GARCIA HERNÁNDEZ SAWHNEY LLP

2490 Mariner Square Loop, Suite 140, Alameda, CA 94501
T 510.695.2802 • F 510.380.7704 • ghslaw.com

MEMORANDUM

TO: Oakland Police Commission **DATE:** June 24, 2021

FROM: Conor Kennedy, Garcia Hernandez Sawhney, LLP

RE: Charter Section 604(g) and the City of Oakland's Memorandum of Understanding with the Oakland Police Officers Association

Question Presented

Did Employee Relations properly interpret Charter Section 604(g) and the City of Oakland's Memorandum of Understanding with the Oakland Police Officers Association ("OPOA") in handling a Step 3 grievance of a Discipline Committee decision to terminate five sworn officers?

Short Answer

No. Employee Relations mishandled its administration of the terminated officers' grievances by failing to consult the Discipline Committee and giving an outside firm inappropriate direction about what is required to respond to a Step 3 grievance. The outside firm compounded those errors by delivering a biased draft recommendary report, which should have been more directly aligned with the scope of the grievance that Employee Relations received.

In administering the terminated officers' grievances, Employee Relations should have formulated a response in consultation with the constituent entity of the City of Oakland that the Charter identifies as the final decisionmaker: the Discipline Committee. That is because Charter Section 604(g)(2) prohibits the City Administrator or his or her subordinates or designated representatives from rejecting or modifying a Discipline Committee decision: which means that to properly carry out the grievance process, the City's responses must arise from Employee Relations' direct consultation with the Discipline Committee.

At several critical junctures in administering this grievance, Employee Relations decided against consulting or even notifying the Discipline Committee, even though the purpose of the multi-step grievance procedure is to facilitate the Discipline Committee's agreement to voluntarily resolve the grievance.

Procedural Background

On March 11, 2018, five Oakland police officers fired upon (four discharged firearms, one deployed bean bags) Mr. Joshua Pawlik, who died on scene. On July 11, 2019, an Oakland Police Commission Discipline Committee exercised its Charter authority to terminate all five officers. After that decision was affirmed by a hearing officer, which the Discipline Committee accepted on April 14, 2020, the City Administrator delivered termination notices on May 11, 2020.

Employee Relations received "Step 3" grievances challenging the terminations, and in the case of

a sixth officer, challenging a suspension. "Step 3" is part of a multi-step process that provides:

> The Employee Relations Officer, or a designated representative shall contact the employee or representative within seven (7) calendar days of receipt of the grievance to schedule a meeting to attempt to resolve the dispute. The Employee Relations Officer or designee shall respond in writing to the grievance within thirty (30) days after the third step hearing. If the Employee Relations Officer fails to respond within the thirty (30) days, the Association may move the grievance to the next step.

(Memorandum of Understanding between the City of Oakland and the Oakland Police Officers' Association, effective December 12, 2018 through June 30, 2024 ("MOU"), Pg. 40, Art. X, § C (3).) A "grievance" is a formal complaint by an individual or group of public employees who are covered by a collective bargaining agreement, alleging that they have been wronged by a past or ongoing violation of the agreement or some other legal right. A collective bargaining agreement's grievance provisions often set forth a series of "steps," with successive steps increasing in formality, to "resolve" and settle a grievance. After Step 3, if a grievance is not resolved voluntarily, the City's internal processes proceed to Step 4 and then Step 5, which is binding arbitration. Step 4 in the MOU provides that the grievants and the City continue to attempt to resolve the matter "through informal means" at an informal resolution conference. Step 5 provides that the grievance be submitted to an "impartial arbitrator," whose decision will take binding effect.

