



2005 JUN -3 PM 4:09

ONE FRANK H. OGAWA PLAZA • 6TH FLOOR • OAKLAND, CALIFORNIA 94612

Office of the City Attorney  
John A. Russo

(510) 238-3601  
FAX: (510) 238-6500  
TDD: (510) 839-6451

June 7, 2005

**HONORABLE CITY COUNCIL  
Oakland, California**

**President De La Fuente and Members of the City Council:**

**Subject: Supplemental Report Regarding Immediate Dispute Resolution**

**I. PURPOSE OF THE REPORT**

Council has requested further explanation for our opinion that the Oakland Police Officers Association (OPOA) is not entitled to Immediate Dispute Resolution to challenge the Chief's order that officers must appear at a Citizens Police Review Board hearing when a tort claim has been filed but no litigation has been initiated. This Office previously explained that a tort claim does not constitute litigation. Information previously presented to the Council indicated that few CPRB cases arise in which a tort claim has been filed but no litigation is pending. This report additionally responds to questions from the Council about whether the Pueblo Consent Decree requires the City to provide advice to its labor negotiators in open session when the underlying issues involve the CPRB, and whether the OPOA is entitled to grieve and ultimately arbitrate discipline imposed on officers as a result of their failure to attend CPRB hearings in cases in which tort claims, but no lawsuits, have been filed.

**II. SUMMARY OF THE BASIS FOR THE CITY ATTORNEY'S OPINION CONCERNING OPOA'S REQUEST FOR IMMEDIATE DISUTE RESOLUTION AND IMPLICATIONS FOR THE RIDERS' SETTLEMENT AGREEMENT COMPLIANCE**

The OPOA challenged "the validity of the underlying order" from Chief Word that the officers must appear and testify at a CPRB hearing. The OPOA's letter "formally grieve[d]" the order to the officers, and demanded that it be afforded "immediate dispute resolution" pursuant to Article IX, Subsection E of its Memorandum of Understanding (MOU) with the City of Oakland. The OPOA contended that the matter was appropriate for immediate dispute resolution because it affected a "substantial number of its members." It requested that Chief Word and Employee Relations enter into "immediate resolution discussions" with the OPOA. The letter

**HONORABLE CITY COUNCIL**

**Oakland, California**

**SUBJECT: Supplemental Report Regarding Immediate Dispute Resolution**

DATE: June 7, 2005

PAGE: - 2 -

also sought to confirm an agreement with Chief Word that OPOA members would not be ordered to appear at the CPRB hearing rescheduled for that day.

On August 2, 2004 this Office issued an opinion concluding that the matter for which the OPOA sought immediate dispute resolution involved the interpretation of the CPRB ordinance rather than a matter arising under the contract. It therefore advised the City to deny immediate dispute resolution to the OPOA. Moreover, this office concluded that granting immediate dispute resolution to the OPOA would jeopardize the City's ability to promptly implement reforms necessitated by the Settlement Agreement in *Allen v. City of Oakland*, United States District Court Case No. C00-4599 THE (the Agreement that resolved legal claims arising out of the conduct of the Riders officers) and could also subject the City to future demands for immediate dispute resolution where it was not warranted pursuant to the "beneficial past practices" clause in the MOU with the OPOA. The basis for this Office's position is explained in detail below.

**III. THE MEMORANDUM OF UNDERSTANDING BETWEEN THE CITY AND THE OPOA**

The OPOA's contract with the City contains a provision relating to Immediate Dispute Resolution and a "beneficial past practices" clause.

**A. The Immediate Dispute Resolution Clause**

The pertinent sections of the Immediate Dispute Resolution provision, IX E, which limit the scope of issues that can serve as a basis for Immediate Dispute Resolution, are as follows. Language limiting the scope is highlighted.

In the event there is a dispute regarding the interpretation or application of this Agreement that imminently affects the Association or a substantial number of members represented by the Association, either the City or the Association may upon written notice request suspension of the grievance process as described in Section 3 of this Article and proceed to immediate resolution discussions with the Chief of Police and the Employee Relations Officer. Such discussions shall be concluded within forty-five (45) days of the date of the initial request for same and the action which prompted the request for immediate dispute resolution shall be stayed, pending discussion/conclusion. (Emphasis supplied).

Should the dispute still not be resolved, it may be submitted directly to an arbitrator selected in accordance with the procedure detailed below.

**HONORABLE CITY COUNCIL**

**Oakland, California**

**SUBJECT: Supplemental Report Regarding Immediate Dispute Resolution**

**DATE: June 7, 2005**

**PAGE: - 3 -**

Immediately upon receipt of the written notice as specified above, the City and the OPOA agree to expedite the selection of an arbitrator and arbitration date. The OPOA and City agree to jointly develop the selection procedures to be used.

In any case the arbitrator shall have no power to add to or to subtract from the provisions of this Agreement, the Personnel Rules, or departmental rules or orders in rendering his/her award. Pending prompt and immediate decision of the arbitrator, the stay of intended action giving rise to the dispute shall continue in effect.

It is expressly understood and agreed that the provisions of this Section shall not be invoked for actions involving individual employee disciplinary actions or grievances.”

