STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 1319, AFL-CIO, Charging Party, v. CITY OF PALO ALTO, Respondent.	Case No. SF-CE-869-M PERB Decision No. 2388a-M April 10, 2017

Appearances: Davis & Reno by Duane W. Reno, Attorney, for International Association of Firefighters, Local 1319, AFL-CIO; Renne, Sloan, Holtzman & Sakai by Charles D. Sakai, Attorney, for City of Palo Alto.

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on remand by the California Court of Appeal, Sixth Appellate District, after disposition of a petition for a writ of review filed by the City of Palo Alto (City) seeking review of PERB's prior decision in this case, PERB Decision No. 2388-M. In that decision the Board concluded that the City had violated the Meyers-Milias-Brown Act (MMBA)[1] by failing to consult with the International Association of Firefighters, Local 1319, AFL-CIO (Local 1319) prior to placing a measure before the voters that amended the city charter to repeal its binding interest arbitration provisions. As a remedy, PERB ordered, among other things, that the City rescind its resolution placing this matter on the ballot.

[1] The MMBA is codified at Government Code section 3500 et seq. All statutory references are to the Government Code unless otherwise indicated.

The Court of Appeal affirmed the Board's legal conclusions on the merits, i.e. that the City violated the MMBA by failing and refusing to consult with the Local 1319 before passing the resolution placing the issue before the voters. However, the Court determined that the constitutional separation of powers bars PERB from ordering a municipality to take any legislative action such as rescinding a previous resolution. Accordingly, the Court annulled PERB Decision No. 2388-M, directed PERB to strike that part of its order directing the City to rescind its resolution, and remanded the matter to the Board to order any other appropriate relief consistent with the opinion of the Court.

Pursuant to the Court's order, *City of Palo Alto*, PERB Decision No. 2388-M is hereby vacated and set aside and replaced with this decision.

INTRODUCTION

The complaint, issued by PERB's Office of the General Counsel on September 7, 2011, alleged that without prior consultation in good faith with Local 1319, the City took action on July 18, 2011, to adopt rules for the administration of employer-employee relations, when it: (1) adopted a motion to submit to the voters a ballot measure to repeal from the City Charter procedures for binding interest arbitration of collective bargaining impasses with police and firefighter employee organizations; and (2) held a "first reading" to approve an ordinance requiring instead non-binding mediation over such impasses. By this conduct, alleged the complaint, the City violated MMBA sections 3503, 3506, 3507 and 3509(b), as well as PERB Regulation 32603(a), (b), and (f).[2]

Following an evidentiary hearing held in late September 2011, a PERB administrative law judge (ALJ) issued his proposed decision (attached). The ALJ concluded that: (1) PERB

[2] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

has jurisdiction over the alleged violations of MMBA section 3507; (2) the section 3507 duty to consult in good faith is indistinguishable from section 3505 duty to meet and confer in good faith; (3) section 3507's consultation obligation imposes on public agencies, duties akin to those established by section 3505, viz., to provide recognized employee organizations reasonable notice of the agency's intention to adopt or alter the agency rules and regulations for the administration of employer-employee relations, including rules for resolution of collective bargaining impasses, and upon request of a recognized employee organization, to consult in good faith prior to taking action to adopt or alter rules and regulations for administration of employer-employee relations; (4) the City provided Local 1319 reasonable notice of its intention to adopt or alter rules and regulations; and (5) Local 1319 failed to timely request that the City consult in good faith, and by its inaction waived its MMBA consultation rights.

The Board has reviewed the hearing record, the proposed decision, and the parties' respective exceptions and responses. Based on this review, we conclude that the ALJ's findings of fact are supported by the record, and except as specifically indicated below we adopt the ALJ's findings as the findings of the Board itself. The ALJ's conclusions of law concerning PERB's jurisdiction and the parties' respective duties under MMBA section 3507 are in accordance with applicable law, and we adopt these conclusions as the conclusions of the Board itself.

However, as we explain below, we reach different conclusions than did the ALJ on the ultimate factual issues, viz., whether Local 1319 timely requested consultation with the City over the City's proposed repeal or modification of interest arbitration procedures in the City Charter, and whether the City failed or refused to consult.

In mid-July 2010 representatives of Local 1319 demanded to meet and confer with the City over a then-recently-announced City proposal to repeal interest arbitration procedures in the City Charter applicable to police and firefighter employees. Commencing in late-July 2010, and continuing in June and July 2011, the City took the position with Local 1319 that: (1) interest arbitration was a permissive, and not a mandatory, subject for meeting and conferring; and (2) the City would not meet and consult with Local 1319 representatives, but instead would listen to Local 1319 representatives' concerns, along with those of the public generally, during public comment periods at its regular public meetings. The City did not offer to meet with Local 1319's representatives to clarify the parties' positions regarding: (1) whether the City's proposed repeal of interest arbitration procedures was a mandatory or permissive subject for meeting and conferring, or (2) whether the City's statutory consultation obligation required the City to engage in direct discussions with representatives of Local 1319 rather than hearing Local 1319's representatives during public comment periods at regular public meetings of the Council or its committees.

We conclude that by refusing to meet with Local 1319's representatives, the City failed and refused to consult in good faith. Thus, the City acted in derogation of its duty to consult with Local 1319 in good faith, up to and including July 18, 2011, when the City approved a measure to repeal interest arbitration procedures. We turn now to the procedural history, a factual summary, our review of the proposed decision, the contentions of the parties, and our discussion and disposition of the legal issues.

PROCEDURAL HISTORY

On July 28, 2011, Local 1319 filed an unfair practice charge alleging that on July 18, 2011, without prior consultation in good faith with Local 1319, the City approved changes to

its rules for administration of employer-employee relations, including a ballot measure to repeal binding interest arbitration from the City Charter (Charter) and an ordinance requiring non-binding mediation of disputes arising from bargaining impasses. On August 1, 2011, Local 1319 requested that PERB seek injunctive relief.

On August 4, 2011, the parties met informally with a Board agent to discuss the charge and Local 1319's request for injunctive relief. No settlement was reached.[3]

On September 7, 2011, PERB's Office of the General Counsel issued an unfair practice complaint alleging that on July 18, 2011, the City Council (Council) approved a ballot measure to repeal Article V of the Charter which provided for binding interest arbitration, and held a "first reading" to approve an ordinance requiring non-binding mediation over bargaining disputes resulting from bargaining impasse without consulting in good faith with Local 1319. On the same day, PERB noticed an expedited hearing on the complaint for September 26 and 30, 2011.

On September 26 and 30, 2011, after disposing of several pre-hearing motions, PERB's ALJ conducted a formal hearing on the complaint. (Proposed decision, pp. 2-3.)

