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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

SAN MATEO COUNTY FIRE FIGHTERS LOCAL 2400, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, MARK GREENE, KEVIN RUANE, ROBERT DAVIS, EARL CHINN, CORY TRAMMEL, RANDY HIMES, KURT HALLIDAY, JOHN ROEMER, AARON SAY, JOHN S. MOLINELLI, JR., DOES ONE THROUGH ONE HUNDRED, Plaintiffs and Petitioners, vs. CITY OF SAN MATEO, RICHARD B. DELONG, as City Manager of the City of San Mateo, ARTHUR N. KORON as the Fire Chief of the City of San Mateo, ROES ONE THROUGH TEN, Defendants and Respondents.	Case No. 238390 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF AND FOR WRIT OF MANDATE AND DECLARATORY RELIEF

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A. PRELIMINARY STATEMENT

In these proceedings a labor union representing firefighters and nine successful firefighter applicants have filed a complaint challenging an "Employment Agreement" unilaterally imposed without negotiations with the union.

As specifically set forth in the complaint and the Declarations, the "Employment Agreement" required all successful job applicants to commit to specific physical standards not required of other firefighters, and further required annual retesting. The "Employment Agreement" also contained a pledge that the applicants would not smoke on or off duty. The job applicants were all told that they would not be hired unless they agreed to sign the agreement. The "Employment Agreement" provided for automatic termination if the applicants failed the annual retesting or violated the no smoking pledge.

The union also joins other successful firefighter job applicants who have been denied employment on grounds of nepotism. A city manager's rule, which has never been approved by the City Council, the Civil Service Commission or by the voters, precludes applicants from employment in the fire department if they have relatives who work for the fire department. In the case of John Molinelli, Jr., an attempt was made by a top Fire Department official to obtain a waiver of the City Manager's nepotism "rule". The waiver was denied by the City Manager.

The union therefore seeks a writ of mandate ordering the City to hire John Molinelli, Jr., an action the city would have taken but for the City Manager's actions. The union also seeks injunctive relief prohibiting the City from enforcing the nepotism rule and prohibiting enforcement of the unilaterally imposed pre-employment contracts.

B. THE PREEMPLOYMENT CONTRACT IS AN UNDULY OPPRESSIVE AND UNCONSCIONABLE CONTRACT OF ADHESION, WHICH SHOULD BE DENIED ENFORCEMENT

A contract of adhesion was defined in Neal v. State Farm Ins. Co. (1961) 188 Cal. App. 2d 690, 694, 10 Cal. Rptr. 781 when the court stated "the term signifies a standardized contract which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." There is no serious question but that the "Employment Agreement" falls within this definition. The Respondents and Defendants drafted the agreement and offered it to applicants for employment on a "take it or leave it" basis, knowing full well that applicants had no bargaining strength and would not have until after they became employees and members of the bargining unit represented by Local 2400. Respondents drafted the contract knowing as well that its terms would deny applicants a substantial portion of the benefits of Local 2400's bilaterally negotiated Memorandum of Understanding. The Court apparently preferred to "bargain" with job applicants individually rather than deal with them as members of Local 2400.

Once it is determined that a contract is adhesive it is necessary to apply the judicially established tests to determine the issue of enforceability. In Graham v. Scissor-Tail Inc. (1981) 28 Cal. 3d 807, 171 Cal. Rptr. 604, 623 P. 2d 165, the California Supreme Court set forth the criteria for enforcement when it stated:

"(6a) Generally speaking, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or "adhering" party will not be enforced against him. (See, e.g. Gray v. Zurich Insurance Co. (1966) 65 Cal.2d 263, 271-272 (54 Cal. Rptr. 104, 419 P. 2d 168); Steven v. Fidelity & Casualty Co. (1962) 58 Cal. 2d 862, 869-870 (27 Cal. Rptr. 172, 377 P.2d 284); Wheeler v. St. Joseph Hospital, supra, 63 Cal. App. 3d 345, 357; see generally Sybert, supra, at pp. 305-306, and cases there cited.)18

(2b) The second--a principle of equity applicable to all contracts generally--is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or "unconscionable." (See e.g. Steven, supra, 58 Cal.2d at pp. 878-879; Jacklich v. Baer (1943) 57 Cal. App. 2d 684 (135 P.2d 179).)19"

The Supreme Court further noted that another factor which may have a "profound and decisive effect on the reasonable expectations of the "adhering" party is the extent to which the contract in question may be said to be one affecting the public interest." See also Tunkl v. Regents of University of California (1963) 60 Cal. 2d 92, 101, 32 Cal. Rptr. 33, 383 P. 2d 441.

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The tests established in Scissor-Tail support plaintiffs' contention the "Employment Agreement" imposed on job applicants in these proceedings should not be enforced. Given the public interest in having working conditions such as those addressed in the pre-employment contract determined through the meet and confer process set forth in Government Code Section 3500 et seq. (The Meyers-Milias-Brown Act), it cannot be concluded that job applicants or adhering parties were reasonably expected to waive substantial rights which they would otherwise have under state law. Nor can it be concluded that the job applicants would agree to the establishing of working conditions in a manner totally inconsistent with the method provided for and required by the Meyers-Milias-Brown Act.

