

Memorandum

To: SANDAG Audit Committee
Hon. Bill Baber, Audit Committee Chair
Hon. Bill Wells, Audit Committee Vice-Chair
Paul Dostart, Public Member
Stewart Halpern, Public Member
Robert Monson, Public Member

From: Arthur A. Hartinger
Ryan McGinley-Stempel
Anujan Jeevaprakash

Date: September 10, 2020

Re: Additional Question Regarding the Final Audit of the Office of the Independent Performance Auditor

I. INTRODUCTION

The SANDAG Audit Committee recently retained Renne Public Law Group (“RPLG”) to answer, initially, three questions related to an audit report issued by the Office of the Independent Performance Auditor (“OIPA”). It was impressed upon RPLG to render objective answers to the questions, without exhibiting favoritism on behalf of anyone involved. After we submitted our analysis, we were asked to address two additional questions regarding the delegation of authority from the SANDAG Board of Directors to its Executive Director.

II. QUESTIONS

We have been asked to assume that SANDAG’s (1) bylaws, polices, and Administrative Rules and Regulations, (2) Employee Handbook, and (3) Employment Contract of Hasan Ikhata were adopted by the Board of Directors with the requisite corporate formalities (i.e., formal resolution, board consideration, and adoption of such resolution by majority vote of the Board of Directors). In the context of these assumptions, we have been asked to answer:

1. Has the SANDAG Board of Directors unlawfully delegated or abdicated its obligations under law to the Executive Director?

and correspondingly,

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2. Has the Executive Director unlawfully usurped or appropriated the authority of the SANDAG Board of Directors?

III. EXECUTIVE SUMMARY

First, we conclude that based on the facts and assumptions presented to us, the SANDAG Board has not unlawfully delegated its obligations with respect to employment-related actions to the Executive Director. The Legislature has given SANDAG’s Board broad authority to delegate executive, administrative, and ministerial duties to the office of the Executive Director and has also given the Executive Director express authority regarding appointments of employees. Despite this broad grant of authority, the OIPA repeatedly contends in its Final Audit that SANDAG’s “Board cannot delegate its responsibility to govern the agency to management.” (Final Audit at p. 33.) This appears to conflate the formulation of policy—which is not delegable—with its implementation—which is delegable so long as it is guided by standards and has adequate safeguards. And here, assuming that the Employee Handbook was properly approved by the Board, it appears that the Board has not delegated fundamental policy to the Executive Director. Rather, the Board has delegated implementation of employment policy and has provided adequate standards to assist the Executive Director in implementing that policy. It is a relatively close question whether adequate safeguards were in place to ensure the implementation of that policy did not deviate from the Board’s wishes, but on balance, we conclude that adequate safeguards are present here such that the Board did not unlawfully delegate its authority with respect to employment actions to the Executive Director.

Second, we are generally of the opinion that the Executive Director likely did not unlawfully usurp or appropriate the Board’s authority, but more information regarding whether he reported the severance payments to the Board and whether the Board ultimately ratified his actions is necessary to reach a conclusion on this issue. Because we were asked to assume that the Employment Handbook was adopted by the Board with all of the appropriate formalities, then it would appear that the Executive Director has not usurped the Board’s authority through his promulgation and administration of the Handbook. There is a factual question as to whether the Executive Director complied with the requirements in the Board’s Bylaws and Policy No. 017 to report the agreements that were the basis for the severance payments made to employees who resigned. If he failed to report these agreements timely, then he may have usurped the Board’s authority as to this issue. But if the Board ultimately ratified these and other actions taken by the Executive Director, then they are arguably valid as actions by the Board, regardless of whether they were properly delegated in the first place.

IV. BACKGROUND

The Legislature has expressly permitted the SANDAG Board of Directors to delegate “all executive, administrative, and ministerial power” to its Executive Director. Public Utilities Code section 132351.1 provides:

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All powers, privileges and duties vested in or imposed upon the consolidated agency shall be exercised and performed by and through a board of directors provided, however, that ***the exercise of any and all executive, administrative, and ministerial power may be delegated and redelegated by the board, to any of the offices, officers, or committees created pursuant to this chapter*** or created by the board acting pursuant to this chapter.

(Pub. Util. Code, § 132351.1, subd. (c) [emphasis added].)

Section 132355, in turn, provides that:

Administrative authority for the consolidated agency shall be vested in the office of the executive director, subject to the direction and policies of the consolidated agency as approved by the board. The executive director shall serve at the pleasure of the board and may appoint employees as may be necessary to carry out the functions of the consolidated agency.

(Pub. Util. Code, § 132355 [emphasis added].) The Legislature also provided that the chapter that consolidated transit agencies into SANDAG “is necessary for the public health, safety, and welfare, and shall be liberally construed to carry out the objects and purposes of this chapter and the declared policy of the state as set forth in this chapter.” (*Id.*, § 132354.2.)¹

The SANDAG bylaws provide that “[a]ll powers of SANDAG shall be exercised by the Board of Directors,” which “may choose to delegate several of its responsibilities from time to time in accordance with Board policy.” (SANDAG Bylaws, Article III, § 2(a).)

