

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SHASTA**

HON. STEPHEN H. BAKER

Dept. 3
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176478

**SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 1021,
Plaintiff,**

**RECEIVED
OCT 25 2013
CITY ATTORNEY**

vs.

**CITY OF REDDING, et al.,
Defendants.**

NATURE OF PROCEEDINGS: STATEMENT OF DECISION

I. BACKGROUND

A. The Action:

Petitioner SEIU Local 1021 AFL-CIO ("SEIU") filed this action on January 17, 2013. It consisted of two causes of action. The first sought a writ of mandate under Code of Civil Procedure ("CCP") § 1085 on behalf of City of Redding employees who are members of SEIU and SEIU itself. The second cause of action was brought on behalf of SEIU, as a taxpayer, and sought an injunction under CCP § 526a. The legal premise of both causes of action is that respondents City of Redding ("City") and its City Council ("City Council," collectively "City Respondents") violated Government Code §§ 37103 and 53060 in awarding a contract to Ocom Solutions, LLC, d.b.a. Vertex Business Services ("Vertex") to operate a call center for customers of the City's electric, water, wastewater, solid waste and storm drain utilities.

B. Procedural History:

In February 2013, City Respondents served and filed an answer, a motion for judgment under CCP § 1094 and a motion for judgment on the pleadings (which the Court treated as a demurrer). The motions were supported by a Request for Judicial Notice of documents comprising the legislative record of the City Council's action, which were undertaken over the course of two Council meetings on September 4, 2012 and December 4, 2012.¹

¹ (See *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 7 fn. 2; [the Court may take judicial notice of legislative enactments and legislative history reflecting on the purposes of such an enactment.]) SEIU did not object. City Respondents filed a new Request for Judicial Notice ("RJN") attaching the same legislative record in support of their Opposition to SEIU's instant motion for judgment, which is the subject of this Statement of Decision.

These actions culminated in the City Council's adoption of a resolution determining in material part that "the outsourcing of call center services will maintain a superior and more consistent level of service to Redding utility customers due to the efficiencies of scale and the ability of Vertex to flexibly add and delete resources, including customer service representatives, to meet call demands coming from Redding utility customers." (RJN Exh. D-6, p. 32.)

SEIU objected to the Court's consideration of the legal merits of the action via City Respondents' motions, stating that it wished to adduce other relevant evidence, which was not subject to judicial notice, including a letter sent by the City Attorney, Richard Duvernay, to SEIU's counsel after the City Council took the challenged actions. The Court overruled the demurrer, denied the motions on March 18, 2013 and set the matter for a status conference on March 25, 2013 to discuss the record and briefing schedule.²

Counsel for the parties met and conferred prior to the March 25, 2013 status conference and entered into a stipulation, as modified by the Court to accommodate its schedule. The modified stipulation was reduced to writing, signed by counsel for the parties and the Court issued an order approving the stipulation and setting a hearing on SEIU's merits motion on May 10, 2013. (Stipulation Re Scheduling of Petitioner's Motion for Judgment Under CCP § 1094 and Order Thereon ["Stipulation"].)

C. The Stipulated May 10, 2013 Motion For Judgment (CCP § 1094):

The Stipulation approved by the Court provided: "Petitioner and Respondents both want to see if the legal issues in this matter can be resolved by the equivalent of a motion for judgment under CCP § 1094 on the assumption that there may be no disputed issues of material fact." (Stipulation ¶ 1, p. 1.) The parties also stipulated that "the second cause of action for injunctive relief under CCP § 526a must be resolved on the **exact same facts and law** as the first writ cause of action." (Stipulation ¶ 2, p.1 [emphasis added].) The Stipulation provided a briefing schedule on the proposed SEIU motion for judgment and specially set a hearing date as a short cause matter on the Court's May 10, 2013 calendar at 1:30 p.m. The Stipulation did not address the record.

The Stipulation and Order provided that the Court would issue a tentative ruling on May 6, 2013. The tentative ruling was issued on May 9, 2013. The Court explained to the parties that the voluminous nature of the submissions by both parties and the complex nature of the legal issues precluded the Court from issuing the decision any earlier. Neither party objected to proceeding on May 10, 2013 nor sought a continuance of the hearing.

² The Court also rejected City Respondents' argument that Petitioner lacked standing and was barred by laches. These issues are discussed later in section VI of this Statement of Decision.

D. Nature of Motion For Judgment Under CCP § 1094:

CCP § 1094 permits a writ of mandate to be decided on the motion of either party, if it raises “**only questions of law**,” or disputed “immaterial statements, not affecting the substantial rights of the parties.” (*Id.* [emphasis added].) SEIU thereupon filed its motion pursuant to the stipulation. As provided in the parties’ stipulation, the Court construes Petitioner’s motion as a motion for judgment under CCP § 1094 to resolve both of its causes of action, in light of the parties’ stipulation and this Court’s order that the CCP § 526a cause of action will be resolved on the “same facts and law as the first writ cause of action.” (Stipulation ¶ 2, p. 1.)

The Stipulation is consistent with the allegations of the Petition and applicable law. The Petition alleges in the first cause of action for a writ of mandate that Respondents have violated Government Code §§ 37103 and 53060 by expending funds for a contract which is not for special services authorized by those code sections. (Pet. ¶¶ 19-21.) The second cause of action for injunctive relief as a taxpayer under CCP § 526a incorporates these allegations by reference. (Pet. ¶ 22, p. 5.) “In order to obtain injunctive relief under Code of Civil Procedure section 526a, the taxpayer must establish that the expenditure of public funds which he seeks to enjoin is illegal.” (*National Organization for the Reform of Marijuana Laws v. Gain* (1979) 100 Cal.App.3d 586, 598-99 [quotes and citations omitted].)

E. City Respondents’ Legal Contentions On The Merits:

City Respondents defend the Council’s actions as follows:

1. The City Council’s legislative action is consistent with its broad home rule constitutional powers under Article XI, Section 7 of the California Constitution, which includes the power to contract.
2. The City Council also acted pursuant to its self-executing power to operate utilities under California Constitution Article XI, Section 9.
3. Under Article XI, Section 7 - the main home rule power of cities and counties - the City requires no further legislative authority to act.
4. The City’s broad constitutional powers can only be limited by state law with which the City legislative action is in “conflict.”
5. “Conflict” for purposes of Article XI, Section 7 means that the local legislative action is “preempted” by state law as set forth in applicable California Supreme Court preemption doctrine, including the recent decision in a Riverside case finding that a Riverside ordinance banning medical marijuana was not preempted by state law. (*City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729).
6. Government Code §§ 37103 and 53060 are permissive not preemptive.
7. The City Council’s action was authorized by Government Code § 53060.

F. Petitioner SEIU's Legal Contentions On The Merits:

1. The gravamen of SEIU's contentions is that the City's sole authority to enter into a contract with Vertex is derived from the special services statutes, Government Code §§ 37103 and 53060: "Sections 37103 and 53060 control this case, not Article XI, Sections 7 and 9." (SEIU Reply Brf. p. 1:27-28.)

2. SEIU argues that call center services can only be contracted out if they fall within the categories of services enumerated in the special services statutes and that the Vertex services do not fall within any of these categories.

3. SEIU also argues that the call center services contracted out to Vertex are not special services authorized by Government Code § 53060 and 37103 and thus that the City Council's action to contract with Vertex was unlawful.

SEIU thereby acknowledges that if the City Council's action is authorized by Government Code § 53060, the City Council's action is valid. As described in greater detail in sections III and IV *infra*, the Court concludes that the City Council's challenged action in awarding a contract to Vertex to operate call center services for the City was authorized by Government Code § 53060, thereby obviating the need for the Court to reach the remaining disputed legal issues raised by City Respondents.

G. The Court's Initial Written Tentative Decision And Oral Revised Decision:

The Court's written tentative decision was issued on May 9, 2013. Both parties presented extensive oral argument. First Petitioner argued at length. Then counsel for City Respondents did so utilizing a PowerPoint presentation, a hard copy of which was provided to both Petitioner's counsel and the Court. While Respondents' counsel addressed all legal arguments supporting City Respondents' principal legal contentions, counsel also pointed out that in light of the Court's determination in its tentative decision that the City's contract with Vertex was a contract for special services authorized by Government Code § 53060, the Court need not reach the City's remaining legal contentions.