And, applying the second test mentioned in Scissor-Tail, supra it is apparent that even where the provisions of the pre-employment contract were within the reasonable expectations of the parties, the agreement should be denied enforcement because the terms are unconscionable. The terms are unduly oppressive since they infringe upon constitutional rights and public policy and are presented to applicants as non-negotiable conditions which must be adhered to at a time when they do not have representation and protection from Local 2400.

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The Meyers-Milias-Brown Act clearly intended that the working conditions of employees represented pursuant to Government Code Section 3500 et seq. should be determined through the meet and confer process and employees ought not to be denied this protection because they are compelled to sign unconscionable pre-employment contracts such as that drafted by Defendants and Respondents.

The legislature has also addressed the problem of unconscionable contracts in adopting Civil Code Section 1670.5, which states:

> "(a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."
>
> "(b) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination. (effective September 19, 1979)"

Section 1670.5 is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability. The basic test is whether, in light of the general background and the needs of the particular case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of

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> the making of the contract. The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power. (Legislative Committee Comment)"

Thus, there is a statutory basis as well as judicial policy for determining that the pre-employment contract should not be enforced. The pre-employment agreement unilaterally imposed by the Respondents in these proceedings should be denied enforcement under both these policies.

C. RIGHT TO PRIVACY--THE REQUIREMENT THAT PETITIONERS NOT SMOKE ON OR OFF DUTY ON PENALTY OF DISMISSAL IS A VIOLATION OF THE CONSTITUTIONAL RIGHT TO PRIVACY

The employment contract provisions, particularly the requirement of the promise not to smoke, impinge upon several fundamental rights guaranteed by the U.S. Constitution. Smoking is a matter of personal preference involving a private choice which is protected by the right all citizens have to privacy.

The California Supreme Court, in White v. Davis (1975) 13 C. 3d 757, 120 Cal. Rptr. 94, 533 P. 2d 222, analyzed the rationale for an amendment to the California Constitution, citing the privacy arguments set forth in the State's election brochure:

> "The right to privacy is an important American heritage essential to the fundamental rights guaranteed by the First, Third, Fourth, Fifth and Ninth Amendments to the U.S. Constitution. This right should be abridged only when there is a compelling public need. . ." (Id., at 775)

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Here, the City of San Mateo must demonstrate a compelling interest which justifies the differentiation in treatment between newly hired fire department employees, who will not be permitted to smoke either on or off the job, and all other employees, who are not similarly affected. There is no conceivable interest of a compelling nature which would permit such an extensive infringement of the right to privacy of a single group.

Even if the state were to show a compelling interest, the California Supreme Court has held that restrictions upon fundamental rights and personal liberties must be drawn with narrow specificity:

> "When the government seeks to limit those freedoms on the basis of legitimate substantial governmental purposes...those purposes cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. Precision of regulation is required so that the exercise of our most precious freedoms will not be unduly curtailed except to the extent necessitated by the legitimate governmental objective." (Vogel v. County of Los Angeles (1967) 68 Cal. 2d 18, 22.)

In the more recent case of City of Carmel-by-the-Sea v. Young (hereinafter "Carmel") (1970) 2 Cal. 3d 259 at 266, the Court relied upon the Vogel decision, expanding its application beyong protection of First Amendment rights solely, when it stated:

> "When the government seeks to require a limitation of constitutional rights as a condition of public employment, it bears the heavy burden of demonstrating

> the practical necessity of the limitation. The condition...must reasonably tend to further the purposes of the government...and the utility of imposing the condition must manifestly outweigh the impairment of the constitutional rights. (citation)"

In the Carmel decision, the Court listed several Supreme Court decisions which uphold the principle that personal liberties and fundamental human rights are entitled to protection against overbroad intrusion or regulation by the government. The Court further noted that these decisions were not limited merely to rights expressly mentioned in the Constitution, but also extended to basic values "implicit in the concept of ordered liberty." The Court pointed out that, where there is a "significant encroachment upon personal liberty," the state must show a compelling interest in order to support the law as necessary. A merely rational reason is not sufficient. If less drastic means can achieve the same basic purpose, those means must be employed." (at page 268)

The City of San Mateo cannot show a compelling need to impose a no smoking prohibition targeted at all newly hired firefighters. All other currently employed firefighters may continue to smoke on or off duty. Nor was the no smoking rule adopted with the purpose of lessening the interference upon the rights of other non-smoking employees. This rule outlaws all smoking and still allows other smoking employees to interfere with the rights of these plaintiffs. Clearly, there can be no compelling

interest in the imposition of such an ill-conceived rule. An injunction should issue accordingly.

D. EQUAL PROTECTION--THE REQUIREMENT TO ADHERE TO TERMS OF THE PRE-EMPLOYMENT CONTRACT DENIES PLAINTIFFS/APPLICANTS EQUAL PROTECTION OF THE LAWS

Both the United States Constitution and the California Constitution prohibit any state action which in effect would deny any person equal protection of the laws. The United States Constitution provides, in the Fourteenth Amendment, that: "No State shall...deny to any person within its jurisdiction the equal protection of the laws."
The same provision is reflected in the California Constitution, Article 1, Section 7(a):

> "A person may not be deprived of life, liberty, or property without due process of laws or denied equal protection of the laws;. . ."