The SANDAG bylaws provide that the Board “shall appoint an Executive Director who shall hold office until he or she resigns or is removed by the Board of Directors,” who “shall be the chief executive officer of SANDAG,” and who “shall have charge of all projects and property of SANDAG.” (SANDAG Bylaws, Article V, § 4(a).) Under the bylaws, the “Executive Director will be responsible to the SANDAG Board of Directors as set out in the Board Policies and administrative policies and manuals for the administration of SANDAG’s business, including”:

- (1) development of program objectives, definition, directions and priorities;
- (2) management of SANDAG programs and coordination of staff and support services;
- (3) the development of financial support programs for SANDAG activities;
- (4) the recommendation and submission of an annual SANDAG program budget to the Board

¹ AB 805, which established the Office of the Independent Auditor and the Audit Committee, did not alter any of these provisions. (See generally Assem. Bill No. 805 (2017-2018 Reg. Sess.).)

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of Directors; (5) execution of the adopted personnel, purchasing, and budgetary systems; and (6) development of a recommended administrative policy that includes a process to conduct staff performance evaluations on a regular basis to determine if the knowledge, skills, and abilities of staff members are sufficient to perform their respective functions, and which is brought to the Board for review on an annual basis. The Executive Director shall perform such other and additional duties as is necessary to carry out the objectives and function of SANDAG and as directed by the Board of Directors.

(SANDAG Bylaws, Article V, § 4(b).)

Under the bylaws, the “Executive Director is hereby enabled to promulgate an employee manual, as well as all other administrative policies governing the administrative procedures of SANDAG.” (SANDAG Bylaws, Article V, § 4(d).)

The bylaws also provide that:

Delegation of authority from the Board of Directors for final financial/contracting approvals, including selection of vendors, acceptance of funding, stipulations of any nature, and any resulting budget amendment to serve as a limitation applicable to a particular job or program (not to be exceeded on a serial basis), shall be as follows:

a. Up to \$100,000 to the Executive Director, subject to increase by Board action, *or as may be modified in Board Policy No. 017 concerning delegation of authority to the Executive Director.*

....

e. The Executive Director ... shall report approvals under this section to the Board of Directors at least quarterly.

(SANDAG Bylaws, Article VI, § 5 [emphasis added].)

Board Policy No. 017, entitled “Delegation of Authority,” is meant to “establish the authority granted by the Board of Directors to the Executive Director” and “provide[] the Executive Director with authority to delegate functions he or she has been delegated by the Board to SANDAG staff.” (SANDAG Board Policy No. 017.) Relevant here, this policy authorizes the Executive Director to “[e]nter into agreements not currently incorporated in the budget and make other modifications to the budget in an amount up to \$300,000 per transaction so long as the overall budget remains in

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balance”² and requires the Executive Director to “act as the appointing authority for SANDAG with the authority to appoint, promote, transfer, discipline, and terminate all employees of SANDAG subject to the provisions of SANDAG administrative manuals, policies, and procedures.” (SANDAG Board Policy No. 017, §§ 4.1, 5.)

Pursuant to these delegations, the Executive Director has promulgated an Employment Handbook that we have been asked to assume was adopted by the SANDAG Board of Directors with the requisite corporate formalities. (See SANDAG Employee Handbook, §§ 2.2 & p. 206 [discussing delegation of authority and Board Policy No. 017].) The Executive Director’s employment contract (which we have also been asked to assume was adopted by the Board with the appropriate formalities) references this Employment Handbook in section 2.4, making clear that the Executive Director is subject to the “policies contained in Section 13 of the SANDAG Employee Handbook and any other applicable Employee Handbook provisions, but only to the extent the Employee Handbook provision does not conflict with an expressly agreed-upon term in” his employment contract. (Employment Contract of Hasan Ikhata, § 2.4.)

The OIPA took issue with these delegations in its Final Audit, asserting that:

- SANDAG’s “Board cannot delegate its responsibility to govern the agency to management.” (Final Audit at pp. 27, 33.)³
- “OIPA found that the Board is empowered by the Legislature to set compensation, not management.” (Final Audit at p. 37.)⁴
- “[T]he creation of Board policies and direction is a responsibility of the Board, and that responsibility cannot be delegated to the Executive Director.” (Final Audit at p. 75.)⁵
- “OIPA made changes to the body of the finding and included additional recommendations within the report to clarify that the role of the Board is to govern the agency, and that the responsibility to govern cannot be delegated.” (Final Audit at p. 135 [Comment 1].)⁶

² “This provision may not, however, be used multiple times on the same budget line item or contract in order to circumvent the \$300,000 limit.” (SANDAG Board Policy No. 017, § 4.1.)

³ (See also https://www.sandag.org/uploads/meetingid/meetingid_5554_27973.pdf, at pp. 331, 337.)

⁴ (*Id.* at p. 341.)

⁵ (*Id.* at p. 379.)

⁶ (*Id.* at p. 401 [Comment 1].)

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- “The Draft Audit Report was amended to ... clarify that under applicable sections of the PUC, the Board of Directors cannot delegate its responsibility to govern the agency to SANDAG’s Executive Director.” (Final Audit at p. 136 [Comment 4].)⁷
- “The OIPA amended the finding to include additional criteria to clarify that the creation of Board policies and direction is a responsibility of the Board, and that responsibility cannot be delegated to the Executive Director.” (Final Audit at p. 136 [Comment 6].)⁸

V. LEGAL ANALYSIS

We have been asked by SANDAG’s Audit Committee to determine (A) whether the SANDAG Board of Directors unlawfully delegated or abdicated its obligations under law to the Executive Director; and correspondingly, (B) whether the Executive Director unlawfully usurped the authority of the SANDAG Board of Directors.