On September 30, 2011, the City requested that the ALJ postpone ruling in the case until after November 8, 2011, the date of the election on the City's ballot measure repealing

[3] On August 5, 2011, Local 1319 withdrew without prejudice its request for injunctive relief and requested that its charge be placed in abeyance pending a second informal meeting scheduled for September 13, 2011. On September 7, 2011, Local 1319 renewed its request for injunctive relief, and the charge was removed from abeyance. On September 12, 2011, the City filed a supplemental opposition to injunctive relief. Thereafter, on September 15, 2011, PERB's Office of the General Counsel notified the parties that the injunctive relief request had been denied without prejudice.

interest arbitration.[4] Also on September 30, 2011, the City requested an additional day of hearing in order to obtain testimony of expert witnesses, and the ALJ's approval for an interlocutory appeal of the ALJ's denial of its pre-hearing motion to dismiss.[5]

On November 15, 2011, the ALJ issued his proposed decision. Thereafter, on December 5, 2011, Local 1319 filed exceptions. On January 9, 2011, the City responded to Local 1319's exceptions, and interposed its own cross-exceptions. On January 26, 2012, Local 1319 responded to the City's cross exceptions.

FACTUAL SUMMARY

We refer the reader to the ALJ's findings, which are set forth in detail at pages 7 through 21 of the attached proposed decision. We highlight here those most relevant to our conclusions below.

Prior to July 2010, Article V of the City's Charter established binding interest arbitration as the mechanism for resolving an impasse in negotiations with organizations representing police and fire personnel over wages, hours or terms and conditions of employment. (Proposed decision, pp. 7-8.)

On July 19, 2010, the Council directed staff to prepare a measure to be placed on the November 2010 ballot to repeal Article V of the Charter. Immediately thereafter, representatives of organizations representing the City's police and firefighter employees, including Local 1319, sent letters to the City's Human Resources (HR) Director, requesting to confer with the City over the proposed change and citing legal authority. Within a few days

[4] The ALJ took the requested postponement under submission, and on October 13, 2011, issued his decision to grant the requested delay in issuing his decision. (Proposed decision, p. 4.)

[5] Both these requests were denied. (Proposed decision, pp. 5-6.)

the City HR Director responded in writing, claiming that interest arbitration provisions were permissive, not mandatory, subjects of bargaining, citing legal authority, and declaring that meet and confer was not required. In his response to Local 1319, the City HR Director suggested as well that if Local 1319 representatives had questions or comments about the repeal proposal, they could contact him, or attend the upcoming Council meetings. Concurrently, the City Attorney advised the Council that the City had no meet and confer obligation to Local 1319 on the repeal of Article V from the Charter. Shortly thereafter, at a meeting in early August 2010, the Council considered, but failed to pass, the proposal to seek voter authorization for repeal of Article V. A subsequent motion at the same meeting passed, directing City staff to return the following year with a timeline for considering the repeal of Article V. (Proposed decision, pp. 9-11.)

Nine months later, on May 3, 2011, the City's Interim HR Director Sandra Blanch (Blanch) sent an e-mail to Local 1319's President Anthony Spitaleri (Spitaleri) informing him that on May 10, 2011, the Council's Policy and Services Standing Committee (PSSC) would meet to discuss a ballot measure to modify or repeal the Charter's binding interest arbitration provision. The e-mail stated, "If you wish to meet and discuss regarding this issue please contact [Assistant Director] Marcie Scott in Human Resources." Spitaleri responded by e-mail to Marci Scott (Scott) inquiring whether her e-mail to him was a request to meet and confer, and by voice mail to Blanch inquiring whether the City was seeking to meet and confer. Neither Scott nor Blanch responded to Spitaleri. (Proposed Decision, pp. 11-12.)

Spitaleri did not attend the May 10, 2011 meeting of the PSSC, having a conflict. But at least one other representative of Local 1319 did attend. During the PSSC meeting the City attorney advised the PSSC that meeting and conferring with employee organization

representatives was required, citing *Seal Beach*,[6] and that the time needed to do so would depend on availability of the parties. The PSSC reached no conclusion on May 10, 2011, as whether to recommend repeal or modification of the interest arbitration provision in the Charter. The PSSC directed staff to return at a subsequent PSSC meeting with more options regarding interest arbitration and more background information. (Proposed decision, p. 13.)

On June 3, 2011, Scott sent Spitaleri an agenda packet for the next PSSC meeting to be held on June 7, 2011. The packet again indicated consideration of the interest arbitration question. Scott invited Spitaleri to contact her if he "had any questions." (Proposed decision, p. 14.)

Spitaleri did not attend the June 7, 2011 meeting of the PSSC, again having a conflict. But at least two other representatives of Local 1319 did attend. The PSSC reached no consensus and opted to refer to the full Council any decision on whether to repeal or modify the interest arbitration provision in the Charter, and when to do so. (Proposed decision, p. 14.)

On June 18, 2011, Scott notified Spitaleri by e-mail that the agenda for the June 20, 2011 Council meeting contained an item regarding the interest arbitration issue, and again asked Spitaleri to contact her "with any questions." (Proposed decision, p. 15.)

On June 20, 2011, City staff provided the Council a written report regarding the PSSC's deliberations on the possible changes under consideration to the Charter provision for interest arbitration, and on the lack of a PSSC consensus on modification v. repeal. This report contained, inter alia, an opinion from the City Attorney that meeting and conferring with employee organization representatives was not required, because interest arbitration was not a

[6] *The People ex rel. Seal Beach Police Officers Association et al., v. City of Seal Beach et al.* (1984) 36 Cal.3d 591 (*Seal Beach*).

mandatory subject.[7] (Proposed decision, p. 18.) During the public comment period which followed the staff report, Spitaleri and another Local 1319 representative addressed the Council, urging that rather than act that day on a measure to repeal Article V, that the Council should refer the topic again to the PSSC where all affected employee organizations could participate in the deliberations to update the interest arbitration provisions and provide recommendations to the Council. Spitaleri opined that denying the organizations an opportunity to express their ideas and assist in formation of an improved policy could damage employee relations. (Proposed decision, pp. 15-16.)

The Council did refer the matter back to the PSSC, with directions to consider the matter further and to provide the Council at its July 25, 2011 meeting, with the following: a draft of significant modifications to the interest arbitration provision, a draft of language to repeal interest arbitration, and a recommendation for the date on which to submit the matter to the City's voters. At that point Council Member Klein, who also served on the PSSC, stated that he understood labor representatives wanted to negotiate modifications to the interest arbitration provision, but that he opposed negotiating with them. He stated that instead the Council should receive input from both employee organizations and the public. (Proposed decision, pp. 15-16.)

On June 28, 2011, the PSSC met again. Again, Spitaleri did not attend but another Local 1319 representative did. The PSSC directed staff to draft language for repeal of interest arbitration as well as for substantial modifications thereof, and in addition to draft language for

[7] This opinion was a reversal of the position taken by the City Attorney in comments to the PSSC at its May 10, 2011 meeting, but consistent with the position of the City Attorney in late July 2010.

an ordinance requiring mediation of collective bargaining impasses. (Proposed decision, p. 17.)

On July 11, 2011, Scott e-mailed Spitaleri that the PSSC would meet again on July 12, 2011. The e-mail transmitted several documents including a draft resolution for a ballot measure to repeal interest arbitration, draft language to modify substantially the existing interest arbitration provision, and a draft ordinance requiring mediation of collective bargaining impasses. Again, Scott invited Spitaleri to "contact her" if he "had any questions." (Proposed decision, p. 17.)