To respond to the grievances ER received in this matter, the City of Oakland's Labor & Employee Relations Department ("Employee Relations), designated as its representative Mr. Jeff Sloan, Principal of Sloan Sakai Yeung & Wong, LLP ("Sloan"). Sloan issued a set of draft grievance responses in February of 2021, all entitled "Grievance Response" (the first as to the five terminated officers, referred to herein as "Sloan Report" or "Sloan's Report," and second a "companion" report as to the five-day suspension, which we do not address in this opinion). Sloan's Report recommends modifications to the Discipline Committee's findings. Based on those new decisions, Sloan also recommends rejecting the Discipline Committee's decisions to terminate.

On February 25, 2021, Human Resources emailed the officers' attorneys:

> Please be advised that Employee Relations has been unable to resolve the above referenced Step 3 grievances. Pursuant to the operable Memorandum of Understanding with the OPOA, the Union may advance this grievance to the next step, binding arbitration.

Thus, despite contracting the response out to Sloan, Employee Relations did not adopt Sloan's findings or recommendations as the City's response. Instead, Employee Relations decided that Sloan's Report would not resolve the officers' grievances.

It was not until March of 2021 that the Commission learned the precise nature of the officers' grievances and that Employee Relations held meetings about the grievances dating back to November of 2020. Also for the first time at that juncture, the Commission read Sloan's Report and learned of H.R.'s decision not to adopt it.

Review of Authorities: Oakland City Charter, Collective Bargaining Agreement or "MOU"

Discipline Committee authority was first established via 2016 ballot initiative, Measure LL, and amended by another initiative in 2020, Measure S1. Measures LL and S1 set forth detailed requirements for Discipline Committee membership, as well as procedural changes to how the City of Oakland renders officer disciplinary decisions when civilian complaint investigators disagree with Department leadership over proper findings or levels of discipline. (*See e.g., Vandermost v. Bowen*, (2012) 53 Cal.4th 421, 469 (analyzing voter initiative that "completely changed" redistricting process in California: "membership and procedural requirements are carefully designed to ensure that redistricting is undertaken on a nonpartisan basis.")). Specifically, a Discipline Committee of three Police Commissioners must convene any time that there is a formal, documented disagreement or dispute about discipline between the investigation agency that reports to the Police Commission, the Community Police Review Agency ("CPRA"), and the Oakland Police Department's traditional leadership structure. (Charter § 604(g)(2).)

In pertinent part, the Charter provides that:

> . . . the Discipline Committee shall resolve any dispute between the Agency and the Chief of Police. Based solely on the record presented by the Agency and the Chief of Police, the Discipline Committee shall submit its final decision regarding the appropriate findings and proposed discipline to the Chief of Police who shall notify the subject officer. The City Administrator shall not have the authority to reject or modify the Discipline Committee's final decision regarding the appropriate findings and level of discipline.

Discipline Committees consist exclusively of Oakland Police Commissioners, who under the Charter must reside in Oakland (unlike City employees or Department Directors). (Charter § 604(c)(1).) Former Oakland Police Department police officers cannot serve as Commissioners or Discipline Committee members. (*Id.)*

Measure LL and Measure S1 expressly incorporate the grievance rights of officers disciplined as a result of a Discipline Committee decision, as reflected in the MOU. Section 604(g)(4) states:

> All employees are afforded their due process and statutory rights including Skelly rights. After the findings and imposition of discipline have become final, the subject officer shall have the right to grieve/appeal the findings and imposition of discipline if such rights are prescribed in a collective bargaining agreement.

The operative "collective bargaining agreement," is the "MOU" between the City of Oakland the Oakland Police Officers Association ("OPOA"). Article X of that MOU sets forth specific grieve/appeal rights, which include a disciplined officers' right to submit a "grievance in writing to the Employee Relations Officer." The MOU provides that upon proceeding to a Step 3 response to a grievance:

> The Employee Relations Officer, or a designated representative shall contact the

> employee or representative within seven (7) calendar days of receipt of the grievance to schedule a meeting to attempt to resolve the dispute. The Employee Relations Officer or designee shall respond in writing to the grievance within thirty (30) days after the third step hearing. If the Employee Relations Officer fails to respond within the thirty (30) days, the Association may move the grievance to the next step.