A. **ISSUE ONE: Has the SANDAG Board of Directors unlawfully delegated or abdicated its obligations under law to the Executive Director?**

Answering this question requires evaluating both (1) the extent to which the Legislature has authorized the Board to delegate its authority to the Executive Director; and (2) the constitutionality of that delegation.

1. **Whether the Legislature authorized the SANDAG Board to delegate its authority regarding employment matters to the Executive Director**

“[U]nless a statute expressly allows them to do so, public agencies and officers may not surrender or delegate to subordinates any powers involving the exercise of judgment or discretion.” (*City of Los Angeles v. Superior Court* (2013) 56 Cal.4th 1086, 1094-1095.) “Under normal circumstances and absent statutory provisions to the contrary the dismissal of employees involves the exercise of judgment or discretion.” (*California Sch. Employees Assn. v. Personnel Commission* (1970) 3 Cal.3d 139, 144; see also *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 24 [concluding that the statutory duty of cities to fix compensation of all appointive officers and employees could not be delegated to arbitrators because “[w]hen the Legislature has made clear its intent that one public body or official is to exercise a specified discretionary power, the power is in the nature of a public trust and may not be exercised by others *in the absence of statutory authorization*”], emphasis added.)

Thus, in *California School Employees Assn., supra*, 3 Cal.3d 139, the California Supreme Court concluded that a school district’s governing board had improperly delegated authority to suspend,

⁷ (*Id.* at p. 402 [Comment 4].)

⁸ (*Id.* at p. 402 [Comment 6].)

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demote, or dismiss employees to the district’s business manager as well as to the personnel director of the district and its personnel commission. (*Id.* at pp. 141-142, 143-145.) The “pertinent statutory provisions” for the district revealed that the Legislature had crafted an intricate merit-based civil service system for the district in which the “power to employ, suspend, demote and dismiss merit system classified employees [was] vested [solely] in the governing board of each district.” (*Id.* at p. 142.) One statutory provision required the “governing board” to “employ, pay, and otherwise control the services” of such employees. (*Ibid.*, citing former Ed. Code, § 13703.) Another set of statutory provisions set limits on the board’s authority to suspend, demote or dismiss employees, provided an intricate process for the district’s personnel director to challenge the board’s decision with the personnel commission, and provided a mechanism for requiring the board to reinstate an employee whose appeal was upheld by the personnel commission. (*Id.* at pp. 142-143, citing former Ed. Code, §§ 13742, 13743, 13744, 13745.)

In the Court’s view, these statutory provisions “by necessary implication” established that “it is the function the governing board of each district to suspend, demote or dismiss employees, the function of the commission’s personnel director thereupon to file written charges, and the function of the personnel commission to review the board’s action on appeal.” (*California School Employees Assn.*, *supra*, 3 Cal.3d at p. 143.) Moreover, the “Education Code [did] not expressly authorize a district’s governing board to delegate to subordinates the power to suspend, demote or dismiss employees.” (*Id.* at p. 145.)

By contrast, in *Golightly v. Molina* (2014) 229 Cal.App.4th 1501, the taxpayer plaintiffs asserted that the Government Code did not allow the Los Angeles County Board of Supervisors to delegate its authority with respect to social program agreements (SPAs) based on the absence of any express authorization in the disputed Government Code provision allowing boards of supervisors to enter into such agreements. (*Id.* at p. 1515.) The Court of Appeal rejected this argument, explaining that “nothing in [the Government Code provision at issue] prohibits a board of supervisors from delegating its contracting authority with respect to SPAs” and another Government Code provision permitting counties to exercise their powers “through agents and officers acting under authority of the board or authority conferred by law.” (*Ibid.*) Accordingly, the Court “conclude[d] the Government Code permits a board of supervisors to delegate its authority to enter into SPAs with recipient social service organizations.” (*Ibid.*)

Here, unlike in *California School Employees Assn.*, and as detailed at length in our previous memorandum dated August 31, 2020, the Public Utilities Code does not impose a civil service system on SANDAG. Moreover, similar to the Government Code provisions in *Golightly* and unlike the Education Code provisions in *California School Employees Assn.*, the relevant Public Utilities Code provisions here expressly grant the SANDAG Board of Directors broad authority to delegate executive, administrative, and ministerial powers to the Executive Director and expressly give the Executive Director the power to make appointments. Section 132351.1 permits the SANDAG Board of Directors to “delegate and redelegate” “the exercise of any and all executive, administrative, and ministerial power” to “any of the offices” created by SANDAG’s enabling

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legislation, including the office of the Executive Director. (See Pub. Util. Code, § 132351.1, subd. (c); *id.*, § 132355 [providing for the creation of the office of the Executive Director].) Section 132354 sets forth SANDAG’s broad powers, which include the power to “appoint necessary employees,” to “define their qualifications and duties,” and to “enter into and perform all necessary contracts.” (Pub. Util. Code, § 132354, subds. (f) & (g).) And section 132355 provides that “[a]dministrative authority for the consolidated agency shall be vested in the office of the executive director, subject to the direction and policies of the consolidated agency as approved by the board” and that “[t]he executive director shall serve at the pleasure of the board and may appoint employees as may be necessary to carry out the functions of the consolidated agency.” (Pub. Util. Code, § 132355.)