Spitaleri did not attend the July 12, 2011 meeting of the PSSC, again having a conflict. But at least one other representative of Local 1319 did attend. The PSSC determined to forward to the Council the language for an ordinance on mediation of collective bargaining impasses, approved the draft repeal resolution to go to the Council for action, and approved as well sending to the Council some proposed modifications of the existing Charter provision on interest arbitration. (Proposed decision, p. 17.)

On July 17, 2011, Scott again e-mailed Spitaleri, notifying him that at its meeting the next day the Council would consider the interest arbitration issue. The e-mail provided Spitaleri a hypertext link to the Council's agenda packet, which contained, inter alia, a report from the City Attorney to the Council transmitting the recommendations of the PSSC, which report opined that the City had no obligation to meet and confer over its decision to seek modification or repeal of Article V. Scott's e-mail invited Spitaleri to "contact her" if he "had any questions." (Proposed decision, p. 18.)

On July 18, 2011, the Council met. It considered the report from the City Attorney's office transmitting the PSSC's recommendations. As had the report to the June 20, 2011

meeting of the Council, the City Attorney's report to the July 18, 2011 meeting opined that interest arbitration was a permissive, and not a mandatory subject of meeting and conferring, and thus the City was not obliged to meet and confer. The report also stated that staff had provided to organizations representing police and fire employees the opportunity for "informal discussion and comment" by "informing them of the dates that the PSSC reviewed the item and providing copies of the reports." However, stated the report, no "oral or written comment" was received from "those organizations" at the meetings. (Proposed decision, p. 18.)

During the public comment period which followed the City Attorney's report, Spitaleri requested that the Council adhere to California Government Code 3507 which he described as "part of the Meyers-Milias-Brown Act stating that a public agency must consult in good faith with representatives of a recognized employee organization before adopting procedures for the resolution of disputes involving wages, hours and other terms or conditions of employment." (Proposed decision, p. 18, emphasis in original.) Following the public comment period, the Council considered but failed to approve a motion to submit to voters a measure to modify Article V. It then approved a different motion to submit to voters a measure to repeal Article V and also approved on "first reading," an ordinance requiring non-binding mediation of collective bargaining impasses. (Proposed decision, p. 19.)

On July 18, 2011, immediately after the Council meeting, Spitaleri approached the City's negotiator, Dell Murray (Murray), and requested that Murray respond for the City to Spitaleri's request made during the public comment session to the Council that the City consult in good faith with Local 1319 over the proposal to repeal interest arbitration. Murray demurred, telling Spitaleri to submit his request via e-mail. (Proposed decision, p. 19.)

On July 19, 2011, Spitaleri e-mailed Murray as follows:

> I am requesting the city abide by California [Government] Code 3500-3511 as required in sections 3504.5 (a) and 3507 (a). As you know I made the same request at the city council meeting of July 18[,] 2011.

(Local 1319, Exh. 22.) Murray did not respond to Spitaleri's e-mail.

The City's deadline to submit the ballot measure to the registrar's office for placement on the November 8, 2011 election was August 12, 2011, although Scott had been informed in June 2011 by the City clerk that the deadline for submission of a ballot measure to the registrar was August 1, 2011, and in turn Scott had so informed the PSSC and Spitaleri. The Council was scheduled to meet next on July 25 and thereafter on August 1, 2011, although the Council had been notified in advance that at these meetings only eight of the nine Council members would attend. (Proposed decision, p. 19.)

On July 27, 2011, Spitaleri e-mailed Murray again, as follows:

> Am I to assume that since I haven't heard from you concerning my request, the city wishes not to meet and consult on the repeal of Binding Interest Arbitration as required by the California [Government] Code 3500-3511.

(Local 1319, Exh. 23.) Murray responded to Spitaleri that he (Murray) had asked Scott to send Spitaleri the staff report from July 18, 2011, which set forth the City's position, to wit, that interest arbitration was a permissive, and not a mandatory, subject of meeting and conferring, and therefore the City was not obliged to meet with Local 1319 over the issue. (Proposed decision, p. 20.)

On July 28, 2011, Local 1319 filed the instant charge.

On August 1, 2011, City Attorney Molly Stump (Stump) responded to Local 1319's counsel, asserting that the City's action of July 18, 2011, on the mediation ordinance was not a final Council action. Stump cited a provision of the City's Municipal Code calling for a

"second reading" of ordinances. Concurrently, Scott provided essentially the same information to Spitaleri. (Proposed decision, pp. 20-21.)

On August 15, 2011, the parties met to discuss the mediation ordinance. As of the date of the hearing, the City had taken no further action on the mediation ordinance. (Proposed decision, p. 21.)

On November 8, 2011, a majority of voters approved the repeal of the interest arbitration provision from the Charter. (Proposed decision, p. 21.)

PROPOSED DECISION

Ruling first on the City's claim that MMBA section 3509, subdivision (e)[8] vested jurisdiction in the courts, not PERB, the ALJ reasoned that a superior court rather than PERB would have jurisdiction pursuant to section 3509, subdivision (e) only where there was an "action" involving interest arbitration as governed by Code of Civil Procedure (CCP) section 1280 et seq. Here, noted the ALJ, there was no "action" pending pursuant to CCP section 1280 et seq., and thus section 3509, subdivision (e) was inapplicable. Pursuant to section 3509, subdivision (b), PERB therefore retained jurisdiction over allegations that the City violated the MMBA by failing to consult in good faith with Local 1319 pursuant to MMBA section 3507. (Proposed decision, pp. 23-24.)

[8] MMBA section 3509, subdivision (e) provides, in pertinent part:

> Notwithstanding subdivisions (a) to (c), inclusive, consistent with, and pursuant to, the provisions of Sections 3500 and 3505.4, superior courts shall have exclusive jurisdiction over actions involving interest arbitration, as governed by Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure, when the action involves an employee organization that represents firefighters, as defined in Section 3251.

Ruling next on the City's claim that PERB itself [9] had deemed interest arbitration a permissive, not a mandatory, subject of meeting and conferring, the ALJ reasoned that these PERB decisions concerned the scope of meeting and conferring under MMBA section 3505, not the scope of consultation under section 3507. Thus, they were not controlling. (Proposed decision, p. 24.)

Relying on several court decisions antedating PERB jurisdiction over the MMBA, the ALJ construed the duty to consult in good faith under section 3507 as akin to the meet and confer duty under MMBA section 3505. Thus, concluded the ALJ, except for the scope of consultation which section 3507 itself states with particularity, the consultation process under section 3507 is otherwise indistinguishable from the meet and confer process under section 3505. In both settings, the parties must: (1) meet and confer promptly upon request by either party, (2) continue for a reasonable period of time in order to exchange freely information, opinions and proposals, and (3) endeavor to reach an agreement. (Proposed decision, pp. 24-25.)

