes that formulating policies that promote public safety and trust between police agencies and the communities they serve is a fundamental duty of local government that must not be encumbered with undue delays, or worse, bargained away behind closed doors.

There is no legal requirement that the City meet and confer, at this time, with SFPOA regarding the Yee Amendment. It is time for the City to prioritize transparency and reform, and allow the Yee Amendment to proceed to the next step—review by the voters.

Sincerely,



Stuart Plunkett
President, Bar Association of San Francisco