**B. The MOU Sets Out the Full Understanding of the Parties**

Article X of the MOU-Resolution states:

This Memorandum of Understanding resolves in full, for its duration, all issues between the parties concerning wages, hours, and other terms and conditions of employment.

It further states:

The parties agree that this Memorandum of Understanding sets forth the full and entire understanding of the parties regarding the matters set forth herein.

Except as specifically otherwise provided herein (including, but not limited to, the last paragraph of this section) or in any letter of understanding executed simultaneously herewith, it is agreed and understood that each party hereto voluntarily and unqualifiedly waives its rights and agrees that the other shall not be required to meet and confer with respect to any subject or matter covered herein during the period of the term of this Memorandum of Understanding, except regarding the interpretation of this Memorandum of Understanding. The foregoing shall not preclude the parties hereto from meeting and conferring at any time during the duration of this agreement with respect to any other subject matter within the scope of meeting and conferring and this Memorandum of Understanding upon mutual agreement of the parties.

**HONORABLE CITY COUNCIL**

**Oakland, California**

**SUBJECT: Supplemental Report Regarding Immediate Dispute Resolution**

DATE: June 7, 2005

PAGE: - 4 -

**C. The Beneficial Past Practices Clause**

Significantly, the MOU contains a “beneficial past practices” clause. The clause states:

Except for the subject matters of scheduling of work hours and work days and performance of bargaining unit work (including, but not limited to, “civilianization”) which would be open to interest arbitration for the life of the contract, existing benefits or beneficial practices, which are normally subject to meet and confer, shall not be modified without mutual agreement.

**IV. THE OPINION OF THIS OFFICE**

On August 2, 2004 the City Attorney’s Office issued a legal opinion concluding that the OPOA was not entitled to immediate dispute resolution pursuant to its MOU with the City. On August 6, 2004, the City Attorney’s Office provided the Independent Monitoring Team that is charged with overseeing the City of Oakland’s compliance with the Settlement Agreement in *Allen v. City of Oakland*, United States District Court Case No. C00-4599 THE (the Agreement that resolved legal claims arising out of the conduct of the Riders officers), at its request, with the opinion. The City Attorney’s opinion is as follows:

This Office finds that the OPOA’s letter requesting immediate dispute resolution does not trigger the immediate dispute resolution process provided by Article IX E of the Memorandum of Understanding between the City and the OPOA. Immediate dispute resolution is limited to disputes “regarding the interpretation or application of this Agreement that imminently affect the Association or a substantial number of members represented by the Association.” The “Agreement” is the MOU between the City and the OPOA.

Although the OPOA’s letter avoids identifying with specificity the dispute for which it is requesting immediate dispute resolution, the actual dispute between the OPOA and the City for which immediate dispute resolution is sought is about whether officers have to appear at a CPRB meeting and answer questions when a tort claim has been filed but a civil action has not been instituted. The OPOA contends that a tort claim constitutes “litigation” pursuant to the CPRB ordinance and that the Board may not hear cases in which litigation has been initiated. Counsel for the Board, Tony Lawson, has advised the Board that a tort action does not constitute litigation and that the CPRB may hear cases in which a tort claim has been filed. The “dispute” is thus about the interpretation of the revised CPRB ordinance, rather than about the “Agreement.”

In reaching this conclusion this Office consulted with Scott Kronland, a partner at Altshuler Berzon in San Francisco. Scott is outside counsel to this office for labor

**HONORABLE CITY COUNCIL**

**Oakland, California**

**SUBJECT: Supplemental Report Regarding Immediate Dispute Resolution**

DATE: June 7, 2005

PAGE: - 5 -

matters arising out of the Settlement Agreement. Altshuler Berzon represents the AFL-CIO and many major unions, such as the UAW, and has handled numerous important cases before the U.S. Supreme Court.

**V. THE GRIEVANCE PROCEDURE IS AVAILABLE TO OPOA MEMBERS TO CHALLENGE DEPARTMENTAL ORDERS AS WELL AS DISCIPLINE IMPOSED AS A RESULT OF REFUSAL TO APPEAR AT CPRB HEARINGS**

Although this Office has concluded that Immediate Dispute Resolution is not available to challenge the policies and procedures of the CPRB, which require officers to appear at CPRB hearings as subjects and witnesses, OPOA members may grieve through arbitration any discipline that is imposed as a result of their failure to appear at CPRB hearings. Indeed, as previously explained, the OPOA is entitled to grieve any dispute involving the interpretation or application of the MOU and any disciplinary action taken against an employee, the application of the Personnel Rules, or the application of Departmental Rules or Orders (Article IX A). Unlike other unions in the City, the MOU with the OPOA permits members to grieve even the lowest forms of discipline—counseling or training and oral reprimands (Article IX B). It is indisputable that OPOA members would be entitled to grieve the application of departmental rules or orders or the imposition of discipline through the grievance procedure and arbitration. By contrast with the Immediate Dispute Resolution clause, the grievance procedure does not permit the OPOA to “stay” departmental actions pending discussions, an arbitration, and the issuance of an arbitrator’s decision.