After oral argument by counsel for the parties, the Court announced a revised tentative decision and directed Respondents' counsel to prepare a Statement of Decision closely following the City's PowerPoint presentation during oral argument. The Court directed that Statement of Decision was to include: 1) a determination that the Vertex call center services fall within the classes of special services set forth in section 53060 for the reasons stated in the Court's tentative ruling and at oral argument as detailed in the City's PowerPoint presentation; 2) petitioner had standing and was not barred by laches; 3) the Court would not address the remaining constitutional arguments because they were moot, and; 4) the statement of decision was to include a section on the standard of review as argued by both the City and SEIU.

The initial Statement of Decision analyzed the arguments made by Petitioner as to the standard of review in its briefs both in support of SEIU's instant motion for judgment and in opposition to City Respondents' prior motion for judgment and judgment on the

pleadings/demurrer. Petitioner's Objections to the initial Proposed Statement of Decision contained a two page discussion of the standard of review that mirrors the arguments made in its Reply Brief on its motion for judgment. In addition, Respondents' counsel solicited the written input of Petitioner's counsel. Petitioner's counsel submitted its proposed language stating its views on the standard of review to Petitioner on May 29, 2013.

H. SEIU's Asserted Need For Additional Briefing:

In SEIU's objections to the initial proposed Statement of Decision it asserted that it should have been given an opportunity to further brief *Serv. Employees Internat. Union v. Bd. of Trustees* (1996) 47 Cal.App.4th 1661, 1673-1675 on which the Court's initial tentative decision relied in concluding that, like the specialized expertise that Barnes & Noble provided the community college district in that case, Vertex provides the City specialized expertise in the efficient and successful management of customer call centers and does so for a large number of utilities.

The Court sees no reason for further briefing. This case was cited by SEIU, itself, in its opening brief. (SEIU Memorandum of Points & Authorities in Support of Petition for Writ of Mandate p. 4:11-17), and its Reply (Reply. Brf. at p. 8:15). Both briefs described the three-factor test in the special services cases and relied on *Serv. Employees Internat. Union v. Bd. of Trustees* case. Similarly, in response to the City's prior demurrer, the City cited the special services cases, including the *Serv. Employees Internat. Union v. Bd. of Trustees* case and the three-factor test they articulated. SEIU discussed that case in its opposition and the City in its Reply. In short, this case has been discussed in every brief filed by the parties. Moreover, SEIU counsel discussed the case at length in his opening and closing argument on May 10, 2013. SEIU has therefore had ample opportunity to express its views on the case.

II. STANDARD OF REVIEW

The parties disagree on the standard of review the Court should employ in determining whether the City Council's actions were authorized by the special services statutes. Below, the Court discusses the two competing standards of review advanced by the parties. In sections III and IV the Court analyzes the facts employing both standards of review and concludes that under either standard of review, the services contracted for by Respondents were special services authorized by Government Code § 53060.

Respondents' first point to the underlying separation of powers doctrine that constrains judicial review of legislative discretion: "A court is without power to interfere with a purely legislative action, in the sense that it may not command legislative acts. The reason for this is a fundamental one: it would violate the basic constitutional concept of the separation of powers among the three coequal branches of government." (Witkin, 8 Cal. Proc. (5th ed.2008) Extraordinary Writs, §93, pp. 983, see also *Monarch Cablevision Inc. v. City Council, City of Pacific Grove* (1966) 239 Cal.App.2d 206, 211 [court is without power to interfere with a purely legislative action, in the sense that it may not

command or prohibit legislative acts, as it would violate the basic constitutional concept of the separation of powers among the three coequal branches of government.].) Petitioner has not disputed this underlying principle in any of its briefs but has argued that this is irrelevant for purposes of determining the City Council's compliance with the special services statutes, as discussed in greater detail in subsections II B, C and E.³

Respondents also argue that judicial review of legislative action is confined to determining whether the challenged legislative action "was arbitrary, capricious, entirely lacking in evidentiary support, or procedurally unfair" and "whether the [challenged action] is consistent with applicable law." (*Associated Building & Contractors Inc. v. San Francisco Airports Commission* (1999) 21 Cal.4th 352, 361.) Courts do not inquire "whether, if we had the power to do so, we would have taken the action taken by the agency." (*Id.*) In its briefs, SEIU has not directly disagreed with this standard of review but has instead argued, relying on *Jaynes v. Stockton* (1961) 193 Cal.App.2d 47, that the legal issue is whether the City Council had discretion at all.

SEIU relies on an extensive quote from *Jaynes v. Stockton* (1961) 193 Cal.App.2d 47, 53-54 ("*Jaynes*") to maintain that the issue is "whether City Council had discretion to authorize the contracting out [of] call center services." (Reply Brf. p. 12-13) and that "it is up to this Court to determine whether the Council had the authority to contract out services under sections 37103 and 53060." (Reply Brf. p. 11:15.) Unlike the school district in *Jaynes*, City Respondents agree that this Court has the right to determine whether the services contracted for were special services under the special services statutes. Thus, there is no disagreement between the parties as to whether the Council's decision is subject to judicial review.

In *Jaynes*, the issue on appeal was whether a school district is authorized to employ a private attorney to advise its board of trustees respecting a specific school problem when the services of the county counsel are available to them for this purpose. The Board of Trustees for the District had retained outside counsel to handle a legal issue. However, when it came time to pay for those services, the superintendent refused, contending that the trustees should have received their legal advice upon the subject in question from the county counsel, and that the board's employment of special counsel was unlawful. The trial court found that the legal services rendered by the outside attorneys were indeed available to the school district from the county counsel, at no cost or expense to the district; that he was willing to perform them; and that they did not constitute special services and advice. Thus, the trial court made two conclusions of law; that: (1) the services rendered were not "special services and advice" within the meaning of section 53060 of the Government Code, and (2) even though they were "special

³ The City Council's actions in adopting the challenged resolution were legislative. (See *Monarch Cablevision Inc.*, *supra*, 239 Cal.App.2d at 210 [Holding that the act of a city council in granting a franchise pursuant to Government Code section 53066 was entirely legislative.]; and *Mike Moore's 24-Hour Towing v. City of San Diego* (1996) 45 Cal.App.4th 1294, 1303 [Holding that a city's award of contracts for vehicle towing services and its decision to reject the protests of several of the losing bidders were legislative actions.])

services and advice," the school district was not authorized to employ the firm of attorneys in question to furnish them, because the county counsel was willing, qualified and competent to perform those services.

The Appellate Court affirmed the trial court. The Appellate Court summarized its analysis, in pertinent part, as follows:

The appellants contend that the board of trustees is vested with discretion to determine *when* special services are needed; impliedly suggest that this discretion attached to its determination that the services in question *were* special services; and, relying on the general rule that in the absence of an abuse of discretion courts will not interfere with the decision of an administrative agency made in the exercise of its administrative powers (*Cobb v. Pasadena City Board of Education, supra*, 134 Cal.App.2d 93, 96), contend that the determination in question is not subject to judicial review. This contention fails to consider the distinction between the exercise of discretion and the existence of authority to exercise that discretion. Whether special services were necessary, when they should be obtained, and who should be employed to furnish them were matters subject to the board's discretion providing the facts were such that they had authority to exercise that discretion; one of these facts involved the nature of the services required; unless those services were special services, the power to act under the statute did not exist; and any preliminary determination by the board with respect thereto is subject to judicial review. The board is not the final arbiter of its authority to act; this is a judicial function involving the application of law to facts; the court determines the facts in accord with established rules; and its determination in this case, being adequately supported by the evidence, is conclusive on appeal. *Jaynes* at pp. 53 – 54.