The requirement that new hires in the fire department sign a promise not to smoke on or off the job, and agree that failure to keep this promise constitutes cause for termination regardless of circumstances and that they agree to other working conditions more burdensome than those of all other city employees is a significant differentiation in the way these candidates for employment are treated in their employment relationship as compared to other firemen currently on the job, as well as other personnel of the same employer. This is precisely the type of differentiation

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with which the equal protection clauses of the state and federal constitutions are concerned. The right to equal protection of the law is a right not to be treated differently from others in the community unless the differentiation in treatment is based upon a classification that is itself reasonable. As summarized by the California Supreme Court In Re Gary W. (1971) 5 Cal. 3d 296, 303, Cal. Rptr. 1, 486 P. 2d 1201:

> "The state may not, however, arbitrarily accord privileges to or impose disabilities upon one class unless some rational distinction between those included in and those excluded from the class exists. The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law exercise like treatment."

See also, Purdy and Fitzpatrick v. State of California (1969) 71 Cal. 2d 566, 578, 79 Cal. Rptr. 77, 456 P. 2d 645.

Once it is established that a state imposed differentiation exists, it is incumbent upon the governmental entity to establish that the action is rational, or that it is reasonably related to some legitimate governmental objective. (In re Gary W., supra; Purdy and Fitzpatrick v. State of California, supra.) When a classification impinges on a fundamental interest, the classification will be held to deny equal protection unless justified by a compelling governmental interest. See, generally, Harper v. Virginia Board of Elections (1966) 383 U.S. 663, 16 L.Ed. 169, 86 S.Ct. 1079 (poll tax

impinged on fundamental right to vote, state must show compelling interest for poll tax); Shapiro v. Thompson (1969) 394 U.S. 618, 22 L. Ed. 600, 89 S. Ct. 1322 (residency requirement for receipt of welfare benefits impinged on fundamental right to travel, state must show compelling interest for residency requirement.)

And even where a compelling interest is shown, restrictions upon fundamental rights and personal liberties must be drawn with narrow specificity:

> "When the government seeks to limit freedoms on the basis of legitimate substantial government purposes...those purposes cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved... (Vogel v. County of Los Angeles (1967)

For the reasons stated in Section C of this argument, the City cannot meet its burden of showing a compelling need for a "no-smoking" pledge. Nor, can it demonstrate a compelling need for the imposition of other working conditions and for more onerous employment infringment on job tenure and due process guarantees than those enjoyed by other employees. And for these additional reasons, an injunction should issue against the enforcement of the pre-employment contract imposed on those individual plaintiffs.

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E. THE REQUIREMENT THAT APPLICANTS SIGN PRE-EMPLOYMENT CONTRACTS CONTAINING DECLARATIONS RESPECTING THEIR ASSUMPTION OF DUTIES VIOLATES CALIFORNIA CONSTITUTION ARTICLE XX SECTION 3 WHICH PROHIBITS SUCH OATHS OR DECLARATIONS

The California Constitution prohibits the City of San Mateo from requiring that applicants for positions as Firefighter/Engineers, or any other positions, take an oath or make such declarations such as are contained in the pre-employment contracts plaintiffs here complain of. California Constitution Article XX Section 3 provides in part:

> "And no other oath, declaration, or test, shall be required as a qualification for any public office or employment.
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> 'Public officer and employee' includes every officer and employee of the State, including the University of California, every county, city, city and county, district, and authority including any department, division, bureau, board, commission, agency, or instrumentality of any of the foregoing." Article XX, Section 3

The issue of whether prohibition against other oaths contained in paragraph three of Article XX, Section 3 applies to oaths or declarations concerning the performance of duties as well as those relating to loyalty to the United States was determined affirmatively by the Court of Appeals in San Francisco Police Officers Assn. v. City and County of San Francisco (1977) 69 Cal. App. 3d 1019, 138 Cal. Rptr. 755. This case concerned a local charter requirement that San Francisco police officers file with the civil service commission a declaration acknowledging that they would comply with a prohibition against strikes. The city agreed the declaration was necessary "as a test of individual fitness to

discharge the duties he is hired to perform" and that the declaration "seeks to protect the tangible and immediate interests of employees (i.e. the public) from default of specific employment obligations by employees charged with performing specialized and crucial public functions." 69 Cal. App. 3d, 1019, 1022. The Court issued injunctive relief prohibiting the City from requiring such declarations, reasoning:

> "(3) The California Supreme Court in Tolman v. Underhill (1952) 30 Cal. 2d 708 (249 P. 2d 280) held that the constitutional provision and implementing legislation (Gov. Code. Secs. 1360-1369 (Oaths of Public Officers) and Secs. 3103-3109 (oaths for public employees) preempt the field. At page 713, the court said: "As we have already seen, the Legislature has enacted a general and detailed scheme requiring all state employees to execute a prescribed oath relating to loyalty and faithful performance of duty, and it could not have intended that they must at the same time remain subject to any such additional loyalty oaths or declarations as the particular agency employing them might see fit to impose. Multiplicity and duplication of oaths and declarations would not only reflect seriously upon the dignity of state employment but would make a travesty of the effort to secure loyal and suitable persons for government service." (Id., at p. 1022)

Here respondents have exacted from applicants as conditions of employment declarations in the form of written pre-employment contracts which concern responsibilities which the respondents insist applicants assent to and so indicate their assent by signing the contracts. There could be no more clear violation of the prohibition against "other oaths" contained in California Constitution Article XX, Section 3. For these additional reasons,

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the injunction prayed for should issue.