(MOU, Pg. 40, Art X. § C (3).)

Employee Relations' duty and responsibility to administer Oakland's disciplinary decisions derives from the City Administrator's Charter Authority codified in Section 503, which states: "The City Administrator shall be responsible to the Council for the proper and efficient administration of all affairs of the City under his jurisdiction . . ."

Analysis

While Sloan's Report was not adopted, it forms part of the record to be reviewed by the Step 5 "impartial arbitrator" empowered under the MOU to reverse the Discipline Committee. In April of 2020, after a meeting on the topic, the Commission asked our firm for a legal opinion, citing several concerns.

The Commission's primary concern is that the Sloan Report was developed without consulting the Discipline Committee. This concern was raised at a Police Commission meeting on April 22, 2021. The H.R. Director responded to the concern: "I've consulted with the City Administrator and we want to make sure we don't make a process error again of this nature and . . . we are going to make a commitment to you to be more communicative, upfront, to share this information." Although the Commission lauded the H.R. Director for committing to this partial course correction, it is remarkable that Employee Relations neglected to communicate about its Step 3 meetings with the officers or the direction Employee Relations gave to Sloan.

Employee Relations' chosen course of action conflicts with the plain language of the Charter and the MOU, as well as the underlying purpose of the multi-step grievance process.

Section 604(g)(2) states: "The City Administrator shall not have the authority to reject or modify the Discipline Committee's final decision regarding the appropriate findings and level of discipline." In looking to what sources of law govern a best faith interpretation of the "reject or modify" clause in Section 604(g)(2), we are mindful that the Supreme Court of California generally warns against reinterpreting clear language beyond its ordinary meaning. (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 919-920 ("But the rules of statutory construction are merely aids and sometimes can be used to reach opposite results.")) The Supreme Court also distinguishes between *legislatively* enacted language and *voter-enacted* language. "The particularized meaning of words in complex, legislatively enacted statutes has little bearing on the interpretation of words in an initiative, which we construe according to their ordinary meanings as understood by 'the average voter.'" (*People v. Adelmann* (2018) 4 Cal.5th 1071, 1080 (citing *Vandermost, supra*); *Kaiser v. Hopkins* (1936) 6 Cal.2d 537, 538.) In essence,

unless voter-enacted Charter language like Section 604(g)(2) is unclear, it is properly construed in accord with its ordinary, everyday meaning as understood by the average voter.

Applying that approach, Section 604(g)(2) is not ambiguous. The process that led to the Sloan Report conflicts with the express language in the Charter. The federal court that also oversees the Negotiated Settlement Agreement has interpreted Section 604(g)(2) broadly, as having "remov[ed] the ultimate role of the City Administrator in the discipline process and confer[s] that power on the Commission through the investigatory powers of the CPRA and the resolution process of the Disciplinary Committee." (Order, *Negrete v. City of Oakland*, 19-cv-05742-WHO at *12 (June 6, 2020) (on appeal)). By extension, the Charter divests those operating under the color of authority of the City Administrator – such as Employee Relations' "designated *representatives*" – from modifying or reversing Discipline Committee decisions as well.

The Charter informs how Employee Relations must administer the relevant collective bargaining agreement (the "MOU" between the City of Oakland and the OPOA). First and foremost, sworn officers' grievance and appeal rights are strictly observed under the Charter: Discipline Committee decisions are subject to grievance and appeal "if such rights are prescribed in a collective bargaining agreement." (Charter § 604(g)(4).) (As mentioned above, *supra*, the MOU does indeed prescribe those rights.) Therefore, the MOU does not conflict with the Charter: it is read in harmony with the Charter. (*See* PERB Decision 2540-M at pp. 15 N.7.)