Accordingly, the Legislature made the considered choice to give the Executive Director substantial authority over employment matters and has clearly authorized the SANDAG Board to delegate significant executive, administrative, and ministerial power regarding these matters to the office of the Executive Director.

2. Whether the Board’s delegation of authority violates the non-delegation doctrine

The issue is therefore whether the SANDAG Board’s exercise of this duly-granted statutory authority nonetheless violates the constitutional principles embodied in the non-delegation doctrine.

As the California Supreme Court has explained, the “doctrine prohibiting delegation of legislative power ... is well established in California” and also “precludes delegation of the legislative powers of a city.” (*Kugler v. Yocum* (1968) 69 Cal.2d 371, 375.) The “purpose of the doctrine ... is to assure that ‘truly fundamental issues will be resolved by the Legislature and that a grant of authority is accompanied by safeguards adequate to prevent its abuse.’” (*Id.* at p. 376 [quotation marks and alterations omitted].)

Thus, numerous cases have held that while a “legislative body is constitutionally prohibited from delegating the formulation of legislative policy,” it may nevertheless “declare a policy, fix a primary standard, and **authorize executive or administrative officers to prescribe subsidiary rules and regulations that implement the policy and standard and to determine the application of the policy or standard to the facts of particular cases.**” (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 167 [emphasis added]; see also, e.g., *State Bd. of Education v. Honig* (1993) 13 Cal.App.4th 720, 750 [“The Legislature may, after declaring a policy and fixing a primary standard, confer upon executive or administrative officers the ‘power to fill up the details’ by prescribing administrative rules and regulations to promote the purposes of the legislation and to carry it into effect”]; 45 Cal. Jur. 3d Municipalities § 329 [“while legislative or discretionary powers devolved by charter or law on the legislative body cannot be delegated to others, it is equally well established that ministerial or administrative functions may be delegated to subordinates or agents”].)

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These cases recognize the principle that “delegation by legislative bodies is essential to the basic ability of government to function.” (*Golightly, supra*, 229 Cal.App.4th at p. 1515.) Thus, “[o]nly in the event of a total abdication of that power, through failure to either render basic policy decisions or to assure that they are implemented as made, will [a] court intrude on legislative enactment because it is an unlawful delegation.” (*Gerawan Farming, Inc. v. Agricultural Labor Relations Bd.* (2017) 3 Cal.5th 1118, 1146, quoting *Kugler v. Yocum* (1968) 69 Cal.2d 371, 384.)

The California Supreme Court has formulated this inquiry into two steps: “an unconstitutional delegation of authority occurs *only when* a legislative body (1) leaves the resolution of fundamental policy issues to others or (2) fails to provide adequate direction for the implementation of that policy.” (*Gerawan, supra*, 3 Cal.5th at p. 1146 [quotation marks and alterations omitted; emphasis added].)

Accordingly, we consider (a) whether SANDAG’s Board left the resolution of fundamental policy issues to the Executive Director or (b) whether the Board failed to provide adequate direction for the implementation of policy to the Executive Director.

a. Whether the Board has left the resolution of fundamental policy issues to the Executive Director

Delegating employment-related actions such as hiring, promoting, firing, and approving severance payments to the Executive Director does not leave fundamental policy issues to the Executive Director in light of the assumption that the Employment Handbook was adopted by the Board with the requisite corporate formalities and the fact that the SANDAG Board retained its budgeting authority.

In *Golightly v. Molina, supra*, 229 Cal.App.4th 1501, the taxpayer plaintiffs argued that the Los Angeles County Board of Supervisors had improperly delegated its power to the County CEO to enter into social program agreements (“SPAs”). (*Id.* at pp. 1509, 1515.) The Board had delegated authority to the County CEO (formerly the County’s chief administrative officer) to “execute such contracts and agreements as may be necessary to implement the social programs to be paid from funds appropriated in the Budget for discretionary use by the supervisors, when such programs are to meet the social needs of the population of the County, including but not limited to, the areas of health, law enforcement, public safety, rehabilitation, welfare, education and legal services, and the needs of physically, mentally and financially handicapped persons and aged persons.” (*Id.* at p. 1510.) The Court of Appeal rejected the plaintiffs’ delegation argument. After concluding that the Government Code authorized the delegation of authority by the Board, the court considered whether the authority delegated by the board left the resolution of fundamental policy issues to the County CEO. (See *Golightly, supra*, 229 Cal.App.4th at pp. 1515-1516.) The court concluded that it did not. Although “the approval of a county budget is a fundamental legislative function and the power and obligation to enact a county’s budget is vested by law in the board of supervisors,” the County CEO’s execution of contracts with social service providers using funds appropriated by the Board was not a policy decision but rather an implementation of a policy where

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the “Board ha[d] retained its budgeting authority.” (*Id.* at p. 1517, quoting *Kugler, supra*, 69 Cal.2d at pp. 379-380 [“fact that a third party, whether private or governmental, performs some role in the application and implementation of an established legislative scheme [does not] render the legislation invalid as an unlawful delegation”].)