F. THE PREEMPLOYMENT CONTRACTS CONFLICT WITH POLICIES SET FORTH BY CALIFORNIA STATUTES CONCERNING WORKERS COMPENSATION AND THUS ARE CONTRARY TO PUBLIC POLICY, ILLEGAL AND VOID

A contract that is against public policy is illegal and void and will not be enforced by the courts. Joseph Denunzio Fruit Co. v. Crane (D C Cal) 797 Supp. 117, motion for new trial granted (D C Cal) 89 F. Supp. 962, reversed on other grounds (CA Cal) 182 F. 2d 569, cert. denied 342 U.S. 820, 96 L. Ed 620, 72 S. Ct. 37, and cert. denied 344 U.S. 829, 97 L. Ed 645, 73 S. Ct. 32 California Civil Code Section 1667 also provides that that is not lawful which is contrary to express provisions of law or contrary to the policy of express law.

The California Labor Code establishes the statutory basis for the state's Workers Compensation programs. A brief examination of but a few sections demonstrates that the terms of the pre-employment contract requiring that Firefighter-Engineers bear the expense of "medical correction or physical conditioning" when such may become necessary to maintain the physical standards in the contracts contrary to these provisions are invalid.

Labor Code Section 4600 provides in part:

"Section 4600. Provision by employer: Liability for neglect or refusal: Reimbursement for medical expense to prove contested claim: Right to reasonable expenses of transportation, meals and lodging, together with temporary disability indemnity.

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"Medical, surgical, chiropractic, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, and apparatus, including artifical members, which is reasonably required to cure or relieve from the effects of the injury shall be provided by the employer. In the case of his neglect or refusal seasonably to do so, the employer is liable for the reasonable expense incurred by or on behalf of the employee in providing treatment. After 30 days from the date the injury is reported, the employee may be treated by a physician of his own choice or at a facility of his own choice within a reasonable geographic area."

Labor Code Sections 6202, 6306 and 6307 provide:

"6202. Joint responsibility for initiation of plan

The initiation of a rehabilitation plan shall be the joint responsibility of the injured employee, and the employer or the insurance carrier.

"6306. Medical and vocational rehabilitative services

The injured employee shall receive such medical and vocational rehabilitative services as may be reasonably necessary to restore him to suitable employment.

"6307. Benefit additional to workmen's compensation

The injured employee's rehabilitation benefit is an additional benefit and shall not be converted to or replace any workmen's compensation benefit available to him."

Labor Code Section 139.5(c) provides:

"(c) When a qualified injured workman chooses to enroll in a rehabilitation program, he shall continue to receive temporary disability indemnity payments, plus additional living expenses necessitated by the rehabilitation program, together with all reasonable and necessary vocational training, at the expense of the employer or the insurance carrier, as the case may be."

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Thus, since the pre-employment contract would require that an injured worker unable to meet the contract's physical standards be responsible for his own medical expenses and vocational rehabilitation, these requirements are contradictory to the mandate of the above-cited Labor Code sections, contrary to public policy and void. An injunction should issue accordingly.

G. THE UNILATERAL ADOPTION OF THE PRE-EMPLOYMENT CONTRACT AS A CONDITION OF PLAINTIFFS' CONTINUED EMPLOYMENT VIOLATES THE MEYERS-MILIAS-BROWN ACT, CALIFORNIA GOVERNMENT CODE SECTION 3500 ET. SEQ.

Through the enactment of the Meyers-Milias-Brown Act (Gov. Code Sections 3500-3510) in 1968, the California Legislature recognized the right of local government employees to organize collectively and be represented by an employee organization of their own choosing "on all matters of employer-employee relations. (Gov. Code Section 3502).

As noted in International Association of Fire Fighters Union Local 1974 v. City of Pleasanton (1976) 56 Cal. App. 3d 959, 967-968, the stated purpose of the Act is to improve employer-employee relations by promoting "full communication between public employers and their employees":

> "Section 3503 establishes the right of recognized employee unions directly to represent their members in 'employment relations with public agencies'. This right to representation reaches 'all matters of employer-employee relations,' (Gov. Code, Section 3502; italics added) and encompasses 'but (is) not limited

> to wages, hours, and other terms and conditions of employment' (Gov. Code Section 3504)." (Social Workers Union, Local 535 v. Alameda County Welfare Dept. (1974) 11 Cal. ed 382, 388 (113 Cal. Rptr. 461, 521 P. 2d 453) (Original italics; fn. omitted. For the texts of the M-M-B Act sections cited, see fn. 2, ante).) The M-M-B Act thus "defines the scope of the employee's right to union representation in language that is broad and generous." (Ibid. (Original italics).) The phrase "wages, hours, and other terms and conditions of employment" is to be liberally construed, consistent with the "generous interpretation" which has been accorded it in decisions dealing with the federal law from which it has been incorporated into the M-M-B Act. (Id., at p. 391).