First, the Appellate Court found whether the services were "special services" entailed an issue of fact. The Appellate Court concluded that this decision should be upheld because it was supported by substantial evidence. (*Id.* at p. 53-54.) As to the second finding, *Jaynes* had argued that the determination of the school district was not subject to review because it involved the exercise of discretion. The Court of Appeal however concluded that, "Section 53060 of the Government Code did not authorize the school district to pay for services which the county counsel was required to perform without charge." (*Id.* at p. 54.) The Court of Appeal explained its reasoning thus:

In many cases, the courts of this state have expressly stated or impliedly recognized the rule that a public agency created by statute may not contract and pay for services *which the law requires a designated public official to perform without charge* unless the authority to do so clearly appears from the powers expressly conferred upon it, [citations omitted] or unless the services required are unavailable for reasons beyond the agency's control, such as inability, refusal or disqualification of the public official to act. This rule is based on sound principles. The law will not indulge an implication that a public agency has authority to spend public funds which it does not need to spend; that it has authority to pay for

services which it may obtain without payment; or that it may duplicate an expenditure for services which the taxpayers already have provided. (*Id.* at p. 57 [emphasis added].)

After noting that contemporaneous opinions of the Attorney General had concluded that § 53060 only applied to special services not required to be performed by a public official (*id.* at p. 55-56) the Appellate Court also held:

“Government Code, §53060 does not empower a school district to contract for special services *obtainable from and which the law requires to be performed by a designated public official.*” (*Id.* at p. 57 [emphasis added].)

Thus, in *Jaynes* the school district did not have the discretion to expend the funds in the first place since the services were required to be performed by a public official ready willing and able to perform them.

The instant case is therefore completely distinguishable from *Jaynes*. Here, there is no equivalent absolute legal prohibition on the City Council’s action, assuming it is otherwise consistent with the special services statutes. In this case, unlike *Jaynes*, no statute or cases require utility call center services to be performed by City employees and SEIU has pointed to none in its briefs. In addition, Government Code § 36505, provides that the city “*may* appoint a city attorney, superintendent of streets, a civil engineer, and such other subordinate officers or employees *as it deems necessary.*” (Emphasis added.)

In undisputed evidence submitted to the Court, the City Manager Kurt Starman explains that most cities, including the City of Redding, contract out for services with private entities, and verifies the declaration and attached chart of City employee Chris Carmona depicting the many services contracted for by the City of Redding for the last ten years including those affecting SEIU employees and Customer Service Representatives (“CRS”) in the customer call center at issue in this proceeding. (Starman Dec., ¶¶ 8-10; Carmona Dec., Exh. A.) City Manager Starman also points out that “contract” cities, patterned after a model pioneered by the City of Lakewood, contract out many or most of their services to either public or private entities. (Starman Dec., at p. 9.)⁴ Contrary to Petitioner’s suggestion at oral argument on May 10, 2013, all contract cities are not charter cities (*id.* at ¶ 9) including the City of Lakewood itself.⁵

⁴ The contract cities movement began in Los Angeles County when a section of Long Beach decided to incorporate. (See the following web sites for historical information about the contract cities movement begun by the City of Lakewood: the Los Angeles County public library, the contract cities organization web site and the City of Lakewood home page: <http://www.colapublib.org/history/lakewood/faq.html#q3>; <http://contractcities.org/index.php/about/history>; http://www.lakewoodcity.org/about_lakewood/default.asp.)

⁵ “Lakewood is a general law city.” (See link to City’s web site about the city’s organization and structure: http://www.lakewoodcity.org/about_lakewood_2/community_profile/city_organization_and_roles.asp.)

The evidence is undisputed that the City call center has been unable to meet industry standards in performing call center services for at least eight years and thus the services are not available from public sources. (Tippin Dec., Exhs. A & B, RJN Exhs. A-2 & D-2 [Staff reports for Sep. 4, and Dec. 4, 2012 Council mtgs.]; RJN Exh. C & E [transcript of Sep. 4 and Dec. 4 2012 mtgs.].) Indeed, SEIU, in support of its motion, submitted a declaration from its business agent Stephen Cutty attaching a copy of a letter from Redding City Attorney Rick Duvernay to SEIU's counsel attempting to persuade them not to file suit by providing them with attached charts establishing that the City operated call center had consistently fallen below industry performance standards for at least eight years. (Cutty Dec. Exh. F [Duvernay letter and attached performance charts].) Thus, *Jaynes* does not preclude the City Council's contract with Vertex, assuming the contract is otherwise consistent with the special services statutes.

The other special services cases cited by the parties construing section 53060 do not mention the issue of legislative discretion or the standard of review related to it. They were decided by the Court of Appeal either after the trial court had sustained a demurrer without leave to amend (*Cobb v. Pasadena City Bd. of Education* (1955) 134 Cal.App.2d 93) or the trial court had issued findings of fact after a trial challenging particular contracts, not legislative action. (*California Sch. Employees Assn v. Sunnyvale Elementary Dist.* (1973) 36 Cal.App.3d 46, 60-61 [*"Sunnyvale"*]; *Darley v. Ward* (1982) 136 Cal.App.3d 614, 627-628) or the trial court had entered summary judgment and the court of appeal noted that there was no dispute as to material facts. (*Serv. Employees Internat. Union v. Bd. of Trustees* (1996) 47 Cal. App.4th 1661, 1665 [*"Appellant does not contend that the existence of disputed material facts made summary judgment inappropriate."*].)

Petitioner has not clearly stated what the standard of review should be in its current motion other than to argue, that under *Jaynes* the City Council did not have discretion to contract for Vertex' call center services. Petitioner's view of the applicable standard of review was, however, stated in its Opposition to Respondents' prior Motion for Judgment. (Pet. Opp.) There Petitioner argued that whether a service was special was an issue of fact citing the *Sunnyvale* case. "Whether a service is 'special' within the meaning of section 53060 is a question of fact." *California School Employees Assn. v. Sunnyvale Elementary Dist.* (1973) 36 Cal.App.3d 46, 61." (Pet. Opp. p. 12:12-14.) In SEIU's Objections to the initial Statement of Decision, it states that "the Court must conduct a *de novo* review to determine whether sections 53060 and 37103 authorize the City to contract out call center services.

Based on the forgoing authorities, this Court reviews the City Respondents actions in order to determine whether the Council acted in conformity with applicable law, arbitrarily or capriciously or entirely without evidentiary foundation. It is noteworthy, however, that even if this Court were to consider the City's decision, *de novo*, the Court would still conclude that the Vertex contract was a contract for special services under Government Code § 53060, as discussed in greater detail below.

III. THE SCOPE OF GOVERNMENT CODE § 53060

It is undisputed that general law cities have the inherent power to contract. “[A] city has authority to enter into contracts which enable it to carry out its necessary functions, and this applies to powers expressly conferred upon a municipality and to powers implied by necessity. [Citation.]” (*Morrison Homes Corp. v. City of Pleasanton* (1976) 58 Cal.App.3d 724, 734; accord *Costa Mesa City Employees Association v. City of Costa Mesa* (2012) 209 Cal.App.4th 298, 310 [“cities have the implied authority to enter into contracts to carry out their necessary functions.”].) It is also undisputed by SEIU that if the City’s challenged action to contract for Vertex call center services is authorized by Government Code § 53060, SEIU’s petition must be denied.

Section 53060 provides in pertinent part as follows:

The legislative body of any public or municipal corporation or district may contract with and employ any persons for the furnishing to the corporation or district [1] *special services* and advice in [2] **financial, economic, accounting**, engineering, legal, or *administrative matters* [3] if such persons are *specially trained and experienced and competent to perform the special services required*. **The authority herein given to contract shall include the right of the legislative body of the corporation or district to contract for the issuance and preparation of payroll checks.** The legislative body of the corporation or district may pay from any available funds such compensation to such persons as it deems proper for the services rendered. (Numbers inserted)

SEIU has contended that each of the sections of the statute are separate required elements of the statute. While the cases interpreting section 53060 utilize only a separate three factor test (see discussion in subsection III C *infra*) for purposes of this discussion, the Court analyzes section 53060 in the restrictive manner urged by SEIU. The Court concludes that the services contracted for would fall within the language of section 53060 and also be authorized by the statute under the three-factor test articulated by the courts construing section 53060.