The purpose of any multistep grievance process like the one in the MOU – a process that increases in formality at successive steps – is generally understood to encourage the voluntary resolution of the grievance between the grievant and the final decisionmaker at the earliest stage possible – *i.e.,* well before the need to submit a grievance to binding arbitration. For this reason, we emphasize that Step 3 is a pre-arbitration step. Under the MOU's grievance process, Steps 1 and 2 require informal meetings. These can be skipped where the subject of the grievance is discipline, such as an officer's termination, and the grievance advances directly to the next step: Step 3. (MOU, Pg. 44, Art X. § H.) A Step 3 grievance challenging a sworn officer's termination requires Employee Relations to meet and "attempt to resolve the dispute" reflected in the grievance. (MOU, Pg. 40-41, Art X. § C (3).) After meeting, the City's obligation under the MOU is to issue a "response" to the grievance. The final step, Step 5, is binding arbitration: to resolve the grievance, an "impartial arbitrator" hears witnesses and makes findings and rulings that have the force of law. (MOU, Pg. 41-42, Art X. § C (5).)

As a pre-arbitration step, Employee Relations must administer Step 3 in consultation with the constituent entity of the City of Oakland that the Charter identifies as the final decisionmaker: the Discipline Committee. Consulting the Discipline Committee about the basis and merit of the grievance and the proper scope and content of the required written response would have been the best faith way to "attempt to resolve the dispute." After Employee Relations received the grievance, it should have initiated a series of official consultations with the Discipline Committee, after which a response would be memorialized in-house and issued to the terminated officers. If that response did not resolve the grievance, the process would then advance to informal resolution, Step 4, and unless the matter were resolved at that juncture, then on to Step 5, which is binding arbitration. No grievance rights would have been abridged.

Instead, Employee Relations failed to inform the Discipline Committee of the Step 3 grievance or provide any update whatsoever to the Discipline Committee. Although some of the details are difficult to ascertain, Employee Relations seems to have deputized Sloan's firm to conduct a full scope review of the factual and legal determinations of the Discipline Committee. Sloan explains what the City of Oakland communicated to his firm about his role as follows: "The direction I received as Step 3 designee was to assess this case neutrally, on its merits."

Sloan's firm used this broad authority to go on tangents about political objections to core aspects of the City Charter and the Negotiated Settlement Agreement, rather than trying to resolve the grievances in consultation with the proper final decisionmaker. The Sloan Report questions as "heavily disputed" the stipulated agreements the City of Oakland entered consensually through the Negotiated Settlement Agreement that empower the Compliance Director to overturn Police Chief decisions. Notably, these stipulations took on the force and effect of law at the time that one of Sloan's employee served as Police Chief for Oakland.

The Sloan Report also includes unnecessary characterizations of several decision-makers involved in this matter. Two excerpts suffice to illustrate this:

- "Parroting the Monitor's analysis, the Police Commission followed the Compliance Director's lead."
- "The Skelly decision parroted the analysis of the Compliance Director, rejecting the argument that the Discipline Committee needed to explain why it rejected the City's expert's findings."

The false trope that Discipline Committee members acted as parrots is core to Sloan's analysis. One important through line of the Sloan Report's critique of the decision to terminate is that the Compliance Director gave "virtually controlling weight to the video" of the officers shooting Mr. Pawlik. The Report extends this critique to the Discipline Committee only by insinuation: implying that the Discipline Committee's analysis is no more than mere "parroting" of the Compliance Director's alleged mistakes.

Based upon the numerous ways in which the Sloan Report deviates from the plain language of the Charter and the MOU, as well as the structure and intent of the entire grievance article of the MOU, we are left with the conclusion that this was more than a mere process error.

In sum, Employee Relations decided against consulting the Discipline Committee here, even though the purpose of the multi-step grievance procedure is to facilitate the Discipline Committee's agreement to voluntarily resolve the grievance. Going forward, this error calls out for correction to better ensure the Charter and MOU are administered faithfully, given the inevitable need for Discipline Committees to work with Employee Relations to resolve Step 3 grievances in the future.