To achieve this purpose, Section 3505 of the Government Code imposes the obligation upon local governmental agencies "to meet and confer and endeavor to reach agreement on wages, hours, and other terms and conditions of employment" prior to adopting any rule or policy relating to those matters. In Los Angeles County Civil Service Commission vs. Superior Court (1978) 23 Cal. 3d 55, the Supreme Court held that the Act imposes this obligation not only on city councils and boards of supervisors, but also on all other local boards and commissions which have authority over wages, hours, and other terms and conditions of employment. It is now well established that when a local governmental agency has amended a rule affecting the terms and conditions of employment of its employees without first meeting and conferring with the recognized employee organization until either an agreement or an impasse has been reached, the purported

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amendment is void and relief should be granted restraining that agency from implementing, enforcing, or otherwise giving effect to it.

In International Association of Fire Fighters Union, Local 1974 vs. City of Pleasanton, supra, 56 Cal. App. 3d 959, the Court of Appeal held that because the Pleasanton City Council had failed to meet and confer in good faith over proposed rule changes relative to (1) the definition of an employee grievance, (2) pay for sick leave earned by an employee but not actually taken, (3) "educational incentive pay", (4) the procedure whereby the City announced competitive examinations for employment, (5) the time at which an employee serving an initial twelve-month probationary period would be eligible for a non-automatic "merit pay increase" and (6) the reclassification of employees holding the positions of "Fire Captain" and "Fire Prevention Officer" as "middle management" employees of the City, injunctive relief should be granted enjoining the City from implementing, enforcing, or otherwise giving effect to those rule changes.

In Vernon Fire Fighters, Local 2312 v. City of Vernon (1980) 107 Cal.App.3d 802, the Court of Appeal stated:

> "'The rule in California is well settled' A city's unilateral change in a matter within the scope of representation is a per se violation of the duty to meet and confer in good faith.'(T)he courts have not been reluctant to intervene 'when a public agency has taken unilateral action without bargaining at all. In such

> situations, courts have been quite zealous in condemning the unilateral action and in granting appropriate relief". (International Assn. of Fire Fighters Union v. City of Pleasanton, supra, 56 Cal. App. 3d 959, 967, quoting Grodin, Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts (1972) 23 Hastings L.J. 719, 753-754 (hereinafter Grodin, Public Employee Bargaining in California)).
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> As respondent rightly contends in its cross-appeal, "the employer's fait accompli thereafter makes impossible the give and take that are the essence of labor negotiations. "20 Moreover, to allow another construction would be at direct odds with the purpose of the MMBA which is 'to promote full communication between public employers and their employees."21 (Id., at pp. 823-824)."

There can be no doubt that the implementation of a pre-employment contract as a disciplinary tool has a significant impact on the fire fighters represented by Local 2400. Penalties, including discharge, have been prescribed for failure to continuously comply with the terms of the contract and the contract exposes the fire fighters to jeopardy which had not prevailed or existed under previous rules. Under these circumstances, the pre-employment contract terms represent mandatory subjects for the meet and confer process. Vernon Fire Fighters, Local 2312 v. City of Vernon, supra, 107 Cal. App. 3d 802.

Nor can there be serious doubt that the unilateral adoption of work rules and standards of performance through use of this pre-employment contract is of considerably greater importance to Local 2400's members than was the rule regarding

the washing of cars in city facilities, which was found to be a mandatory subject of the meet and confer process in Vernon. Moreover, the pre-employment contract has at least as much of an impact on the city's disciplinary proceedings as the charge in the definition of a grievance, which was found to be a matter within the scope of representation and a mandatory subject for the meet and confer process in I.A.F.F. Local 1974 v. City of Pleasanton, supra, 56 Cal. App. 3d 959. In light of these cases and analogous decisions under the National Labor Relations Act , and the "generous interpretation" to be accorded the scope of representation under the Meyers-Milias-Brown Act (Id.at 967-968), it is clear that defendants were required to meet and confer in good faith with plaintiff Local 2400 prior to implementing the pre-employment contracts and their extensive terms.

Nor is there any factual doubt that defendants have failed to meet and confer. Shortly after the policy of requiring new hires to positions within Local 2400's bargaining unit was made known to plaintiffs, Local 2400 wrote and requested to meet and confer with defendants clearly explaining the legitimate concerns and responsibilities of the union to meet and confer on the terms of the contract, as well as the duty of the city to do so. Defendants have declined to enter into any meet and confer sessions over the matter, however, and insist they have no responsibility to so so.

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Defendants have contended in denying their responsibility to meet and confer that they need not do so because the contracts are required only of new hires. This contention is without merit and no authority exists to support the position that working conditions can be determined by individual contract for bargaining unit members because they have been recently hired when the individual contracts substantially reduce their rights and benefits to which they would be entitled otherwise under a union contract as is here the case.

Substantive authority exists to support Local 2400's contention that it must be permitted to represent all of the employees in its bargaining unit.[1/]

The Supreme Court of the United States in J.I. Case Co. v. NLRB (1944), 321 U.S. 332 stated at p. 503:

> ". . .however engaged, an employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement, even if on his own he would yield to less favorable terms. The individual hiring contract is subsidiary to the terms of the trade agreement and may not waive any of its benefits, any more than a shipper can contract away the benefit of filed tariffs, the insurer the benefit of standard provisions, or the utility customer the benefit of legally established rates."