In *Rodriguez v. Solis* (1991) 1 Cal.App.4th 495, the Court of Appeal held that the Fresno City Council properly delegated its authority to the City’s Director of Development to determine whether signs are “compatible with their surroundings” under a City zoning ordinance. (*Id.* at p. 507.) The plaintiffs argued that the delegation of authority was unlawful “because the *Director* has made the fundamental policy decision of banning all freestanding signs along Freeway 41” and “only the *council* has the authority to make that determination.” (*Ibid.*) The court rejected this argument, explaining that the “council set forth the purpose of [the ordinance] by requiring compatibility with surroundings before a sign permit could be approved in order to promote and protect the public health, safety and welfare” and that “the fundamental policy decision was, in fact, made by the council and the authority to *implement* the policy was entrusted to the Director.” (*Ibid.*)

A long line of cases has permitted the delegation of authority over employment-related issues to administrative agencies, as well as private unelected mediators and arbitrators. For example, in *Hess Collection Winery v. Agricultural Labor Relations Board* (2006) 140 Cal.App.4th 1585, 1604, the Court of Appeal recognized that the Legislature’s express declaration that “a need exists for a mediation procedure in order to ensure a more effective collective bargaining process between agricultural employers and agricultural employee” was a fundamental policy decision but that a regulation issued by the Agricultural Labor Relations Board outlining the specific factors the mediator and the Board would apply in arriving at a collective bargaining agreement (pertaining to the mediation procedure expressed by Legislature) was not a fundamental policy decision because “after declaration of the legislative goals and establishing a yardstick guiding the administrator, [the Legislature] may authorize the administrator to adopt rules and regulations to promote the purposes of the legislation and to carry it into effect.” (*Hess Collection of Winery, supra*, at p. 1604.) In *Gerawan, supra*, 3 Cal.5th 1118, the California Supreme Court reaffirmed *Hess*, upholding the Legislature’s delegation of authority to private mediators to arbitrate disputes arising in the context of negotiations over collective bargaining agreements regarding agricultural laborers. (See *id.* at p. 1147.)

Similarly, in *City of Los Angeles v. Superior Court, supra*, 56 Cal.4th 1086, the Court concluded that compelling a city to arbitrate the validity of its furlough program under MOUs did not constitute an unlawful delegation to the arbitrator of two discretionary policymaking powers—salary setting and budget making—that the city’s charter vested in the city council. (*Id.* at p. 1094.) The Court explained that by “ratifying the MOUs” at issue, “the City made discretionary choices in the exercise of its salary-setting and budget-making authority.” (*Id.* at p. 1095.) Accordingly, “the arbitrator would not be exercising any such discretionary authority” by “deciding whether the furlough program violates the terms of the MOUs.” (*Ibid.*) Because “the arbitrator’s role [would]

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be entirely adjudicative, not legislative,” it did “not constitute an improper delegation to the arbitrator of any of the City’s discretionary authority.” (*Ibid.*; see also *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 622 & fn. 13 [rejecting nondelegation challenge to a Vallejo city charter provision that permitted an arbitral board to resolve disputed terms of employment after considering “all factors relevant to the issues from the standpoint of both the employer and the employee, including the City’s financial condition” so long as “the arbitrators do not proceed beyond the provisions of the Vallejo charter”].)

These decisions illustrate that “fundamental policy decisions” are the goals and standards outlined by the legislative body, and that the implementation of these outlined policies are not fundamental policy decisions and therefore can be appropriately delegated.

Here, the SANDAG Executive Director is given authority over various employment actions by statute, under Board Policy No. 017, and in the Employee Handbook.

As discussed above, the Executive Director has the power to appoint employees under the Public Utilities Code and may be delegated executive, administrative and ministerial powers by the Board. (See Pub. Util. Code, §§ 132351.1, subd. (c), 132355.)

Board Policy No. 017, in turn, requires the Executive Director to “act as the appointing authority for SANDAG with the authority to appoint, promote, transfer, discipline, and terminate all employees of SANDAG subject to the provisions of SANDAG administrative manuals, policies, and procedures.” (SANDAG Board Policy No. 017, § 5.)

To this end, the Employee Handbook states that the “Board of Directors has delegated responsibility and authority for administration of SANDAG to the Executive Director.” (SANDAG Employee Handbook at p. 206.) It further states that the “Executive Director or his/her designee shall be responsible for administration of the human resources program and is hereby deemed to be the appointing authority with the power to appoint, promote, transfer, discipline, and terminate all employees of SANDAG subject to the provisions of this Handbook.” (See SANDAG Employee Handbook at p. 11.) As seen from the “Employment Practices” section of the SANDAG Employee Handbook, the Board⁹ outlined the standards of these employment actions, i.e. the “fundamental policy decisions” regarding employment matters. The powers delegated to the Executive Director, such as hiring and firing, are implementations of those outlined employment policies similar to what courts have upheld in the cases discussed above.

The OIPA asserts that “the Board is empowered by the Legislature to set compensation, not management.” (Final Audit at p. 37.) But the Handbook also makes clear that the SANDAG

⁹ We have been asked to assume that the Employee Handbook, as well as its predecessor document (the Administrative Rules and Regulations), were adopted by the Board with the requisite corporate formalities.