**VI. THE 1996 MOU BETWEEN THE CPRB AND THE CITY CONTAINS NO PROVISIONS BEARING ON THIS MATTER**

In 1996 the City executed a separate Memorandum of Understanding with the OPOA concerning the “Continuation of the Citizens Police Review Board. The term of the agreement was July 31, 1996 to June 30, 1998. Its provisions do not refer to the issues raised by the OPOA in its request for Immediate Dispute Resolution. Rather, its scope is limited to maintaining the confidentiality of documents generated by Internal Affairs to which the CPRB has access.

**HONORABLE CITY COUNCIL**

**Oakland, California**

**SUBJECT: Supplemental Report Regarding Immediate Dispute Resolution**

DATE: June 7, 2005

PAGE: - 6 -

**VII. THE PUEBLO CONSENT DECREE REQUIRES THE CITY TO PROVIDE DIRECTION TO LABOR NEGOTIATORS PERTAINING THE CPRB IN OPEN SESSION**

On January 11, 2001 the City entered into a Consent Decree to resolve actions filed in 1998 by People United for a Better Oakland (PUEBLO) and the American Civil Liberties Union (ACLU) against the City, and by the City against the Public Ethics Commission, Alameda County Superior Court Case Nos. 805369-1 and 805568-8. The Oakland Police Officers Association (OPOA) was brought in as a necessary party in both suits. Prior to entering into the Consent Decree the Alameda County Superior Court had ruled that the policies and procedures of the CPRB were "management rights." The Consent Decree provides as follows:

1. The City must comply with the Brown Act and Sunshine Ordinance when discussing issues pertaining to the CPRB.
2. The Meyers-Milias-Brown Act provides the relevant standard for determining when a change to the CPRB alters the terms and conditions of OPOA members' employment, requiring a meet and confer process with the OPOA prior to implementation.
3. Any meeting of the City Council to discuss or consider legislation or recommendations concerning the organization, management or policies pertaining to the CPRB will be conducted in public, at open session. The City may, however, meet with its attorneys in closed session concerning "pending" litigation.
4. CPRB legislation, reports or recommendations that "relate to the terms and conditions of employment" of OPOA members and that the OPOA contends are subject to the meet and confer requirements of the Meyers-Milias-Brown Act will be handled as follows:
  - a. If the City and OPOA disagree on whether an issue is within the scope of representation or bargainable (subject to a meet and confer obligation), the issue of the scope of representation and bargainability must be resolved at a binding arbitration. The arbitration must be publicly noticed under the Brown Act and Sunshine Ordinance and the public may attend the arbitration as observers, but may not participate. The process for arbitrator selection is spelled out in the Decree.

**HONORABLE CITY COUNCIL**

**Oakland, California**

**SUBJECT: Supplemental Report Regarding Immediate Dispute Resolution**

DATE: June 7, 2005

PAGE: - 7 -

- b. If the City agrees to, or is ordered by an arbitrator to negotiate a CPRB issue with an employee union, the City Council's direction to the City's labor representative must be given in open session.
- c. The City may, but need not negotiate with the OPOA concerning policies and procedures of the CPRB, subjects that the Superior Court found "as a matter of law...do not primarily relate to employment conditions" and instead "involve managerial policy decisions not subject to negotiation under the Meyers-Milias-Brown Act." If the City chooses not to negotiate over the CPRB's policies or procedures the OPOA is not entitled to go to arbitration under Section 910 of the City Charter. Should the City choose to negotiate over such subjects, the City does not waive the contention that the matter is not arbitrable.
- d. The City may meet and confer with the OPOA over any issue related to the CPRB, provided staff direction and reports from staff are given publicly.

If the City provides direction to staff or labor negotiators concerning the CPRB's policies and procedures, including the CPRB ordinance that does not exempt officers from appearing at hearings when tort claims, but no lawsuits, have been filed, the PUEBLO Consent Decree requires that such direction occur in open session.

**VIII. CONCLUSION**

This office concluded that the Immediate Dispute Resolution Clause did not encompass the issue raised by the OPOA—whether officers are required to appear and testify when tort claims have been filed. Moreover, this office concluded that at a time when the Oakland Police Department is subject to the provisions of the Settlement Agreement in *Allen v. City of Oakland*, to extend the immediate dispute resolution provision to matters that were not encompassed by it could impede the City's ability to comply with its Settlement Agreement obligation, a consequence that must be avoided.

Furthermore, the beneficial past practices clause in the MOU magnifies this office's concern. That provision prohibits modifying "beneficial past practices" without mutual agreement. For that reason it is particularly important to avoid creating precedent for expansion of the immediate dispute provision beyond its terms.

**HONORABLE CITY COUNCIL**

**Oakland, California**

**SUBJECT: Supplemental Report Regarding Immediate Dispute Resolution**

DATE: June 7, 2005

PAGE: - 8 -

Finally, matters pertaining to the CPRB, including instruction to City labor representatives concerning negotiations over CPRB matters, must occur in open session.

Respectfully submitted,



JOHN A. RUSSO  
City Attorney

Attorney Assigned:  
Vicki Laden