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1/ The California Supreme Court has clarified that in interpreting the Meyers-Milias-Brown Act, the Courts should consider analogous provisions and decisions of the National Labor Relations Act, 29 U.S.C. Section 151 et. seq. See, Fire Fighers Union v. City of Vallejo (1974) 12 Cal. 3d 608, 116 Cal. Rptr. 507, 526 P. 2d 971; also, Grodin, "Public Employee Bargaining in California, the M-M-B Act in the Courts" (1972) 23 Hastings Law Journal 719, 749.

In Creative Engineering, Inc., 228 NLRB 582 (1977), 94 LRRM 1507, the employer National Labor Relations Board was held to have violated the Labor Management Relations Act by unilaterally changing terms by hiring new non-union employees at lower rate of pay.

A pre-hire contract was held to have violated the Labor Management Relations Act when it unilaterally abrogated the contract without notifying the union, and subsequently changed the terms of employment. In Saks and Company, dba Saks Fifth Avenue 247 NLRB No. 128 (1980), 103 LRRM 1241 the National Labor Relations Board held that a successor employer was required to bargain with the union that represented predecessor's alterations employees before it set initial terms and conditions of employment for its new employees.

Finally, in Gay Law Students v. Pacific Telephone Co., 24 Cal. 3d 458, 156 Cal. Rptr. 14, the California Supreme Court, in footnote 16, noted that a distinction as advocated here by the City between employees and new hires cannot be made where to do so would clearly allow employers to thwart the legislative purpose of protecting citizens by merely advancing their practices to an earlier stage of the employer-employee relations.

> "Although Sections 1101 and 1102 refer only to employees," identical terminology in the federal Labor Management Relations Act has been held to protect applicants for employment as well as on the job employees. (See, e.g., Phelps Dodge Corp. v. Labor Board (1941) 313 U.S. 177, 191-192 (85 L. Ed. 1271, 1281-1282. 61 S. Ct., 845, 133 A.L.R. 1217); and N.L.R.B. v. Mason and Hanger-Silas Co., Inc. (8th Cir. 1971) 449 F.2d 424, 427.)"

" We cannot view the statutes as permitting employers to hire only members of the Republican Party, but forbidding them from firing members of the Democratic Party. Such an anomalous interpretation of these statutes would allow employers to thwart the legislative purpose of protecting citizens by merely advancing their discriminatory practices to an earlier stage in employee-employer relations. "Employers cannot be permitted to evade the salutory objectives of (a) statute by indirection." (California State Restaurant Assn. v. Whitlow (1976) 58 Cal. App. 3d 340, 347 (129 Cal. Rptr. 824).)"

For the reasons that the City of San Mateo has violated its duty to negotiate under the Meyers-Milias-Brown Act, Government Code Section 3500 et seq., an injunction should issue "prohibiting the City and its representatives from enforcing the "Employment Agreement" imposed on the plaintiffs.

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H. RESPONDENT CITY MANAGER'S DETERMINATION THAT CERTAIN RELATIVES OF FIREFIGHTER/ ENGINEERS ARE TO BE EXCLUDED FROM POSITIONS AS FIREFIGHTER/ENGINEERS WAS IN EXCESS OF HIS AUTHORITY

The U.S. Supreme Court determined that the power of the Chief Executive does not include the authorization to make law when in Youngstown Sheet & Tube Co. v. Sawyer (1952) 343 U.S. 579, 72 S. Ct. 863, it declared, "In the framework of our Constitution, the President's power to see that laws are faithfully executed refutes the idea that he is to be a lawmaker."

The general limitation of power applicable to state administrative agencies was stated in Ferdiz v. State Personnel Board (1969) 71 C.2d 96, 104, 77 Cal. Rptr. 224, 453 P.2d 728, which held that administrative agencies "must act within the powers conferred upon it by law and may not validly act in excess of such powers." And the application of this principle to administrators was made clear when the California Supreme Court determined:

> "...the legislature may after declaring a policy and fixing a primary standard to guide the exercise of delegated legislative power confer on executive officers or administrative agencies the 'power to fill up the details' by prescribing administrative rules and regulations. . . "
> First Industrial Loan Co. v. Daugherty (1945) 26 C.2d 545, 549, 159 P.2d 921.