A. First Element - Call Center Services Are “Special” Services:

Section 53060 authorizes a legislative body of a municipal corporation to contract for “special services and advice in financial, economic, accounting, engineering, legal, or administrative matters . . .” The statute simply provides that the legislative body may contract for particular and distinct services having a special function or purpose. Call center services are certainly “of a distinct or particular kind or character” and have “a specific or particular function or purpose.”

The court of appeal in *Jaynes* noted that “special services” could have a lot of

different meanings depending upon the circumstances.⁶ It then articulated the factors which must be examined as follows:

[W]hether services are special requires a common standard with which to make a comparison. As applicable to the statute in question, this standard is the result of a composite consideration of various factors; at once apparent are those which relate the nature of the services required to the subject matter thereof, to the qualifications of the person capable of furnishing them, to their availability from public sources, and to the temporary basis of the employment through which they are obtained. (*Id.* at pp. 51-52. [citations omitted].)

The *Jaynes* court explained that “special services” may be special to the contracting entity because those services are not available to the entity from its own resources:

[S]ervices desired may be special services as far as the school district is concerned because they are in addition to those usually, ordinarily and regularly obtainable through public sources, even though they are the usual, ordinary and regular services rendered by a person in the particular field of endeavor of which the desired services are a part. The architectural services required by a district may be regarded by an architect as ordinary and usual architectural services but, nevertheless, they are the services of a person possessing a particular skill and are unusual and out of the ordinary to the district if not available to it through official channels. (*Id.* at p. 52.)

SEIU in its Reply Brief did not dispute that the services were “special” services. Moreover the undisputed evidence before the City Council and the evidence submitted to this Court establishes that the City call center was unable to meet industry standards for customer service, for every year from 2004-2012, as a result of its small size and inability to increase or reduce size in response to call volumes. (Tippin Dec., Exhs. A & B, RJN Exhs. A-2 & D-2 [Staff reports for Sep. 4 and Dec. 4, 2012 Council mtgs.]; RJN Exh. C & E [transcript of Sep. 4 and Dec. 4 mtgs.]; Cutty Dec. Exh. F [Duvernay letter and performance charts].) SEIU submitted no contrary evidence to the City Council even though representatives of the union were present at two different council meetings on this subject on September and December 4, 2012. For the first time, petitioner submitted declaration from an individual customer service representative claiming that inadequacies in the City-operated call center were caused by an obsolete billing system and cumbersome protocols. However, this is belied by undisputed evidence of Vertex’ performance since the transfer.

⁶ “The term ‘special’ has been defined by reference to a great variety of synonyms and synonymous phrases among which are those suggested by appellant, i.e., unique, unusual and out of the ordinary; also included are extraordinary, extraordinary, not general noting something more than ordinary additional to the regular, as distinguished from ordinary, usual or typical and in addition is frequently used as opposed to general, *and in legal phrases is most frequently employed as denoting something particular or limited, in contradistinction to general or permanent.* (*Jaynes, supra*, 193 Cal.App.2d at pp. 51 [emphasis added, citations and quotations omitted].)

Using the same billing system used by City staff, except for a one week learning curve, the Vertex call center dramatically improved customer service for Redding residents when it became operational on January 28, 2013 despite a record high volumes of calls. (Tippin Dec. ¶¶ 14, 15, Exh. C; Bryan Dec. ¶ 5.) Complaints regarding call center services coming into the Electric Department's general phone number and to the City Manager's have noticeably declined since. (*Id.* at ¶ 16.)

The Court therefore finds, based on these material undisputed facts, that the City's contract with Vertex was for "special" services within the meaning of Government Code § 53060.

B. Second Element – Call Center Services Likely Entail Financial, Economic, Accounting, Or Administrative Matters:

SEIU also contends that the "special" services must fall into the categories mentioned in section 53060. That section authorizes the legislative body to contract for "special services and advice in financial, economic, accounting, engineering, legal, or administrative matters." The case law, however, does not treat these illustrations of special services to be restrictive as discussed in subsection III C *infra*.

Nonetheless, the Vertex services appear to fall into several possible categories of services described in section 53060. That section provides in pertinent part:

The authority . . . given to contract shall **include** the right of the legislative body of the corporation or district to contract for the issuance and preparation of payroll checks." (Emphasis added.)

If issuing payroll and preparation of payroll checks is "included" within the special services enumerated, those services must fall within one of the listed categories of services in section 53060, under SEIU's restrictive view of the statute. Since payroll services are neither legal nor engineering services they must be services which concern financial, accounting, economic or administrative matters.

The Customer Service Division ("Division") of the City of Redding is responsible for administering the utility billing and collection process for the electric, water, wastewater, solid waste and storm drain utilities. (Tippin Dec. at ¶ 2.) The critical element of this process is performed by specially trained administrative staff referred to as Customer Service Representatives ("CSRs"). The position description for CSRs at the City's call center (Exh. K, Sherri DeMaagd Dec.) requires that they utilize intermediate accounting skills and are involved in the administering of the City's customer call center using detailed procedures and standards set forth in Redding City Council Policy 1402. (RJN, Exh. H.) These services are similar to or more complex than those of issuing and preparing payroll checks.

At oral argument, counsel for Petitioner asserted that section 53060 reads as follows "accounting, services, including the issuance and preparation of payroll checks"

thereby arguing that the preparation and issuance of payroll services are deemed an accounting service. However, as Respondents pointed out, the statute does not read as Petitioner claims. It first authorizes the legislative body to contract for "special services and advice in financial, economic, accounting, engineering, legal, or administrative matters if such persons are specially trained and experienced and competent to perform the special services required." Then, in an entirely new sentence, it states "The authority herein given to contract shall include the right of the legislative body of the corporation or district to contract for the issuance and preparation of payroll checks." The Court therefore concludes that the Vertex call center services would likely fall within one of the four categories into which payroll services would be classified, namely financial, economic, accounting or administrative matters, assuming, for purposes of this discussion, that the Court is required to make such a determination. Petitioner's counsel on rebuttal acknowledged that he was mistaken and was actually quoting from Government Code § 31000 which authorizes contracts for special services for counties and reads completely differently from Government Code § 53060.⁷

⁷ Section 31000 provides:

The board of supervisors may contract for special services on behalf of the following public entities: the county, any county officer or department, or any district or court in the county. Such contracts shall be with persons specially trained, experienced, expert and competent to perform the special services. The special services shall consist of services, advice, education or training for such public entities or the employees thereof. The special services shall be in financial, economic, accounting (including the preparation and issuance of payroll checks or warrants), engineering, legal, medical, therapeutic, administrative, architectural, airport or building security matters, laundry services or linen services. They may include maintenance or custodial matters if the board finds that the site is remote from available county employee resources and that the county's economic interests are served by such a contract rather than by paying additional travel and subsistence expenses to existing county employees. The board may pay from any available funds such compensation as it deems proper for these special services. The board of supervisors may, by ordinance, direct the purchasing agent to enter into contracts authorized by this section within the monetary limit specified in Section 25502.5 of the Government Code.

Nonetheless Petitioner's counsel asserted that the language of section 31000 was relevant because he claimed that all the special services statutes were adopted at the same time. However, the language of 31000 did not originally contain the language relating to payroll services as is evident from a case quoting that language in 1952:

The board of supervisors may contract with and employ any person for the furnishing to the county, or for and on behalf of any district within the county for furnishing to the district, of special services and advice in financial, economic, accounting, engineering, legal, or administrative matters by any persons specially trained and experienced and who is competent to perform the special services required. The board may pay from any available funds such compensation to any such expert as it deems proper for the services rendered."

(Handler v. Board of Sup'rs of San Mateo County (1952) 39 Cal.2d 282, 286.)

The Court notes that since sections 53060 and 31000 read completely differently even though they both authorize the county to contract for special services and sections 37103 and 53060 also read differently even though they both apply to cities, it would appear that the category of services is merely illustrative, not restrictive. This would also explain why the special services cases do not refer to the category of services in their discussion of the test for contracting for special services as discussed next.