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compensation program is “[s]ubject to approval by the Board of Directors as part of the Annual Budget.” (SANDAG Employee Handbook, § 10.4.)¹⁰

Further, the use of language such as “authority for administration of SANDAG” and “subject to the provisions of this Handbook” are indicators that the Board has controlled the employment policies and the Executive Director is carrying out executive, ministerial, and administrative powers which, as noted above, are allowed to be “delegated and redelegated” pursuant to Public Utilities Code section 132351.1.

b. Whether the Board failed to provide adequate direction for the implementation of policy to the Executive Director

Answering the second prong of the delegation inquiry turns on whether the governing body has “provided an adequate yardstick for the guidance of the administrative body empowered to execute the law” and “safeguards adequate to prevent ... abuse.” (*Gerawan, supra*, 3 Cal.5th at pp. 1150-1151.) Of these two, courts have recognized that safeguards are more important than standards: “The need is usually not for standards but for safeguards. ... [T]he most perceptive courts are motivated much more by the degree of protection against arbitrariness than by the doctrine about standards.” (*Kugler, supra*, 69 Cal.2d at p. 381.)

In *Kugler, supra*, 69 Cal.2d 371, the Court concluded that a city ordinance that would benchmark city firefighter compensation against another city “contain[ed] built-in and automatic protections that serve as safeguards against exploitative consequences from the operation of the proposed ordinance” since “Los Angeles is no more anxious to pay its firemen exorbitant compensation than is Alhambra. Los Angeles as an employer will be motivated to avoid the incurrence of an excessive

¹⁰ To be sure, in *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, the California Supreme Court upheld a general law city council’s refusal to place an initiative on the ballot that would subject future labor negotiations to binding interest arbitration because “the city council may not delegate its power and duty to fix compensation.” (*Id.* at pp. 25, 27.) But this conclusion derived from the rule that “[w]hen the Legislature has made clear its intent that one public body or official is to exercise a specified discretionary power, the power is in the nature of a public trust and *may not be exercised by others in the absence of statutory authorization.*” (*Id.* at p. 24 [emphasis added].) As the *Bagley* Court explained in distinguishing *Kugler v. Yokum, supra*, 69 Cal.2d 371: “The case involved the sufficiency of standards necessary to a valid delegation of legislative power in the absence of statutes demonstrating an intent that the power be exercised by a specific legislative body. Here legislative intent limiting delegability is clear.” (*Bagley, supra*, at p. 26.) Here, by contrast, because the Legislature has granted the SANDAG Board the authority to delegate any and all administrative, executive, and ministerial functions to the office of the Executive Director and has given the Executive Director broad power over appointments, there is no basis to infer a legislative intent to limit delegability.

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wage scale; the interplay of competitive economic forces and bargaining power will tend to settle the wages at a realistic level.” (*Id.* at p. 382.)

In *Gerawan, supra*, 3 Cal.5th 1118, the Supreme Court concluded that the Legislature had provided adequate standards and safeguards in a statute providing for compulsory interest arbitration before a mediator to determine collective bargaining agreements for agricultural laborers because the mediator could “consider those factors commonly considered in similar proceedings” and because the statute provided for a neutral mediator, a right to petition the Agricultural Labor Relations Board for relief, and judicial review with the Court of Appeal. (*Id.* at pp. 1150-1151.)

In *Golightly, supra*, 229 Cal.App.4th 1501, the Court of Appeal determined that the process for approving contracts with social services organizations had adequate safeguards such that the county’s delegation of authority to the County CEO to enter into such contracts was constitutional. (*Id.* at pp. 1517-1518.) These safeguards included legislation that contained limits on which organizations could receive funding, requirements that contracts had to be signed by other county officials, and multiple layers of scrutiny from specific county officials. (*Ibid.*)

In *Rodriguez, supra*, 1 Cal.App.4th 495, the Court of Appeal concluded that a zoning ordinance allowing the City of Fresno’s Development Director to determine whether signs are compatible with their surroundings had sufficient guidance because “[s]tandards for administrative application of a statute can be implied by the statutory purpose,” which was to promote the public welfare “by sign regulation using compatibility.” (*Id.* at pp. 509-510.) The Court did not, however, address the issue of adequate safeguards.

Here, SANDAG’s Bylaws, Board Policies, and Employment Handbook appear to have adequate standards to guide the Executive Director in his implementation of Board policy. The closer question is whether they have adequate safeguards to ensure the Board retains ultimate control.

Article V, section 4(a) of the Bylaws contemplates the removal of the Executive Director by the Board and requires the Executive Director to file with the Director of Finance an official bond in the amount of \$100,000 or such larger amount as the Board specifies in order to guarantee “faithful performance of his or her duties.” (SANDAG Bylaws, Art. V, § 4(a).) Section 4(b) of Article V also makes the Executive Director accountable to the Board in several respects, providing that:

The Executive Director will be responsible to the SANDAG Board of Directors as set out in Board Policies and administrative policies and manuals for the administration of SANDAG’s business, including: (1) development of program objectives, definition, directions and priorities; (2) management of SANDAG programs and coordination of staff and support services; (3) the development of financial support programs for SANDAG activities; (4) the recommendation and submission of an annual SANDAG program

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budget to the Board of Directors; (5) execution of the adopted personnel, purchasing, and budgetary systems; and (6) development of a recommended administrative policy that includes a process to conduct staff performance evaluations on a regular basis to determine if the knowledge, skills, and abilities of staff members are sufficient to perform their respective functions, and which is brought to the Board for review on an annual basis. The Executive Director shall perform such other and additional duties as is necessary to carry out the objectives and function of SANDAG and as directed by the Board of Directors.