As for the scope of consultation, the ALJ noted that section 3507 articulated nine matters for consultation, including "[a]dditional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment." (MMBA, § 3507, subdivision (a)(5).) The ALJ concluded that this language contemplated consultation over procedures for interest arbitration as well as for non-binding mediation. (Proposed decision, p. 25, fn. 16.)

Finally, relying on *Seal Beach*, *supra*, 36 Cal.3d 591, the ALJ concluded that when adopting a rule or regulation involved amending a city charter, consultation required by

[9] *County of Santa Clara* (2010) PERB Decision No. 2114-M; *County of Santa Clara* (2010) PERB Decision No. 2120-M.

section 3507, like meeting and conferring required by section 3505, should occur and conclude before the public agency acts to submit the matter to the voters. (Proposed decision, p. 26.)

Applying these principles, the ALJ reasoned that: (1) as of June 20, 2011, the City had afforded Local 1319 reasonable notice of the City's intention to amend its existing Charter provision for interest arbitration; (2) Local 1319 did not request consultation until July 18, 2011, thereby waiving by inaction its right to consult; and (3) thus, the Council did not violate section 3507 when on July 18, 2011, it approved the ballot measure to repeal interest arbitration. (Proposed decision, pp. 26-28.)

As for the Council's first reading on July 18, 2011, of the ordinance establishing non-binding mediation, the ALJ credited the City's evidence that its governance procedures mandated more than a first reading in order to affect adoption of an ordinance, and, on that basis, ruled that the first reading alone could not constitute City action in derogation of MMBA section 3507. (Proposed decision, p. 28.)

POSITIONS OF THE PARTIES

Local 1319's Exceptions

Local 1319 excepts on two bases to the ALJ's conclusion that Local 1319 waived its right to consult over the City's decision to repeal binding interest arbitration from the Charter via a ballot measure. First, urges Local 1319, the City took a firm decision on June 20, 2011, that it would not meet and confer with Local 1319 to discuss the City's decision to repeal binding interest arbitration from the Charter, thus violating its duty under section 3507 and rendering futile any request by Local 1319 thereafter for consultation. Second, and in any event urges Local 1319, it made requests on June 20, 2011 and again on July 18, 2011, for

consultation, thereby asserting and preserving, not waiving by inaction, its consultation rights under MMBA section 3507.

The City's Response

The City first urges an alternative theory supporting the result reached by the ALJ, namely, that Local 1319's consultation rights were limited to commenting during PSSC and Council meetings on the changes being considered by the City to its rules and regulations, and Local 1319's failure to participate actively in the Council's PSSC processes for changing the City's rules and regulations effectively abandoned Local 1319's consultation rights under section 3507.

Responding to Local 1319's exceptions, the City urges that: (1) on June 20, 2011, the City took no firm position opposing consultation; (2) Local 1319 did not request consultation on either June 20 or July 18, 2011, and the City was not obliged to clarify whether Local 1319's statements then made to the Council were consultation requests; and (3) in any event, PERB lacks authority to require the City to restore the status quo ante.

The City's Exceptions

The City excepts to the ALJ's conclusions that: (1) MMBA section 3509, subdivision (e) does not divest PERB of jurisdiction; (2) recent PERB and judicial decisions regarding interest arbitration do not remove interest arbitration from the scope of representation under section 3507; and (3) the rationale of *Seal Beach*, *supra*, 36 Cal.3d 591 is applicable as well to the City's action at issue here. Additionally, the City excepts to the ALJ's denial of its request for a continuance in the hearing to permit presentation of "expert witness testimony" in support of the City's position.

Local 1319's Response

Local 1319 responds as follows to the City's exceptions: (1) the instant dispute does not concern an "action" within MMBA section 3509, subdivision (e), which removes from PERB's jurisdiction only those questions arising under an existing law or agreement providing for binding interest arbitration, but does not implicate an employer's adoption of rules and regulations pursuant to section 3507; (2) PERB's complaint alleged a prima facie violation of section 3507, and the status of interest arbitration as a permissive subject under section 3505 does not control its status vis-à-vis section 3507; (3) *Seal Beach*, *supra*, 36 Cal.3d 591 is applicable to the City's decision to submit to voters a ballot measure adopting or repealing rules and regulations for the administration of employer-employee relations; and (4) the ALJ properly exercised his discretion when he declined the City's proffer of "expert witness testimony."

DISCUSSION

Introduction

This case presents an issue not previously addressed in depth[10] by the Board, viz., the nature and extent of a pubic agency's duty under MMBA section 3507 to consult in good faith

[10] *County of Amador* (2013) PERB Decision No. 2318-M, p. 12; *County of Riverside* (2011) PERB Decision No. 2163-M, p. 5. In *County of Riverside*, the Board construed MMBA section 3507 to require consultation in good faith before modifying the County's existing rule concerning unit modification. The County's rule was silent on proof of support (POS), but the County had imputed a POS requirement, which was challenged by an employee organization. Declining the County's invitation to accept the County's imputation of a POS requirement, or alternatively to apply PERB's own POS rule, the Board explained that section 3507, subdivision (a) permitted the County to amend its own rule to add a reasonable POS requirement, subject to the County's duty, prior to changing its rule, to consult in good faith with representatives of recognized employee organizations. (*Ibid.*)

with recognized employee organization representatives prior to changing the agency's rules and regulations for the administration of employer-employee relations.

We first consider the role of consultation within the Legislature's MMBA policy design for employer-employee relations in public agencies.[11] A preeminent element of that design is a public agency's discretion, as provided in MMBA section 3507, to adopt its own rules and

[11] The Legislature stated its purpose and intent in MMBA section 3500, as follows:

> (a) It is the purpose of this chapter to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations. It is also the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the various public agencies in the State of California by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by those organizations in their employment relationships with public agencies. Nothing contained herein shall be deemed to supersede the provisions of existing state law and the charters, ordinances, and rules of local public agencies that establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations nor is it intended that this chapter be binding upon those public agencies that provide procedures for the administration of employer-employee relations in accordance with the provisions of this chapter. This chapter is intended, instead, to strengthen merit, civil service and other methods of administering employer-employee relations through the establishment of uniform and orderly methods of communication between employees and the public agencies by which they are employed.
>
> (b) The Legislature finds and declares that the duties and responsibilities of local agency employer representatives under this chapter are substantially similar to the duties and responsibilities required under existing collective bargaining enforcement procedures and therefore the costs incurred by the local agency employer representatives in performing those duties and responsibilities under this chapter are not reimbursable as state-mandated costs.

regulations for the administration of employer-employee relations. In section 3507 the Legislature accorded to employees, through their organizations, a voice in designing their agency's rules and regulations, mandating that prior to adopting its rules and regulations a public agency "consult in good faith" with employee organization representatives. Thus, consistent with section 3500, the Legislature promoted the improvement of personnel management and employer-employee relations by assuring full communication between public agencies and their employees over the rules and regulations for employer-employee relations adopted by the public agency.