C. City Call Center Services Are Special Services Under The Three-Factor Test In The Special Services Cases:

The cases interpreting 53060 after *Jaynes*, do not analyze whether the special services in question fall within the categories of special services described in section 53060. They instead apply a three factor test (also invoked by SEIU in its opening brief at p. 4:14-17) which is derived from the *Jaynes v. Stockton* case, as the first post *Jaynes* case explains:

The leading cases dealing with the ability of school districts to contract with outside agencies pursuant to section 53060 are *Jaynes v. Stockton*, 193 Cal.App.2d 47, 14 Cal.Rptr. 49 and *Cobb v. Pasadena City Bd. of Education*, 134 Cal.App.2d 93, 285 p.2d 41. The test as to whether a school district may contract for services under Government Code section 53060 **depends on [1]the nature of the services; [2] the necessary qualifications required of a person furnishing the services; and [3] the availability of the service from public sources.** (*California Sch. Emp. Assn. v Sunnyvale Elementary Dist.* (1973) 36 Cal.App.3d 46, 60-61 [*"Sunnyvale,"* emphasis added and numbers inserted].)

Notably absent from the three factor "test" articulated by the *Sunnyvale* court was any suggestion that the services contracted for had to fall within the categories in the statute.

The *Sunnyvale* court then goes on to note:

In the *Jaynes* case, the court held that the services rendered by a private law firm to a school district were not 'special' within the meaning of Government Code section 53060 where a private law firm hired by the school district and the county counsel were equally trained, experienced and the county counsel was willing and able to performs the services for the school district and **also under a legal duty to do so.** In *Cobb*, [*Cobb v. Pasadena City Bd. of Education* (1955) 134 Cal.App.2d 93, 95.] the court upheld the ability of a school district to hire and pay an **architect** pursuant to section 53060. (*Id.* at pp. 61-62, [emphasis added].)

It is readily apparent that section 53060 does not explicitly authorize architectural services. Yet, the *Cobb* court considered the contract for such services which was awarded without competitive bidding to be authorized by section 53060:

That statute removes all question of the necessity of advertising for bids for 'special services' by a person specially trained and experienced and

competent to perform the special services required. Now, a board may pay from any available funds a fair compensation to capable and worthy persons for special services. (*Cobb v. Pasadena City Bd. of Education*, *supra*. 134 Cal.App.3d at p. 96.)

The *Sunnyvale* court applied the three factor test it had derived from the *Jaynes* case. It held that the trial court's first finding that the services were "special" was a finding of fact supported by substantial evidence, (*Sunnyvale*, *supra*, 36 Cal.App.3d at p. 61) as was its findings regarding the qualifications of the contractor and that the services were not available from public sources. (*Id.*) The Court of Appeal in *Sunnyvale* did not discuss or specify whether the services fell into any of the statutory categories in section 53060. The services in question involved research and development in transportation and maintenance services, neither of which is expressly mentioned in 53060.

The other special services cases likewise fail to discuss or identify what specific type of statutory service is at stake. For example in *Serv. Employees Internat. Union v. Bd. of Trustees* (1996) 47 Cal.App.4th 1661, 1673-1675, (hereafter "*SEIU*") upholding a school district's contract with Barnes & Noble for services related to management and operation of bookstore operations the court stated: "The test as to whether services are special services depends on 'the nature of the services; the necessary qualifications required of a person furnishing the services; and the availability of the service from public sources.'" (*Id.* at p. 1673.) The court did not discuss what category of services the contract fell within. The court found only as follows:

[T]he District's contract with Barnes & Noble provides the District with management expertise, technological support and profits which respondent could not match through the use of classified personnel. . . . It appears that a main purpose of contracting out the bookstore operation was that a private company could provide the specialized expertise in bookstore management and operation which the District lacked, and which was otherwise unavailable to it. (*Id.* at p. 1674)

At oral argument on May 10, 2013, counsel for Petitioner distinguished the *SEIU* case arguing that it relied on the permissive Education Code in concluding that the services in question were special services under section 53060. Respondents counsel responded that the court in the *SEIU* case had independently analyzed the issues under Government Code § 53060 without reference to the Education Code. A review of the opinion in *SEIU* supports Respondents' position.

Four separate issues were raised by plaintiff in the *SEIU* case, as noted by the Court of Appeal – three related to construction of various Education Code provisions and one related to the claim that Government Code § 53060 prohibited the contract. (*SEIU*,

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supra, 47 Cal.App.4th at p.1165.)⁸ As to the first three issues, the court of appeal concluded that the contract was authorized by the School District's authority under the permissive Education Code and not precluded by any of the Education Code sections cited by the plaintiff. (*Id.* at pp.1665-72.)

The *SEIU* court of appeal then separately analyzed the plaintiff's contention that the contract violated Government Code § 53060.

Government Code Section 53060—Special Services

Appellant contends that the District's contract with Barnes & Noble is not permitted under Government Code section 53060 because the services performed by Barnes & Noble are not "special services." *Assuming for the sake of argument that Government Code section 53060 could operate to undermine the authority granted the District under the permissive Education Code*, we disagree with appellant's contention. (*Id.* at pp.1672 [emphasis added].)

The Court of Appeal's ensuing analysis of section 53060 made no reference to the Education Code. (*See id.* at pp.1672-75.) Accordingly, the Court agrees with Respondents that the *SEIU* case did not rely on the permissive Education Code in concluding that the contract with Barnes and Noble was not prohibited by Government Code § 53060. It only applied the three-factor test without discussing what category the services fell within.

Similarly in *Darley v. Ward* (1982) 136 Cal.App.3d 614, 627-628 [upholding a contract for management services for county hospitals] the court of appeal again applied the three factor test:

Whether services are special requires a consideration of factors such as the nature of the services, the qualifications of the person furnishing them and their availability from public sources. (*Id.* at p. 628)

The court of appeal affirmed the trial court's findings after a trial even though the findings did not refer to the category of services described in the statute:

The trial court found in its findings of fact that [the contractor] "performed services not otherwise available to the County generally, in that they provided persons with expertise not possessed by County employees, and who could be called upon instantly for specific projects." In its conclusions of law, the court found that the subject contracts were for special services within the meaning of the San Mateo Charter and

⁸ "[SEIU] argues 1) that the Barnes & Noble contract is inconsistent with section [Education Code section] 81676, 2) that the repeal of former section 81676.5 indicates a legislative intent to rescind any authority for entering into such a contract, 3) that the contract violates sections 88003 and 88004 by eliminating jobs of classified employees and 4) that this was not a "special services" contract permitted under Government Code section 53060.

Government Code sections 31000 and 53060. We conclude that its findings are supported by substantial evidence. (*Id.*)

D. Third Element Of Statute And Second Factor Under Case Law - Vertex Has The Necessary Qualifications:

The statute requires that the persons contracted with “are specially trained and experienced and competent to perform the special services required.” The cases describe this component as the second factor of the three factor test, namely, the necessary qualifications required of a person furnishing the services. It is undisputed that Vertex staff are specially trained, experienced and competent in providing call center services to multiple utilities. The December 4, 2012 staff report to the City Council reported that the Vertex contract call center maintains standardized service to customers by sharing a large customer service staff between several utilities. Vertex provides a core team to each utility customer but staffs up when call volumes are known to increase. The Vertex contract provides for measureable levels of service and the cost of the service is based on historical call volumes and includes a cap. Vertex was to operate the call center using existing City protocols and systems, prior to the proposed billing system upgrade. (RJN Exh. D-2 bate stamped pp. 7-8, internal Report pp. 2-3.) Since it became operational, on January 27, 2013, except for a one week transitional period, the Vertex call center (using the old billing system) is already meeting industry performance standards despite a record high volume of calls. (Tippin Dec. p. 5:19-26, Exhs. C & D.)

E. Call Center Services, Which Meet Customer Service Industry Standards, Are Not Available From Public Sources:

While the availability of the services from public sources is not listed in the statute, it is an element of the three-factor test in case-law.⁹ As already discussed in Section III A, based on undisputed material facts before the City Council and the Court, call center services which can meet industry standards for customer service are not available to the City in its own staff-operated call center.