In this instance Respondent City has established by ordinance a position classification plan which provides:

> 2.57.070 ADOPTION AND AMENDMENT OF RULES. Personnel rules shall be adopted by resolution of the city council after notice of such action has been publicly posted in at least three public places designated by the city council,

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and at least five days prior to city council consideration. The personnel officer shall give reasonable written notice to each recognized employee organization affected by the ordinance, rule, resolution or regulation or amendment thereof proposed to be adopted by the city council (optional if not within the scope of representation). Amendments and revisions may be suggested by an interested party and shall be processed as provided in the personnel rules. The rules shall establish regulations governing the personnel system including:

(a) Preparation, installation, revision, and maintenance of a position classification plan covering all positions in the competitive service, including employment standards and qualifications for each class;

(b) Public announcement of all tests and acceptance of applications for employment;

(c) Preparation and conduct of tests and the establishment and use of resulting employment lists containing names of persons eligible for appointment;

(d) Certification and appointment of persons from employment lists, and the making of provisional appointments;

(e) Establishment of probationary periods;

(f) Evaluation of employees during the probationary period;

(g) Transfer, promotion, demotion, reinstatement, disciplinary action and layoff of employees in the competitive service;

(h) Separation of employees from the city service;

(i) The establishment of adequate personnel records;

(j) The establishment of appeal procedures concerning the interpretation or application of this chapter and any rules adopted hereunder. (Ord. 1978-19 §2(part), 1978). (Emphasis supplied)

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The authority of the City Manager is set forth by ordinance as well:

> 2.57.030 PERSONNEL OFFICER. The city manager shall be the personnel officer. The city manager may delegate any of the powers and duties conferred upon him as personnel officer under this chapter to any other officer or employee of the city or may recommend that such powers and duties be performed under contract as provided in Section 2.57.170 of this chapter. The personnel officer shall:
>
> (a) Attend all meetings of the personnel board and serve as its secretary;
>
> (b) Administer all the provisions of this chapter and of the personnel rules not specifically reserved to the city council or the personnel board;
>
> (c) Prepare and recommend to the city council personnel rules and revisions and amendments to such rules;
>
> (d) Prepare or cause to be prepared a position classification plan, including class specifications, and revisions of the plan. The plan, and any revisions thereof, shall become effective upon approval by the city council;
>
> (e) Provide for the publishing or posting of notices of tests for positions in the competitive service; the receiving of applications therefor; the conducting and grading of tests; the certification to the appointing power of a list of all persons eligible for appointment to the appropriate position in the competitive service. (Ord. 1978-19 §2(part), 1978). (Emphasis supplied)

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The above references to the City Manager's authority make it clear his power is limited to administration or "filling up the details" by prescribing administrative rules and regulations as mentioned above (First Industrial Loan Co. v. Daugherty, supra)

adopted by the City Manager, it's evident that he has done a great deal more than fill in the gaps.

Moreover, City of San Mateo Charter Section 8.03 has specifically set forth criteria for appointment to city positions on grounds of "blood, marriage or family relationship":

> The city council shall not appoint to a salaried position under the city government or to any board or commission, any person who is a relative by blood or marriage within the third degree of any one or more of the members of such city council, nor shall any department head or other officer having appointive power appoint any relative of his or of one or more of the members of such city council within such degree to any such person.
> San Mateo Charter Section 8.03. Nepotism.
> (Emphasis supplied)

In addition to the statement of the electors concerning Nepotism contained in Charter Section 8.03, which does not contain any such prohibition as the City Manager has enforced against petitioners, the City of San Mateo has established a civil service system which provides for the selection from amongst applicants for all positions in the competitive city service by examination. The character of these examinations is addressed in the duly adopted San Mateo Personnel Rules, which provide:

> SECTION 2A. CHARACTER OF EXAMINATIONS.
>
> (1) Examinations may be written, oral, or in the form of a practical demonstration of skill and ability, or any combination of these. Any investigation of education, experience, character, or identity, and any test of technical knowledge, ability, manual skill or physical and mental fitness or other relevant factors may be included in the examination.
>
> (2) Entrance exminations shall be open, free and competitive.

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While the City Manager is the appointing authority who can choose from lists of eligibles resulting from competitive examinations (Section 5A of Personnel Rules), he has neither express nor implied power to create classifications of individuals and determine that the members of these classifications are to be prohibited from service within the fire department.

I. THE PROHIBITION AGAINST RELATIVES OF FIREFIGHTER/ENGINEERS IS OVERLY BROAD AND NOT BASED UPON ANY COMPELLING INTEREST AND THEREFORE VIOLATES THE EQUAL PROTECTION CLAUSES OF THE CALIFORNIA AND U.S. CONSTITUTIONS

Petitioner Molinelli and other relatives of Firefighter/Engineers have a fundamental interest in not being arbitrarily foreclosed from consideration for employment opportunities with respondent. The California Supreme Court has recognized this interest and declared:

> (6) Civil Rights §3 - Employment - Fundamental Liberty. Protection against the arbitrary foreclosing of employment opportunities lies close to the heart of the protection against second-class citizenship which the equal protection clause of the federal Constitution was intended to guarantee. An individual's freedom of opportunity to work and earn a living is one of the fundamental and most cherished liberties enjoyed by members of our society.
>
> Gay Law Students Assn. v. Pacific Telephone & Telegraph Co., et al. (1979) 24 C.3d 450, 458, 156 Cal. Rptr. 14, 595 P.2d 592.

And when a statute or rule or regulation adopted by a public agency affects a fundamental interest such as in the instant case, the state bears the burden of demonstrating that a compelling

interest exists which interest justifies the limitation placed upon it. See Gary, W. In re (1971) 5 C.3d 296, 96 Cal. Rptr. 1. And, as has been noted above, in Vogel v. County of Los Angeles (1967) 68 C.2d 18, once a compelling interest is established, restrictions upon fundamental interests must nonetheless be drawn with narrow specificity.