(SANDAG Bylaws, Art. V, § 4(b).)

Board Policy No. 017, in turn, requires the Executive Director to “prepare for the Board’s consideration” and update on a regular basis “an administrative policy that includes a process to conduct staff performance evaluations on a regular basis ... in order to allow the Board to monitor the staff evaluation process on a regular basis.” (SANDAG Board Policy No. 017, § 6.) It also requires the Executive Director to “promulgate an administrative policy governing the procedures for delegating his/her authority to other SANDAG staff” pursuant to Article V, Section 4(c) of the Bylaws. (SANDAG Board Policy No. 017, § 7.)

Together, Article VI, section 5 of the Bylaws and Board Policy No. 017 limit the Executive Director to agreements up to \$300,000 that do not affect the budget adopted by the Board and require the Executive Director to report such transactions within a certain period of time. (See SANDAG Bylaws, Art. VI, § 5(a) & (e); Board Policy No. 017, § 4 [“In the event any of the authorities in this paragraph are exercised, the Executive Director will report actions taken to the Board in summary written form at the next regular meeting of the Board”].)

The Employee Handbook has detailed “delegations of authority through the Executive Director by the Board” for certain agreements and employment-related actions and makes clear that the “Executive Director must be authorized by the Board to carry out any and all of the delegated actions set forth in this policy.” (See SANDAG Employee Handbook at pp. 113-125 [Tables 1 and 3] & 206.) Notably, for any agreements in which the Executive Director seeks to authorize a payment pursuant to Board Policy No. 017, the Employee Handbook appears to require that all documents and transactions “have Office of General Counsel review and concurrence.” (SANDAG Employee Handbook at p. 114.) In addition, the “Finance Department must review and approve” these transactions. (SANDAG Employee Handbook at p. 115 [requiring such review for all transactions in Table 1 except for amendments that do not require a change in cost or revenue].) The Handbook also provides that “[t]he cumulative dollar limits on delegated authority will not be refreshed until a new budget has been approved by the Board.” (SANDAG Employee Handbook at p. 115.) And any check or wire transfer exceeding \$5,000 must be signed by two individuals. (See SANDAG Employee Handbook at p. 123.)

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In addition, the Employee Handbook alludes to the Board’s ability to terminate the Executive Director’s employment as set forth in his contract. (See SANDAG Employee Handbook, § 1.7; see also Employment Contract of Hasan Ikhata, §§ 1, 4.2, 4.3, 7.1 [providing that Mr. Ikhata is an “at-will employee” whose performance will be evaluated annually by the Board, whose bonus will be determined by his “overall responsiveness to appropriate Board of Directors’ requests and requirements,” and who may be terminated “immediately at any time with or without cause”]; cf. *Seila Law LLC v. Consumer Financial Protection Bureau* (2020) 140 S.Ct. 2183, 2209 [“The only constitutional defect we have identified in the CFPB’s structure is the Director’s insulation from removal. If the Director were removable at will by the President, the constitutional violation would disappear.”]; *Marine Forests Society v. California Coastal Com.* (2005) 36 Cal.4th 1, 49 [noting that the Legislature’s elimination of the power to remove appointees at will “significantly reduces the potential control that the legislative appointing authorities may have over their appointees”].)

However, one potentially problematic conveyance of power to the Executive Director can be found at Section 1.5 of the Employee Handbook, where it states the following:

The Executive Director is vested with the power to vary or modify the strict application of the provisions of this Handbook to avoid injustice or when it is in the best interest of SANDAG. Any such variances must be granted in writing and signed by the Executive Director.

(SANDAG Employee Handbook, § 1.5.)

This could be problematic because it could be read to give the Executive Director the power to modify the Board’s employment policy decisions without Board approval. Further, there are no scrutiny requirements regarding this power, as the changes are to be signed by the Executive Director and not the Board. (See SANDAG Employee Handbook, § 1.5; see also *id.* at p. 120 [requiring signature of Senior Leadership Team for changes to the Employee Handbook, including Administrative policies].) No other language in the Handbook appears to restrict this power granted in Section 1.5, making it seem as if the Executive Director has significant authority to divert from the policies outlined in the Handbook by the Board in his implementation of these employment actions. Of course, the fact that such variances must be granted in writing does permit the Board to review them after the fact. But it is unclear when—if at all—the Board would be notified about such variances.

Accordingly, although we think it a close question whether adequate safeguards are present to ensure that the Board retains control over the implementation of the fundamental policy it has

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adopted, we ultimately conclude that the Board has lawfully delegated its authority regarding employment related actions to the Executive Director.¹¹

B. ISSUE TWO: Has the Executive Director unlawfully usurped the authority of the SANDAG Board of Directors?

The primary theory under which the OIPA appears to believe that the Executive Director usurped the authority of the SANDAG Board of Directors deals with “assum[ing] control” of the Board’s Administrative Rules and Regulations and in adopting the Employment Handbook. (See Final Audit at pp. 27, 30, 45, fn. 6, 136 [Comment 6].) But if, as we have been instructed to assume, the Employment Handbook was adopted with the appropriate formalities, then we can definitively conclude that that the Executive Director did not usurp any authority on this front.