IV. CITY’S ACTION WAS AUTHORIZED BY GOV. CODE § 53060

Examined under either the standard of judicial review applicable to the City Council’s exercise of legislative discretion or in the alternative under its determination of a question of fact, the Court concludes that the City Council’s challenged action was authorized by Government Code § 53060 based upon undisputed material facts submitted to the City Council, which were buttressed and further explained in declarations and exhibits submitted to this Court containing undisputed material facts. The City Council’s exercise of legislative discretion was embodied in a resolution it adopted on December 4, 2012. (RJN D-6.)

⁹ City Respondents have argued that this factor derived from the *Jaynes* case is only applicable where an existing public official has a duty to perform these services and is willing and capable of doing so. The Court does not reach this question since it finds that in any event the services are not available from public sources.

The City Council's resolution contained several findings, the substance of which are now described. The City owns and operates five separate municipal utilities. As part of operating its utility services, the City provides customer support services including account establishment, meter setting, billing, and customer call center operations. The City has determined it needs to upgrade its current utility customer information system and has selected Vertex Business Services (Vertex) to provide the updated system. Vertex has offered to also provide call center services to the City; as an ancillary service. (*Id.*)

The City Council's central and dispositive finding was that "the outsourcing of call center services will maintain a superior and more consistent level of service to Redding utility customers due to the efficiencies of scale and the ability of Vertex to flexibly add and delete resources, including customer service representatives, to meet call demands coming from Redding utility customers."

The resolution went on to point out that the memorandum of understanding between the City and the Service Employees International Union provides the City with the right to contract out work to be done or services to be rendered provided, that the impact and effect of any such decision may be subject to the meet and confer process.¹⁰ The resolution stated that Government Code § 53060 and 37103 authorized the City to contract for special services. It further noted examples of a pending federal bill and Labor Department statistical tracking for telephone call centers as confirmation that call centers are a type of specialized business.

Based on these legislative findings the Council found that call center services were special services which may be outsourced. The Court first analyzes the City Council's action under the standard of review applicable to judicial review of the exercise of legislative discretion.

A. The Council Did Not Abuse Its Discretion By Acting Arbitrarily Or Capriciously, Entirely Without Evidentiary Support Or Contrary To Applicable Law:

The Court concludes that the City Council engaged in a lawful exercise of legislative discretion under the standard of review applicable to judicial review of legislative discretion. Firstly, the Council's findings were not arbitrary or capricious, but thoughtful and well considered. Secondly, not only were the findings not entirely without evidentiary support but instead they were supported by undisputed extensive written and oral reports responses to questions and Councilmember comments. Finally, the City Council's actions were consistent with and authorized by Government Code § 53060, both under the language of the statute itself (were it read as SEIU suggests) and applying the three-factor test used by cases construing that section.

¹⁰ SEIU submitted a copy of the MOU (Stephen Cutty Dec., Exh. A, p. 2) which so confirms.

1. The Council's Findings Were Supported By Undisputed Evidence:

The City Council's actions with respect to the Vertex contract transpired over the course of two City Council meetings on September 4, 2012 and December 4, 2012. The legislative record is attached as Exhibits to the City's unopposed Request for Judicial Notice (RJN). It includes written and oral reports for each meeting as follows: a) the staff written report for September 4, 2012 meeting (RJN Exh. A-2); b) Redding Electric Utility Manager Barry Tippin's oral report at the September 4, 2012 meeting, contained in a transcript of that meeting, along with public comment and Council discussion (RJN Exh. C); c) the staff written report for December 4, 2012 meeting (RJN Exh. D-2); and d) Redding Electric Utility Manager Barry Tippin's oral report at the December 4, 2012 meeting contained in a transcript of that meeting (RJN Exh. F).

a. The September 4, 2012 Council Meeting:

The September 4, 2012 written staff report (RJN A-2 pp. 6-9) made several points. It explained that Vertex can provide better service at lower cost and that it is a recognized service provider with extensive industry experience in both utility billing systems and call center services. The City call center by contrast has experienced problems because it is unable to grow and reduce staff. A contract center can effectively share staff assigned to different utilities as often peak demands come at different times during the day.

Redding Electric Utility Manager Barry Tippin also provided an oral report. (RJN Exh. C, pp. 1-7.) He said that the City staff operated center has had difficulty with service levels. Customers calling into the call center hang up because of wait times. The cause of the waits is the City's inability to increase or shrink staff. By contrast, Vertex services many utilities with different peak times and demographics and can switch staff to maintain service levels. The Vertex contract will also result in a \$700,000 discount on the billing software upgrade and reduced annual costs for better service. No staff would be laid off.

City Council members including Councilmember Sullivan posed questions to Mr. Tippin and he responded with additional information about the problems with the City-operated center. He said that the City staffs to the middle of caller demand and thus cannot keep up with peak call volumes. (Tippin response, RJN Exh. C, p. 13) The City's call abandonment rate is between twenty to forty per cent on high volume days after furloughs and long weekends. (*Id.*) Councilmember Sullivan stated that her question about the deficiencies in the City call center did not reflect any disparagement of the staff; but in fact it was because of the bad effects on staff morale by the higher call volumes on days after holidays, furlough days and long weekends that caused her to end up supporting the contracting out of the call center, she appreciated the economies of scale in the [contract] call center, she wanted to keep existing City staff and ensure they would not have to deal with irritated customers, the City should not lower customer service standards and she "grilled" Barry Tippin who answered all her pressing questions. (RJN Exh. C, pp.13-14.)

Mr. Tippin confirmed that there would be no loss of staff, only seven vacant positions would be eliminated at about \$630,000-720,000 annual savings per year. (Tippin response to then Councilmember Dickerson RJN Exh. C, p. 16-17, and Mayor Bosetti, p. 20:1-5.).

Marcia Aimes, Chapter President of SEIU, spoke at the September 4, 2012 meeting. She did not contest either the written or oral staff report. Her only comment was to suggest that the City proceed through an RFP process for the billing system upgrade. (RJN Exh. C, pp. 6-7.) No other speaker contested the substance of the written and oral staff reports regarding the benefits of the contract call center with respect to customer service over the staff-operated call center.

A motion was made by Councilmember Sullivan to approve contracting for call center services with Vertex because the City call center was wearing on employees, was not providing the best services for customers, by contracting with Vertex the City benefits from economies of scale, and the City still gets to keep the employees it already has. (RJN Exh C, p. 22.) The motion passed 3-1. (*Id.*)

b. The December 4, 2012 Council Meeting:

The staff negotiated the terms of the Vertex contract over the next months and brought their final recommendation to the City Council at its December 4, 2012 Council meeting to approve the Vertex contract for the billing system upgrade and call center services. As to the basis of staff recommendations to contract with Vertex for call center services, the report stated that the Vertex contract call center maintains standardized service to customers by sharing a large customer service staff between several utilities. Vertex provides a core team to each utility customer but staffs up when call volumes are known to increase. The proposed contract provides for measureable levels of service. The cost in the contract is based on historical call volumes and includes a cap. Vertex will operate the call center using existing city protocols and systems, prior to the billing system upgrade. No staff will be displaced. The report also explained that after the September 4, 2012 Council action when the Council authorized the staff to negotiate the contract with Vertex to assume call center services, the City had issued an invitation to SEIU to meet and confer as to impacts but that the union had failed to respond. (RJN Exh. D-2 bated stamped pp. 7-8, internal Report pp. 2-3.)

Mr. Tippin provided an oral report at the December 4, 2012 meeting as well. He said that Vertex owns and operates a call center for a number of utilities. Vertex customer service staff work from the facility. Vertex will begin its services for the City within two to three months, using the existing billing system. The change will improve customer service mainly due to economies of scale, Vertex expertise in operating call centers for utilities and its flexibility in bringing staff in and out to account for peaks and valleys in call volumes. He also explained that the change to a contract call center is projected to result in an annual costs saving of \$500,000 once fully implemented. (RJN, Exh. F, pp. 4-6.)

Just prior to the Council meeting SEIU delivered a letter to the City Council in which it asserted that the Council's proposed action would violate Government Code §§ 37103 and 53060. (RJN, Exh. D-4, bated stamped pp. 19-21.)