MMBA section 3507 provides, in pertinent part:

> (a) A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of a recognized employee organization or organizations for the administration of employer-employee relations under this chapter. The rules and regulations may include provisions for all of the following:
>
> (1) Verifying that an organization does in fact represent employees of the public agency.
>
> (2) Verifying the official status of employee organization officers and representatives.
>
> (3) Recognition of employee organizations.
>
> (4) Exclusive recognition of employee organizations formally recognized pursuant to a vote of the employees of the agency or an appropriate unit thereof, subject to the right of an employee to represent himself or herself as provided in Section 3502.
>
> (5) Additional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment.
>
> (6) Access of employee organization officers and representatives to work locations.
>
> (7) Use of official bulletin boards and other means of communication by employee organizations.

> (8) Furnishing nonconfidential information pertaining to employment relations to employee organizations.
>
> (9) Any other matters that are necessary to carry out the purposes of this chapter.

(MMBA, § 3507.)

The Legislature did not prescribe with particularity the consultation process mandated by MMBA section 3507. However, several courts of appeal have provided guidance, concluding that consultation under section 3507 is "indistinguishable" from meeting and conferring under section 3505.[12] Relying on these decisions,[13] we conclude, with the ALJ, that the consultation process mandated by section 3507 is very much like the meet and confer process described in section 3505.[14]

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[12] MMBA section 3505 provides, in pertinent part:

> "Meet and confer in good faith" means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.

[13] In MMBA section 3509, subdivision (b), the Legislature instructed us to "apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter."

[14] Judicial interpretations of MMBA section 3507, while not entirely uniform, construe it to impose on a public agency a duty to consult that is "indistinguishable from" the duty to "meet and confer" under section 3505. (*Independent Union of Public Service Employees v. County of Sacramento* (1983) 147 Cal.App.3d 482, 488 [consultation duty of employer stated in management rights provision of memorandum of understanding (MOU) construed to require

Thus, we conclude that a public agency's consultation obligations under MMBA section 3507 arise sufficiently in advance of the agency's adoption of rules and regulations for the administration of employer-employee relations, to permit completion of consultation discussions prior to such adoption. We conclude as well that pursuant to MMBA section 3507, a public agency must: (1) provide reasonable written[15] notice to each employee organization affected by the rule or regulation proposed for adoption or modification by the agency; and (2) afford each such organization a reasonable opportunity to meet and discuss the rule or regulation prior to the agency's adoption. Finally, we conclude that section 3507 imposes on a public agency and on recognized employee organizations, several mutual obligations in the conduct of consultation, which are to: (1) meet and confer regarding consultation subjects promptly upon the request by either party; (2) continue meeting and conferring for a

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meet and confer, relying on prior decision construing section 3507 consultation duty as the equivalent of section 3505 duty to meet and confer in good faith]; *International Assn. of Fire Fighters Union v. City of Pleasanton* (1976) 56 Cal.App.3d 959, 976 (*City of Pleasanton*) [rule adopted by city under section 3507.5 designating management and confidential employees held subject to consultation under 3507; "consultation in good faith" under 3507 held indistinguishable from "meet and confer in good faith" under 3505; city's refusal of union's meet and confer demand held to invalidate subsequently-adopted rule]; *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 821 [anti-carwash rule imposed by county without meeting and conferring under section 3505 deemed unlawful, but even if rule were subject to section 3507 consultation rather section 3505 meeting and conferring, same result as "no basis for distinguishing between the term consultation in good faith as used in section 3507 and meet and confer in good faith process in section 3505," citing *City of Pleasanton*]; *Reinbold v. City of Santa Monica* (1976) 63 Cal.App.3d 433, 442, 445 [city's rule placing police chief in separate bargaining unit held invalid where city failed to demonstrate that it engaged in prior good faith consultation per section 3507]; *Organization of Deputy Sheriffs v. County of San Mateo* (1975) 48 Cal.App.3d 331, 338 [consultation between various county officers and employees prior to the civil service commission hearing, and plus taking of evidence at commission hearing, deemed sufficient to establish county complied with section 3507 consultation requirement prior to adopting rule establishing bargaining unit].)

[15] Under the MMBA section 3405.5 employers provide written notice of matters subject to the meet and confer obligation.

reasonable period of time in order to exchange freely information, opinions and proposals; and (3) endeavor to reach an agreement.[16]

As to the scope of consultation under MMBA section 3507, we conclude, with the ALJ, that section 3507 prescribes a different scope of consultation from that under section 3505, because in section 3507 the Legislature stated with particularity those subjects for consultation. We discuss the extent of these subjects in more detail below.

We likewise conclude, with the ALJ, that an agency may raise affirmative defenses to a complaint alleging that the agency violated the MMBA by failing or refusing to consult in good faith, including the defense that the charging party waived its consultation right under MMBA section 3507.

We turn now to the issues raised by the case before us.

Issues for Decision

The complaint alleged that the City breached MMBA section 3507 in July 2011 when, after informing Local 1319 of its intention to modify its rules and regulations, but without engaging in consultation discussions thereon with Local 1319's representatives, the City: (1) adopted a ballot measure for submission to voters, which, if approved, would repeal from the Charter an existing provision for mandatory binding interest arbitration of collective bargaining impasses with police and firefighter employees; and (2) concurrently took the first step to adopt an ordinance specifying an alternative process of non-binding mediation for resolving such impasses. The complaint thus alleged a garden variety unilateral change undertaken in derogation of a union's right to consult.

[16] We leave for another day questions not presented here, for example, the extent to which disagreements unresolved during the consultation process are properly the subject of any dispute resolution processes established for treating collective bargaining disputes arising under MMBA section 3505 over wages, hours and other terms and conditions of employment.

The ALJ concluded that the City had a duty to consult, but that in this instance Local 1319 waived its consultation rights thereby excusing the City's failure.

Local 1319 excepts to the ALJ's finding that Local 1319 failed to timely assert its consultation right under MMBA section 3507, and to the ALJ's conclusion that thereby Local 1319 waived its consultation right.

The City raises jurisdictional and procedural defenses, and on the merits urges a narrow reading of its MMBA section 3507 duty, limited to permitting employee organization representatives to participate on the same basis as members of the public in the Council's public deliberations, viz., by making comments during public meetings.

We take up the legal issues in the following order: first, we assess the City's claim on appeal that the Board lacks jurisdiction over the City's conduct in this case; second, we assess the City's claim on appeal that it had no duty to consult because advisory arbitration is a "permissive," not a "mandatory," subject of consultation under MMBA section 3507; third, we assess Local 1319's claim on appeal that its consultation demands were timely, along with the City's affirmative defense, including that Local 1319 failed timely to request consultation; fourth, we assess the City's claim on appeal that the ALJ wrongly refused the City's proffer of expert opinion testimony. We begin with jurisdiction.

Jurisdiction

The City claims that: (1) MMBA section 3509, subdivision (e) reserves to the superior courts jurisdiction over the City's conduct alleged here; and (2) by submitting to City voters the ultimate decision on rules and regulations for administration of employer-employee relations, the City divested from itself both the ultimate decision over an amendment to the

Charter and any duty the City might have under the MMBA to consult regarding the decision pursuant to section 3507. We assess each contention.