Nevertheless, the Executive Director may have usurped the authority of the Board by failing to report the severance payments to the Board on a timely basis. However, we find the OIPA’s report confusing on this front. According to the OIPA, the “full Board was not aware of nor approved the payments by a majority vote.”¹² Yet elsewhere in the report, OIPA asserts that “[m]anagement provided an email from the Executive Director to the Board Chair and Vice Chair that stated that the [REDACTED] had resigned and the Executive Director would authorize a 3 month severance compensation payment to [REDACTED] in exchange for [REDACTED] signing a release of all claims against the agency.”¹³

Article VI, Section 5(a) of the SANDAG bylaws and section 4.1 of Board Policy No. 017 authorize the Executive Director to enter into agreements up to \$300,000 so long as the overall budget remains in balance, but Article VI, Section 5(e) of the bylaws requires the Executive Director to “report approvals under this section to the Board of Directors at least quarterly” and section 4 of Board Policy No. 017 requires the Executive Director to “report actions taken to the Board in summary written form at the next regular meeting of the Board.” (SANDAG Bylaws, Art. VI, §§ 5(a) & (e); SANDAG Board Policy No. 017, §§ 4 & 4.1.) If, as OIPA contends, the Executive Director failed to report these transactions in a timely fashion, then he may have overstepped his authority on this front. But as discussed above, the record is unclear.

It is also unclear whether the Executive Director has ever exercised section 1.5 of the Employee Handbook to vary the terms of the Handbook without Board approval. If so, then it is possible

¹¹ It should be noted that while this memorandum outlines what authority *may* be delegated to the Executive Director, and under what circumstances, this does not mean that the Board *must* delegate any particular authority. This is a purely policy question for the Board.

¹² (See https://www.sandag.org/uploads/meetingid/meetingid_5554_27973.pdf, at p. 330.)

¹³ (*Id.* at p. 343.)

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that the Executive Director may have usurped the Board’s authority in that instance, as well. But more information would be needed to reach any conclusion on this front.

In any event, for any action by the Executive Director that the Board ultimately approved, “[a]n agency’s subsequent approval or ratification of an act delegated to a subordinate validates the act, which becomes the act of the agency itself.” (*Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist.* (1989) 49 Cal.3d 408, 427, quoting *California Sch. Employees Assn., supra*, 3 Cal.3d at p. 145.) In *Western Oil*, the plaintiff challenged a pollution control district rule on the ground that it “grant[ed] too much authority to the district’s air pollution control officer” and “delegated too much discretion to its control officer before adopting the rule.” (*Id.* at p. 427.) The California Supreme Court rejected the argument, explaining that “the control officer’s actions before the rule was adopted could not constitute improper rulemaking because the district adopted his list of substances as part of” the rule, thereby validating the act. (*Ibid.*) Here, if the Board has approved any actions by the Executive Director that have subsequently been determined to have exceeded delegated authority, then that approval by the Board could be deemed to validate the act.¹⁴

VI. CONCLUSION

In sum, we conclude that the Legislature authorized the SANDAG Board of Directors to delegate substantial authority regarding employment actions to the Executive Director by permitting the Board to delegate executive, administrative and ministerial duties to the Executive Director and by expressly giving the Executive Director the power to make appointments. The Board’s delegation of power pursuant to these authorizations with respect to hiring, promoting, and firing and other employment-related actions does not appear to leave fundamental policy decisions to the Executive Director and provides sufficient guidance for applying the policies set by the Board. It is a closer question whether the delegation is accompanied by adequate safeguards to prevent

¹⁴ By contrast, in *California School Employees Assn., supra*, 3 Cal.3d 139, the Supreme Court refused to uphold an employee’s dismissal on a ratification theory because the board’s minutes from the relevant meeting reflected that “in dismissing [the employee] as of that day, the board was not acting upon, approving or ratifying the prior actions of [the school district’s personnel director and business manager], but rather was simply following [district personnel commission’s] prior determination that she should be dismissed.” (*Id.* at p. 145.) Similarly, in *Civil Service Assn. v. Redevelopment Agency* (1985) 166 Cal.App.3d 1222, the Court of Appeal refused to uphold the dismissal of an employee from an redevelopment agency based on the executive director’s subsequent ratification because the employee was entitled to final review before the director himself and the director’s “pro forma letter denying [the employee’s] request for appeal and expressing satisfaction with the decision rendered did not in any manner justify the summary process or ameliorate the resulting prejudicial abuse.” (*Id.* at p. 1226.) Both of these cases, however, appear to offer limited relevance here because they dealt with public agencies with robust civil service requirements.

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arbitrariness and ensure the Board retains control, but the Board's ability to terminate the Executive Director at-will and several other provisions in the Bylaws, Board Policies, and Employment Handbook appear adequate. Finally, because we have been instructed to assume that the Employee Handbook was adopted with the requisite procedural formalities by the Board, we do not believe that the Executive Director has usurped the Board's authority with respect to the promulgation of that Handbook. However, if the Executive Director failed to report the severance payments as required by the Board's Bylaws and Policy No. 017, then he may have usurped the Board's authority with respect to that action. That said, to the extent that the Board has since approved any of the disputed actions, there is a good basis to conclude that they have been ratified by the Board and are now the valid action of the agency, even if the Board could not delegate them in the first place.