Mr. Tippin responded to Council questions and Councilmembers made comments. In responding to a question from Councilmember MacArthur, Mr. Tippin stated that the City would not lose any actual staff, and would only eliminate positions which have become vacant due to attrition and there would be a cost savings of \$500,000. (RJN, Exh. F, pp. 10.) Councilmember Sullivan noted that the City will provide better services for less money. (*Id.* at p. 11:1-3.) Mayor Bosetti stated that the City needed to modernize and upgrade services, and has a "fiduciary obligation to save money." He was not unduly alarmed by SEIU's threat to file suit: "Good Lord who hasn't the union sued – that is what they do." (RJN, Exh. F, p. 13.)

Stephen Cutty SEIU field representative spoke at the meeting threatening suit but did not otherwise address any of the substance of the City's written and oral reports. (RJN, Exh. F, pp. 6-7.) Marcia Aimes, SEIU Chapter President likewise made no comments as to the substance of the report as to the City call center services. Her main comment appeared to be that contract jobs would not go to Redding businesses. (RJN Exh. F, pp. 8-9.) The City Council thereupon adopted the resolution described earlier. (RJN Exh. D-7.)

c. Evidence Submitted By The City To The Court Also Supports The Council's Actions:

(i) Inability Of City To Meet Industry Standards

Barry Tippin, an Assistant City Manager for the City, is the Director of the Redding Electric Utility (REU), a Division of which is Customer Service, and has been involved in customer service issues since he assumed the job. (Declaration of Barry Tippin In Opposition To Petitioner's Motion For Writ of Mandate ["Tippin Dec."] p. 1, ¶¶ 1, 3.) The Customer Service Division ("Division") is responsible for administering the utility billing and collection process for the electric, water, wastewater, solid waste and storm drain utilities. (*Id.* at ¶ 2.) The critical element of this process is performed by specially trained administrative staff referred to as Customer Service Representatives ("CSRs"). (*Id.*)

Mr. Tippin points out that a small customer service center like Redding's has significant challenges to meet industry service levels. (*Id.* at ¶ 4.) This is due mostly to the inability to flex staffing levels up or down to meet customer demand. (*Id.*) In Redding, both the walk-in center and the call center have historically been staffed by the same people who float between the two or are permanently assigned to one or the other depending on demand. (*Id.*) Service levels suffer the most when there is high demand in both centers making it necessary to "choose" which customers are served, those on the phone or those who are in the walk-in center. (*Id.*)

Additionally, once the queues for service reach unacceptable levels, it takes hours

to reduce the backlog much like a congested freeway. (*Id.*) The effort to reduce such backlog is intense and stressful for both the customer and the CSR, escalating the chance for bad encounters and resultant complaints. (*Id.*) To exacerbate matters further, technological advances in billing systems provide much more access to information for customers, but also drive the need for more highly trained staff to access, interpret and implement customer transactions, which often require more time to complete. (*Id.*)

The Customer Service Division has historically been unable to meet industry standard service levels of the two main call center indicators: call abandonment rate and percentage of calls answered within 30 seconds. There are a variety of contributing factors including lack of personnel, lack of fully trained personnel, hindrances to personnel availability (absenteeism, furloughs, etc.), variability in call volume by month of the year, day of the week, and so on; however, the primary factor affecting service level is the lack of flexibility to increase and decrease staffing levels to meet customer demand. (Tippin Dec. ¶ 5.)

The call abandonment rate is a percentage of the total incoming calls during a specified period of time. An abandoned call is defined as an incoming call where the caller disconnects or aborts the call before a Customer Service Representative is able to answer. Industry standards are to limit the percent of abandoned calls to 5-7%. The City of Redding calculates its call abandonment rate as the total number of abandoned calls divided by the total of incoming calls into the Express and Express Customer Transaction (ECT; payment only) queues as reported by the Department's Avaya phone system. (Tippin Dec. ¶ 6.) The City's call abandonment rate exceeded the industry standards every year from 2004-2012. (Exh. A, Tippin Dec. ¶6.)

The second indicator is defined as the percentage of total calls which are answered by a Customer Service Representative within 30 seconds. (Tippin Dec. ¶ 7.) The industry standard is to answer 80% of all calls within 30 seconds. (*Id.*) The City of Redding calculates this percentage as the total number of incoming calls answered in less than 30 seconds divided by the total of incoming calls into the Express and ECT queues as reported. (*Id.*) The City's performance on this indicator was also below industry standards in this regard every year from 2004-2012. (Exh. B, Tippin Dec. ¶ 7; Bryan Dec. ¶4.)

This evidence submitted by the City merely expanded upon the information contained in staff written and oral reports and discussions before the City Council.

(ii) The Vertex Contract For Call Center Services

In November of 2011, the City asked Vertex to make a high level assessment to determine the ability to, and the costing of, an upgrade to the billing system. (Tippin Dec., ¶ 10.) In the spring of 2012, when Vertex provided its assessment to the staff it also included unsolicited information and projected costs of Vertex taking over the City's call center to enhance the City's ability to serve its customers, and Vertex offered a \$700,000 discount on the billing system upgrade if the City used the Vertex call center. (*Id.*) In May 2012, the City Council directed the Personnel Director to meet and confer with the Union regarding potential impacts of the possible outsourcing of the call center. (*Id.* at ¶ 10, p. 4.)

City staff and Vertex completed a feasibility study of the call center transfer and technology upgrade, including staff observation of the Vertex Call Center operations. The study concluded that there were no fatal flaws and the staff recommended that the City Council proceed.

In May, 2012 the Council concurred and directed staff to negotiate a contract with Vertex to upgrade the City's billing system and to provide call center services but to do so without the displacement of City staff if possible. After the initial assessment by Vertex, in the spring of 2012, Barry Tippin placed a hiring freeze on appointing new CSRs in order to minimize any impact to City staff should the Council decide to utilize a contract call center. He retained \$122,660 in temporary agency staffing for cashiering and clerical work, re-assigned staff from billing to customer contact, assigned supervisory and management staff to customer contact and modified several internal processes to assist in maintaining service levels. (Tippin Dec. ¶ 12.) These efforts were successful at maintaining existing levels of service, which still fell short of industry standards. (Exhs. A & B Tippin Dec.; Bryan Dec. ¶¶ 3-4.) The City Council approved outsourcing on September 4, 2012 and the contract on December 4, 2012. (RJN Exhs. A-G.)

(iii) Contracting Practices In Redding And Other Cities

Redding City Manager Kurt Starman has been a full-time City employee since 1991 including positions as Administrative Services Director, Deputy City Manager, Assistant City Manager and City Manager. (Declaration of Kurt Starman In Opposition to Petitioner's Motion for Writ of Mandate ["Starman Dec."] ¶ 1, p.1.) Mr. Starman thereby acquired a comprehensive understanding of the resources needed to provide services to the general public. (*Id.* at ¶ 3, p.1.) The City of Redding is a full service City providing public safety (police and fire), highways and streets, public improvements, planning and zoning, recreation and parks, library, airports, convention and auditorium facility, utilities (electric, water, wastewater, storm drainage, and solid waste collection and disposal) and general administrative services. The City's annual budget exceeds \$293,000,000. (*Id.* at ¶ 2, p.1.) As of March 30, 2013, the active City workforce consisted of 708 regular full time positions, 38 full time temporary positions and 296 part time positions. (Starman Dec. ¶ 4.)

In addition to, or as an alternative to services being provided by persons employed by the City, the City contracts with private sector service providers for many specialized services. (Starman Dec. ¶ 5.) Mr. Starman confirms the accuracy of a chart prepared by Chris Carmona which describes the services the City has contracted for either on an exclusive or supplementary basis over a ten year period, including in the Customer Services Division. These services are contracted for in a wide range of areas where related or the same services are also provided by City staff, including ones represented by SEIU and other unions. (*Id.* at ¶ 5, p.1; Exh. A Declaration of Chris Carmona in Opposition to Petitioner's Motion for Writ of Mandate [Carmona Dec.].) Mr. Starman emphasizes, that the City of Redding, like cities all across California, use contracts with private entities to provides citizens the highest quality services and the best value for their money. (Starman Dec. ¶¶ 6-8, 10.) He states that "contract cities" follow the model

pioneered by the City of Lakewood and obtain many or most of their services from private and public entities. (*Id.* at ¶ 9.)