1. MMBA Section 3509, subdivision (e)

The City contends that in MMBA section 3509, subdivision (e) the Legislature reserved to the courts and denied to PERB jurisdiction over a public agency's adoption or modification of a local rule which provides for interest arbitration of firefighter disputes. We are not persuaded.

PERB's jurisdiction arises under MMBA section 3509, subdivision (b), which provides:

> A complaint alleging any violation of this chapter or of any rules and regulations adopted by a public agency pursuant to Section 3507 or 3507.5 shall be processed as an unfair practice charge by the board. The initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board, except that in an action to recover damages due to an unlawful strike, the board shall have no authority to award strike-preparation expenses as damages, and shall have no authority to award damages for costs, expenses, or revenue losses incurred during, or as a consequence of, an unlawful strike. The board shall apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter.

(Emphasis added.) The instant unfair practice complaint alleges that the City violated the duty of consultation established by section 3507, viz., "this chapter," when it adopted rules and regulations for the administration of employer-employee relations by repealing its existing procedure for binding interest arbitration and adopting in lieu thereof a procedure for non-binding mediation. The complaint thus alleges a "violation of this chapter." (MMBA, § 3509, subdivision (b).) It follows that "the initial determination as to whether the charge of unfair practice is justified, and if so, the appropriate remedy necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. . . ." (*Ibid*.)

With the ALJ, we construe MMBA section 3509, subdivision (e) to reserve to the courts questions arising in "actions involving interest arbitration, as governed by Title 9 (commencing with Section 1280) of Part 3 of the [CCP], when the action involves an employee organization that represents firefighters, as defined in Section 3251." (Emphasis added.) MMBA section 3509, subdivision (e) denies PERB jurisdiction over "actions" to enforce an existing interest arbitration procedure, including questions regarding the extent or scope of the parties' arbitration obligations. (*City of San Jose v. International Association of Firefighters, Local 230* (2009) 178 Cal.App.4th 408 [in action brought under CCP 1280 et seq., the superior court, not PERB, has jurisdiction to construe extent of obligation created by interest arbitration provision in city's charter].)

Here, however, Local 1319, a firefighter organization, seeks not to enforce an existing interest arbitration procedure, nor to litigate the extent of disputes covered thereby, but rather to enforce the MMBA requirement that a public agency consult in good faith prior to adopting or changing its rules and regulations for administration of employer-employee relations, including "additional procedures for the resolution of disputes involving wages, hour and other terms and conditions of employment." (MMBA, § 3507, subd. (a)(5).) Because we deem both interest arbitration and mediation to be "additional procedures" within section 3507, subdivision (a)(5) for the resolution of disputes involving matters within the scope of representation, we conclude that the adoption of rules and regulations concerning either interest arbitration or mediation or both, falls squarely within the City's duty, established by section 3507, to consult in good faith. Moreover, as noted by the ALJ, neither the complaint in this case, nor the record before us, presents an "action" to enforce an interest arbitration procedure sounding under CCP 1280 et seq.

Thus, we conclude, with the ALJ, that absent a factual predicate implicating MMBA section 3509, subdivision (e), viz., an "action" pursuant to CCP 1280 et seq., PERB retains exclusive initial jurisdiction to construe and enforce a public agency's duty under section 3507 to consult in good faith, even where, as here, the local rule proposed for adoption or modification by the public agency concerns interest arbitration and even where, as here, the recognized employee organization seeking to enforce its MMBA consultation rights represents firefighters.

2. A Ballot Measure for Voters

The City contends that because its conduct scrutinized here involved proposing to voters a ballot measure to amend the City's Charter, to such extent its conduct is insulated from a statutory duty under MMBA to consult by the City's allegedly supervening constitutional right to propose charter amendments. Again, we are not persuaded.

In *Seal Beach*, *supra*, 36 Cal.3d 591, California's Supreme Court considered and rejected a like contention that a charter city need not comply with an MMBA duty to meet and confer prior to proposing charter amendments impacting matters as to which the MMBA imposed on the city a duty to meet and confer. The Supreme Court ruled that duties imposed by the MMBA on charter cities to meet and confer with employee organizations do not conflict with the exercise by charter cities of their rights under California's Constitution to propose charter amendments, and accordingly that charter cities must comply with their MMBA duties as to matters subject thereto even where a charter amendment may be the ultimate form of the charter city's action. We concede that *Seal Beach* dealt with the meet and confer duty imposed by section 3505, and not the duty to consult in good faith imposed by section 3507. However, we deem this distinction of no moment to our present task. We discern no conceptual or

constitutional impediment to extending the rationale of *Seal Beach* to the MMBA's consultation duty imposed by section 3507.

We hold that in MMBA section 3509, subdivision (b) the Legislature has conferred on PERB exclusive initial jurisdiction over allegations that a public agency, including without limitation a charter city, has failed or refused to consult in good faith pursuant to section 3507, prior to taking direct action on the matter or to acting indirectly by submitting a ballot measure to its voters.

We turn next to the City's claim on appeal that the ALJ construed too broadly the scope of the City's consultation duty.

The Scope of Consultation under MMBA Section 3507

The City contends that interest arbitration, a permissive, not a mandatory, subject for meeting and conferring under section 3505, should likewise be deemed a permissive subject for consultation under section 3507. We are not persuaded.

In support of its position the City cites to PERB's decisions in *County of Santa Clara*, *supra*, PERB Decision No. 2114-M and *County of Santa Clara*, *supra*, PERB Decision No. 2120-M (*Santa Clara* cases). The City relies as well on *DiQuisto v. County of Santa Clara* (2010) 181 Cal.App.4th 236 (*DiQuisto*) in which the court itself relied on *City of Fresno v. the People ex rel. Fresno Firefighters, IAFF Local 753, et al.* (1999) 71 Cal.App.4th 82 (*Fresno Firefighters*). We review these authorities.

In the *Santa Clara* cases, the Board considered an employer's approval of a ballot measure that modified a binding interest arbitration provision without first engaging in meet

and confer discussions under MMBA section 3505.[17] The Board concluded, based on *DiQuisto, supra*, 181 Cal.App.4th 236, that binding interest arbitration procedures were permissive subjects of meeting and conferring and thus beyond the mandatory scope of representation as defined in MMBA section 3504.[18] In the *Santa Clara* cases, however, the Board construed section 3504, not section 3507. Thus, the holding in the *Santa Clara* cases did not contemplate the dispute here presented, to wit, whether the City failed to consult in good faith in violation of MMBA section 3507 over the proposed repeal of an interest arbitration provision from its charter.

