**EXHIBIT 12-D**

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October 5, 2005

*Via Facsimile and First Class Mail*

Monterey Peninsula Water Management District Board
5 Harris Court, Bldg. G
P.O. Box 85
Monterey, CA 93942-0085

Re: LIUNA Local 270 Grievance Regarding Health Insurance Benefits

Dear Monterey Peninsula Water Management District Board :

This law firm represents LIUNA Local 270 ("Local 270" or "Union"). Before you, is the Local 270 grievance regarding the in-lieu benefits to be paid to employees who have opted out of the District health plan. In response to the Board's agenda, in which the Board indicated its intent to include in its consideration Exhibit 9-A, a letter from the General Manager to the grievants dated April 8, 2005, and Exhibit 9-C, a letter submitted by Ellen Aldridge, counsel for the General Manager, Local 270 requested an opportunity to submit a legal opinion regarding why the Board must disregard such items and adopt the recommended findings and decision of the hearing officer. Please accept this letter as the legal opinion submitted by counsel for Local 270.

The Board's authority to decide grievances derives from Article 21, Section E of the Memorandum of Understanding ("MOU") between Local 270 and the District. Section E provides that the grievance procedure ends in a decision by the Board after an evidentiary hearing before the Board or a hearing officer. Accordingly, the Board's decision of the grievance is governed by the terms of that MOU, and the Board must comply with those terms. Otherwise, the Board would exceed its authority.

The MOU specifically requires a certain procedure for the resolution of grievances, which does not include submission of any letter or brief by the General Manager's counsel. In fact, the parties never agreed that the General Manager may be represented by counsel at all. Section E states, "The appellant and General Manager may appear personally and the *appellant* may be represented by a Union representative and/or by counsel at the hearing." (Emphasis supplied.)

At the District's request, the Union agreed to proceed with the hearing without counsel. In good faith, the Union presented its case without an attorney. Clearly, the District's later submittal of a legal argument by counsel for the General Manager constituted an unfair reversal, and it was in violation of the parties' agreement.

After the hearing, Section E provides that the hearing officer shall provide the Board with a summary record of the proceedings and prepare findings, conclusions and decision; and the "*Board shall adopt such recommended findings, conclusion and decision, or shall reject the recommendations of the hearing officer and adopt its own findings, conclusions and decision after a review of the record.*". Note that the word "shall" is mandatory, not permissive. Accordingly, the MOU specifically provides what materials the Board shall consider, and those materials do not include the General Manager's denial of the grievance, nor do they include any letters or arguments from the General Manager's counsel. The hearing officer provided the Board with a summary of the facts and recommended findings, conclusion, and decision in accordance with the MOU. The Board may only consider the materials provided by the hearing officer. The MOU makes it crystal-clear that the Board must either adopt the hearing officer's recommended decision or must review the record, if any, and prepare its own findings and decision. The Board may not reject the hearing officer's recommended decision based upon anything except its own review of the record and its own findings based upon the record.

Judicial review of the Board's decision is available under California Code of Civil Procedure ("C.C.P.") section 1094.5. Subparagraph b provides that the court may review whether the agency has exceeded its jurisdiction, whether there was a fair trial, and whether the agency has failed to proceed in a manner required by law. As discussed above, considering the General Manager memorandum and the Aldridge letter would violate the MOU grievance procedure, which is part of the contractual agreement between the Union and the District. Therefore, to violate the MOU is to fail to proceed in a manner required by law.

If the Board were to reject the hearing officer's decision based upon Exhibits 9-A and 9-C, a court would surely vacate the Board's decision. A similar issue was decided in a published case by a California Court of Appeal, which constitutes binding precedent for the Superior Courts. The court ruled that a writ of mandate under C.C.P. section 1094.5 should be issued to reverse a city manager's decision, on the grounds that the city manager rejected the hearing commission's recommended decision based upon information supplied by the city's personnel director. The court held that the employee had thus been denied a fair hearing within the meaning of C.C.P. section 1094.5, and the city manager's decision must be reversed. Vollstedt v. City of Stockton (1990) 220 Cal.App.3d 265. The same principle applies here. The ultimate decision-maker (the Board) must not reject the recommendation of the hearing officer based upon other information submitted by the employer; the employer may not bypass the hearing process in this way. If the Board were to reject the hearing officer's decision based upon the other information submitted by the General Manager and his counsel, then the Board's decision would not be valid, and the Union would be able to successfully petition a court to vacate the Board's decision.

For these reasons, the Board must not consider Exhibits 9-A and 9-C. Under the terms of the MOU's grievance procedure, the Board must adopt the findings and decision of the hearing officer, unless the Board reviews the record and makes its own findings and decision.[1]

Sincerely,

Anne I. Yen

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opeiu 3 afl-cio(1)

cc: Tim McCormick

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[1] The second option, to review the record and make the Board's own findings, may be impracticable in this particular case, because the hearing was not recorded. Both sides consciously proceeded with the hearing without tape-recording it, without objection. If the General Manager wanted to preserve the possibility of the Board reviewing the record, the General Manager should have ensured that a recording was made. He could have done so and did not. Like the Union, the General Manager took the risk that the hearing officer might not agree with him.