(iv) Vertex Call Center Exceeds Performance Standards

Using the same billing system used by City staff, except for a one week learning curve, the Vertex call center dramatically improved customer service for Redding residents when it became operational on January 28, 2013 despite a record high volume of calls. (Tippin Dec. ¶¶ 14, 15, Exh. C; Bryan Dec. ¶ 5.) Complaints regarding call center services coming into the Electric Department's general phone number and to the City Manager's have noticeably declined since. (Tippin Dec., at ¶ 16.) The Vertex contract payment terms are based on hourly charges for the CSRs not to exceed monthly caps which were based on historical volumes. The calls for February 2013 were 21% higher than in 2012, 33% higher than the average calls in February from 2009-2012, and 17 percent higher than the highest call volume over that same time period. The cap was thus increased. (*Id.* at ¶¶ 16-17.)¹¹

(v) SEIU Did Not Dispute Respondents' Material Facts

SEIU in its Reply did not refute the City's material facts and did not dispute that the City call center has "historically underperformed." (SEIU Opening brief p. 16:10-12). SEIU's moving papers assume that the culprit is the City software that is "functional[ly] obsolete." (*Id.* at p. 12-14.) based upon a declaration of its business agent Stephen Cutty who made no such claim to the City Council on December 4, 2012 when he appeared before them. However, it is undisputed as described above that Vertex has already met industry standards after the first week that it took over despite record high call volumes while using the old billing software and existing City protocols.

SEIU also submitted a declaration by Tamara Ketcham a City Customer Service Representative who attributes deficiencies in call center performance in particular years to particular staffing and other limitations in those years. No such comments were ever presented to the City Council. In any event Ms Ketcham's declaration fails to explain why the call center could not perform at industry standards for an eight year period and does not quarrel with the City's basic premise that a City operated center cannot flexibly increase and decrease staff based upon call volumes.

The declarations submitted in opposition to SEIU's motion by contrast established that the City contracted with temporary agencies and used management staff to fill in when vacancies occurred and described in detail why a small City-operated call center could not meet industry standards and that Vertex had done so within a week of taking over. SEIU submitted no further evidence on Reply and the premise of its motion was that there were no disputed issues of material fact. Neither in its Reply nor at oral argument did SEIU argue that there were disputed issues of material fact which precluded denying its motion.

¹¹ SEIU submitted a transcript of the March 19, 2013 meeting in support of the instant motion.

2. The City Council Did Not Act Arbitrarily Or Capriciously

In light of the wealth of undisputed evidence that the City call center could not meet industry customer service standards in handling customer service calls from its utility customers, the City Council's action in contracting out the call center to Vertex was not arbitrary or capricious. The Council acted thoughtfully and in a well-considered manner to make what it reasonably believed was the best decision for Redding utility customers who called in to its call center. Already, the City Council's decision appears to have been prescient given the immediate improvement in customer service at the call center despite the old billing system.

3. The City Council's Decision Was Consistent With Applicable Law

As described in detail in section III, *supra*, the City Council's decision was consistent with and authorized by Government Code § 53060.

B. The Court Also Finds In The Exercise Of De Novo Review That The Vertex Contract Was One For Special Services Within The Meaning of Government Code § 53060

The Courts also finds reviewing the factual evidence *de novo* that the Vertex contract was for special services based upon all the evidence and the legal analysis discussed above. The evidence submitted by the City is very substantial and undisputed that the call center services provided by Vertex were designed to enable the City call center to meet industry standards for customer service, the City staff-operated call center had failed to meet such standards for eight years largely because of its small size, whereas the Vertex contract call center shared with other utilities enabled the City to benefit from economies of scale. Vertex has substantial expertise and experience in operating a call center for utilities and handling such calls and can flex its staff in response to increased or reduced call volumes from any particular utility customer. In the months that Vertex has been operating the City's call center using the City's existing billing software, it has already met industry standards despite record high call volumes.

V. City Respondents' Additional MERITS Arguments Are Moot

As noted in section I E, *supra*, the City argued six additional legal points relating to the City's constitutional powers and the statutory history of Government Code §§ 53060 and 37103. In light of the fact that Court has concluded, under any claimed standard of review, that the City Council's action to contract with Vertex for call center services was authorized by Government Code § 53060, the Court declines to address them.

VI. City Respondents' Procedural Standing and Laches Defenses Are Rejected

A. SEIU Has Standing

In their prior motions and demurrer City Respondents argued that SEIU lacked standing because, "to establish associational standing, [an entity] must demonstrate that its members would otherwise have standing to sue in their own right," (*Associated Building & Contractors Inc. v. San Francisco Airports Commission* (1999) 21 Cal.4th 352, 361) and no individual Redding SEIU employees stood to lose their jobs. SEIU argued, and the Court agreed, that it had standing to sue to protect diminution of its bargaining unit, relying on *Building Materials Union Teamster's Union Local 216 v. Farrell* (1986) 41 Cal.3d 651.

In response to the instant SEIU motion, City Respondents briefly renew their argument that SEIU lacks standing, seeking to distinguish the *Building Materials Union Teamster's Union Local 216 v. Farrell*, on the grounds that in that case the union was pursuing a suit alleging a breach of its MOU and the employer's duty to meet and confer under the Meyers-Milias-Brown Act ("MMBA"). Respondents argue that in this case the SEIU Memorandum of Understanding authorizes the City to contract out.

SEIU responds that the MOU provision did not result in any waiver of SEIU's right to file an action arguing that contracting out is unlawful on any other basis. The Court concurs. Accordingly, the Court declines to change its prior determination that SEIU has standing to maintain this action.

B. The Action Is Not Barred By Laches

City Respondents briefly also reiterate their prior argument, rejected by the Court, that the action is barred by laches because of SEIU's failure to file suit after the Council's September 4, 2012 action when it directed staff to negotiate the terms of the Vertex contract and to include call center services. The Court previously ruled SEIU could reasonably have waited until the Council made its final decision to award the Vertex contract on December 4, 2012 and thereby avoid a defense that the action was premature.

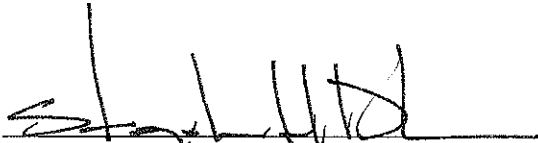
Respondents have renewed their laches defense arguing that under *Costa Mesa City Employees Association v. City of Costa Mesa* (2012) 209 Cal.App.4th 298, 307-308, SEIU could have filed suit after September 4, 2012 when the Council directed the staff to negotiate a contract with Vertex for call center services. At oral argument Respondents also pointed to the additional evidence of the prejudice the City would suffer if the Court had invalidated the Vertex contract. (*See* Tippin Dec. ¶ 18, p. 6.)

Nonetheless, the Court finds that based on the case cited by SEIU on which the Court's prior ruling relied (*Conti v. Board of Civil Service Commissioners* (1969) 1 Cal.3d 351, 359.) SEIU did not engage in unreasonable delay by waiting until the Vertex contract was actually awarded before filing suit.

VII. CONCLUSION

In conclusion, the Court determines, utilizing either the standard of review applicable to the review of legislative discretion or as reviewed de novo, that the City Council's action in contracting for call center services with Vertex was a contract for special services authorized by Government Code § 53060 and thus City Respondents are entitled to a judgment denying the petition for writ of mandate and injunctive relief and dismissing the petition with prejudice.

Dated: October 23, 2013

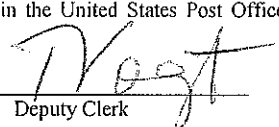

STEPHEN H. BAKER
Judge of the Superior Court

CERTIFICATE OF MAILING

State of California, County of Shasta

I, the undersigned, certify under penalty of perjury under the laws of the State of California that I am a Deputy Court Clerk of the above-entitled court and not a party to the within action; that I mailed a true and correct copy of the above to each person listed below, by depositing same in the United States Post Office in Redding, California, enclosed in sealed envelopes with postage prepaid.

Dated: October 24, 2013


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