Nor did *DiQuisto, supra*, 181 Cal.App.4th 236 or *Fresno Firefighters, supra*, 71 Cal.App.4th 82 construe MMBA section 3507. In *DiQuisto*, the County of Santa Clara was accused of improperly expending public funds to favor a partisan position in an election campaign by bargaining with its employees' unions in an attempt to get the unions to abandon the unions' own initiative measure to establish binding interest arbitration.[19] The unions urged that the County's proposals, viz., that the unions abandon supporting their own interest arbitration initiative measure, were unlawful. The *DiQuisto* court rejected the unions' argument, concluding that an employer was permitted to discuss permissive subjects during meet and confer sessions, and that the County did not offer the unions an improper inducement or engage in campaign activity during meet and confer sessions, either of which might have demonstrated a violation of campaign laws. Regarding the County's meet and confer proposals, the *DiQuisto* court observed:

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[17] *County of Santa Clara, supra*, PERB Decision No. 2120-M, p. 10; *County of Santa Clara, supra*, PERB Decision No. 2114-M, p. 10.

[18] *DiQuisto, supra*, 181 Cal.App.4th at p. 256.

[19] *DiQuisto, supra*, 181 Cal.App.4th at pp. 242-243.

> Under state law, although interest arbitration is not a mandatory subject of contract negotiations, it is a permissive subject about which the parties properly may meet and confer. (*Fresno* [*Firefighters*], *supra*, 71 Cal.App.4th at pp. 96-97.) Likewise, under federal law, binding interest arbitration "is not a mandatory subject of bargaining, since its effect on terms and conditions of employment during the contract period is at best remote." (*N.L.R.B. v. Columbus Printing Pressmen and Assistants' Union No. 252* (5th Circ. 1976) 543 F.2d 1161, 1166.)

(*Id.* at p. 257.)

The *DiQuisto, supra*, 181 Cal.App.4th 236 court's analysis of binding interest arbitration as a permissive subject was limited to the duty to meet and confer under MMBA section 3505 over items within the scope of representation defined in MMBA section 3504.[20] The *DiQuisto* court neither analyzed nor considered the issue before us here, to wit, the duty under section 3507(a)(5) to consult in good faith prior to adopting "procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment."

In *Fresno Firefighters*, *supra*, 71 Cal.App.4th 82 relied upon by the court in *DiQuisto*, *supra*, 181 Cal.App.4th 236, the court similarly construed the scope of representation under MMBA sections 3505 and 3504, not section 3507. Relying on federal decisions interpreting the National Labor Relations Board (NLRA), the *Fresno Firefighters* court concluded that interest arbitration is a permissive subject of meeting and conferring.[21] We note, however, that although federal decisions under the NLRA afford guidance in construing the scope of representation under sections 3505 and 3504, the NLRA contains no provision analogous to

[20] *DiQuisto, supra*, 181 Cal.App.4th at p. 256.

[21] *Fresno Firefighters*, *supra*, 71 Cal.App.4th at pp. 91-92, 96-97.

section 3507.[22] Thus, the *Fresno Firefighters* court's analysis of sections 3505 and 3504, based on provisions of the NLRA, is inapposite to our analysis of section 3507. It follows that neither PERB's *Santa Clara* cases, nor the courts' decisions in *DiQuisto* or *Fresno Firefighters*, provide guidance for our construction of section 3507.

In MMBA section 3507, the Legislature stated with particularity those matters a public agency may include in its rules and regulations for administration of employer-employee relations, and over which it must consult. We deem these matters to be "mandatory subjects" for consultation pursuant to section 3507, subdivision (a). They are distinct, both conceptually and by their very terms, from mandatory subjects for meeting and conferring pursuant to sections 3505 and 3504,[23] which are limited to wages, hours and terms and conditions of employment of employees. By contrast, the mandatory subjects for consultation specified in section 3507 concern the very system of collective representation established by the MMBA, and not employee wages, hours and terms and conditions of employment.

Of particular interest here are subdivisions (a)(5) and (a)(9) to MMBA section 3507. Subdivision (a)(5) prescribes "[a]dditional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment," and subdivision (a)(9) prescribes

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[22] While cases decided under the NLRA are generally instructive, they are not controlling, particularly where PERB is interpreting dissimilar provisions of California's labor relations statutes. (See, e.g., *Los Angeles Unified School District* (1998) PERB Decision No. 1267.)

[23] MMBA section 3504 provides:

> The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

"[a]ny other matters that are necessary to carry out the purposes of this chapter." We deem each sufficient to implicate the subject here at issue, viz., the City's rules and regulations for resolution by binding interest arbitration of collective bargaining disputes over terms and conditions of employment of firefighter employees.

We therefore conclude with the ALJ that a public agency's decision to modify or repeal interest arbitration procedures contained in its rules and regulations for administration of employer-employee relations, is subject to the public agency's consultation duty pursuant to MMBA section 3507, even though a public agency may decline lawfully to meet and confer under section 3505 over a proposal to include an interest arbitration provision in an MOU governing wages, hours and other terms and conditions of employment of agency employees.

We next take up the City's claims on appeal that: (1) Local 1319 failed to request consultation, and (2) in any event the City was not obliged to clarify whether Local 1319 was seeking to consult. We also consider Local 1319's claim on appeal that the City failed to prove up any affirmative defense, including waiver.

Consultation and Clarification

The City contends that Local 1319 failed to request consultation, thus waiving any consultation right it may have had, and that the City was not obliged to seek clarification of Local 1319's requests. Local 1319 counters that it actively sought discussions, which the City refused. We first look to our precedents,[24] and then at the parties' conduct.

[24] We proceed by analogy to our meet and confer precedents, since we have no precedent directly concerning the "indistinguishable" duty to consult under MMBA section 3507. We conclude that a party seeking consultation may couch its request as one to meet and confer, since the MMBA duty to consult in good faith has been construed as the equivalent of the MMBA duty to meet and confer, and since both processes literally involve meeting as well as conferring.

Under our precedents, a party seeking to meet and confer initiates the process by making a request therefor. The request need not be stated in particular terms, but must place the responding party on notice of the subject over which discussions are sought. (*Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223 (*Newman-Crows Landing*), citing, inter alia, *NLRB v. Columbian Enameling and Shaping Co.* (1939) 306 U.S. 292 and *Schreiber Freight Lines* (1973) 204 NLRB 1162.)[25] In *Schreiber Freight Lines*, the National Labor Relations Board (NLRB) affirmed its ALJ's decision, which reasoned that the requirement of a request to bargain was a low threshold, designed not for gamesmanship but merely to assure that an employer would not be found in violation of its statutory duty to negotiate in the absence of notice that its employees through their representatives desired to bargain. The ALJ's decision, affirmed by the NLRB, stated:

> Examination of one of the early Supreme Court decisions reveals the essential elements of a valid [bargaining] demand. Thus, in *N.L.R.B. v. Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939), the Court in establishing that a request to bargain is necessary to an 8(a)(5) violation further indicated that "To put the employer in default . . . the employees must at least have signified to respondent their desire to negotiate." [Fn. omitted.] From a reading of that decision it is apparent that the test of whether a proper request has been made was not designed to invite meaningless "game playing," but merely to avoid a finding of a refusal to bargain against an employer "without some indication given to him by [employees] or their representatives of their desire or willingness to bargain." [Fn. omitted.] In sum <u>where the employer is aware, through direct or indirect means, of an intention to bargain by the employee representative, the inquiry is ended.</u>

(*Schreiber Freight Lines, supra,* 204 NLRB at p. 1168, emphasis added.)