Nepotism rules similar to that complained of herein have been invalidated by the courts. The discharge of a police officer because his wife was employed in the same city department was overturned and an injunction granted to reinstate him in Stearns v. Estes, 504 F.Supp. 998 (C.D. CA 1980). A city charter provision disallowing the employment by the City of Sacramento of the spouse of another city or state employee was found to have a detrimental and unwarranted impact on the fundamental rights of the individuals discriminated against with no corresponding legitimate interest in Mansur v. City of Sacramento (1940) 39 C.A.2d 426. And in Butz v. City of Center Line (1979) 276 NW2d 616, a blanket anti-nepotism provision was found to be invalid.

In applying the requirements of the equal protection clauses of the California and U. S. Constitutions as above stated to the instant case, Petitioners submit that this court should look as well to recent California Appellate Court decisions interpreting the provisions of Civil Code Sections 51 and 52, generally referred to as the Unruh Civil Rights Act. The intent of this legislation was to give all persons full and equal accommodations and privileges in places of public accommodation and amusement

"subject only to the conditions and limitations established by law and applicable alike to all citizens." Gardner v. Tanny (Vic Compton, Inc.) (1960) 182 C.A.2d 506, 6 Cal. Rptr. 490, P7 ALR2d 113. The Unruh Civil Rights Act provisions are now found in the California Fair Employment and Housing Act, Government Code Sections 12900 et seq. Section 12940 of the Government Code provides, in pertinent part as follows:

> It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:
>
> (a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge such person from employment or from a training program leading to employment, or to discriminate against such person in compensation or in terms, conditions or privileges of employment.
>
> Government Code §12940(a) (Emphasis supplied).

The Court of Appeal has indicated that discrimination against members of a classification, i.e. honosexuals, is inappropriate where the discrimination is due exclusively to their status as members of that class and not reasonably based upon the individual conduct of the person excluded. For example:

> (3) Civil Rights §5 -- Housing and Other Property -- Discrimination Against Children. -- Although an individual may forfeit his statutory right of access to the services of a business enterprise by conducting himself improperly or by disrupting the operations of the enterprise,

> the Unruh Civil Rights Act (Civ. Code §51 et seq.) does not permit a business enterprise to exclude an entire class of individuals on the basis of a generalized prediction that the class as a whole is more likely to commit misconduct than some other class of the public. Thus, a landlord's blanket exclusion of all families with minor children was impermissible under the act, even assuming children as a class were noisier, rowdier, more mischievous and more boisterous than adults. The rights afforded by the Unruh Act are enjoyed by all persons, as individuals (disapproving, to the extent it is inconsistent, Newby v. Alto Riveria Apartments (1976) 60 Cal.App.3d 288, 131 Cal. Rptr. 547).
>
> Marina Point, Ltd. v. Wolfson (1982) 30 C.3d 721, ____Cal. Rptr. _____.

And in Hubert v. Williams (1982) 133 C.A.3d Supp. 1, ____Cal. Rptr.____, the court stated:

> In Stoumen v. Reilly, supra, 37 Cal.2d 713, the California Supreme Court stated, although the statement is dicta in the case, that a proprietor of a public restaurant and bar would be liable for damages under Civil Code sections 51 and 52 if he excluded a homosexual based upon that status alone. (Id., at p. 716.)
>
> When arbitrary discrimination is prohibited by a statute, homosexuals have been held to be included in the groups protected by such statutes. In Gay Law Students Assn. v. Pacific Tel. & Tel. Co. (1979) 24 Cal.3d 458, 475-478 [156 Cal. Rptr. 14, 595 P.2d 592], the court held that section 453, subdivision (a) of the Public Utilities Code, which had been construed to ban arbitrary discrimination by a public utility in any respect, prohibited arbitrary employment discrimination against homosexuals, although homosexuals were not specified in the statutory language.
>
> (1b) Based upon the foregoing, we hold homosexuals to be a class protected by the Unruh Act. Based upon the record before us

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> and the nature of the facilities involved, we find no compelling societal interest which could justify an exclusion based upon class status as homosexual (see Marina Point, Ltd. v. Wolfson, supra, at p. 743).

Petitioners therefore submit that discrimination against certain relatives of firefighter/engineers because of their ancestry and without regard to their personal qualifications for positions with the fire department is discrimination disallowed by the Fair Employment and Housing Act as well as violative of the equal protection clauses of the California and U. S. Constitutions.

It is clear as well that while the Nepotism policy here complained of does affect fundamental rights of Petitioner Molinelli and others, absolute exclusion from employment in a fire department with six separate firehouses and three separate shifts, so that a father and his son will not work together, is the type of overly broad remedy disallowed by Vogel, supra, since the problem complained of could obviously be avoided administratively with relative ease.

The City has acknowledged that Petitioner Molinelli, who qualified number four on the eligibility list following the examination procedures, would have been hired but for his relationship with his father. It was only because of that relationship that Petitioner Molinelli was not hired in December, 1981. Accordingly, a Writ of Mandate directing the City to proceed to hire Molinelli with full back pay and an injunction prohibiting hiring of other

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job applicants on nepotism grounds are appropriate.

DATED: October 29, 1982

Respectfully submitted,

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By 
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