[25] When construing MMBA and other California public sector labor relations statutes, California courts and PERB rely on NLRB and judicial decisions construing similar language in the NLRA. (*San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

We concur that it is ultimately the employer's awareness of an employee organization's desire to bargain, which is crucial. While typically we infer such awareness, or lack thereof, from the words used in the employee organization's negotiating demand, such awareness may exist apart from the employee organization's demand. In such a case it is appropriate to enforce the employer's duty to negotiate notwithstanding the words chosen by the organization. (*Schreiber Freight Lines, supra*, 204 NLRB at p. 1168) Thus, we have long held that whether an employer is aware of an employee organization's desire to bargain is to be determined from the facts on a case-by-case basis. (*Delano Joint Union High School District* (1983) PERB Decision No. 307 (*Delano*), citing *Newman-Crows Landing, supra*, PERB Decision No. 223 and authorities cited therein.)

Where an employer believes that the subject over which an employee organization desires to meet and confer exceeds the employer's duty to meet and confer, or an employer is otherwise in doubt as to its meet and confer obligation, the employer must seek clarification. (*Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375, pp. 9-10 (*Healdsburg School District/San Mateo School District*) [party objecting that proposal is beyond scope of representation must make good faith effort at clarification by voicing its specific reasons for believing proposal is outside the scope of representation and entering into negotiations on those aspects of proposal which, after clarification, it views as negotiable; failure to seek clarification in itself violates the duty to negotiate in good faith and will result in an order requiring the objecting party to return to the negotiating table to seek clarification]; *City of San Jose* (2013) PERB Decision No. 2341-M, p. 44; *County of Santa Clara* (2013) PERB Decision No. 2321-M, pp. 31-32; *Rio Hondo Community College District* (2013) PERB

Decision No. 2313, pp. 9-13; *Jefferson School District* (1980) PERB Decision No. 133, p. 11 (*Jefferson*); see also *Kern Community College District* (1983) PERB Decision No. 337, p. 4, citing *Delano, supra*, PERB Decision No. 307.) We conclude that such clarification should occur within the meet and confer process, not merely by the exchange of legal positions through correspondence or in comments between party representatives at public meetings of the governing authority of the agency.[26]

With these precepts in mind, we review Local 1319's requests to meet and the City's responses, and the City's awareness of Local 1319's wish to meet.

1. In July 2010,[27] the City proposed to repeal its interest arbitration procedures. Local 1319 immediately requested in writing to meet and confer. The City promptly refused, claiming in its written response that meeting and conferring over its interest arbitration procedures was permissive, not mandatory. The City did not offer to meet with Local 1319, either to seek clarification of Local 1319's demand or to discuss the City's position that changes to its interest arbitration procedures were beyond the scope of representation. Proponents of the repeal failed to garner sufficient Council member votes, but the Council instructed its staff to bring the matter back for re-consideration in the ensuing election cycle.

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[26] *Los Angeles County Civil Service Commission v. Superior Court* (1978) 23 Cal.3d 55, 61 (*Los Angeles County v. Superior Court*) [MMBA duty to meet and confer includes, inter alia, the exchange of proposals; this duty is not met by a public agency's permitting employee organization representatives to comment on matters at a public meeting].

[27] We discuss events occurring during 2010, as did the ALJ, to provide a full picture of the parties' communications regarding these issues. (See *County of Riverside* (2013) PERB Decision No. 2307-M; *Service Employees International Union, Local 1021 (Sahle)* (2012) PERB Decision No. 2261-M; *Local Lodge No. 1424, International Association of Machinists, AFL-CIO v. National Labor Relations Board* (1960) 362 U.S. 411, 416 [events occurring prior to the limitations period may be utilized to shed light on the true character of matters occurring within the limitations period].)

2. In the Spring of 2011, the Council resumed consideration of repealing its interest arbitration procedures, this time initially through a standing committee of the Council. An early May 2011 e-mail to Local 1319 announced that the Council's PSSC would consider repeal or modification of the interest arbitration procedures. The e-mail invited Local 1319 to contact the City's HR office regarding "meet and discuss." Local 1319 responded by e-mail and voice mail, seeking clarification. Due to problems with the City's e-mail and voice mail communication systems, Local 1319's clarification requests apparently failed to reach City officials. In all subsequent communications, City staff routinely encouraged Local 1319 to contact City officials with "questions," but did not offer to meet.

3. On June 20, 2011, the Council met and received from City staff a report concerning deliberations of the PSSC. The staff report indicated the PSSC had reached no consensus on what changes to make to the interest arbitration procedures, and opined that such changes were permissive, not mandatory, subjects for meeting and conferring. During this meeting, a Council member declared to the assembled Council and others in attendance, his understanding that Local 1319 desired to "negotiate" with the City over changes to the interest arbitration procedures. This Council member also declared that instead of negotiating the City should limit Local 1319's participation to that afforded to the public generally, viz., addressing the Council during public comment periods of public meetings.

4. On July 18, 2011, the Council met again. It again received a staff report concerning deliberations of the PSSC, including recommendations for Council action. The staff report again opined that changes to interest arbitration procedures were permissive, not mandatory, subjects for meeting and negotiating. The staff report indicated that Local 1319 had provided neither oral nor written comments to the Council's PSSC about changes to the

interest arbitration procedures. In the public comment period following presentation of the staff report, Local 1319's representative requested that the City meet with Local 1319 representatives pursuant to the MMBA to consult on the proposed changes to the interest arbitration procedures. Thereafter, despite Local 1319's request, the Council adopted some of the changes recommended by the PSSC, including a ballot measure to repeal interest arbitration procedures from the Charter.

5. On July 18, 2011, immediately after the Council meeting, Local 1319's representative approached the City's negotiator and reiterated the request made moments before to the Council, to meet with the City pursuant to the MMBA to discuss the proposed changes to the interest arbitration procedures. The negotiator demurred and requested Local 1319 to put the request in writing. The next day Local 1319 put its request in writing via an e-mail to the City's negotiator. On July 27, 2011, the City's negotiator responded, reiterating the position taken by the City in July 2010, and in June and July 2011, that the City would not meet because it deemed its interest arbitration procedures to be permissive, not mandatory, subjects.

We find that: (1) as early as July 2010, Local 1319 had requested in writing to discuss (meet and confer) with City representatives the changes proposed by the City to the interest arbitration procedures in its charter; (2) as of the Council meeting on June 20, 2011 and thereafter, the City was aware that Local 1319 still wished to discuss with City representatives the changes proposed by the City to the interest arbitration procedures in its charter; and (3) the City consistently refused to meet with Local 1319, either for clarification or to discuss the subject of the interest arbitration procedures. Instead, the City consistently claimed that it had no duty to meet on the repeal or modification of interest arbitration procedures in its rules and

regulations, and that Local 1319's representatives, like members of the public, were to make their presentations to the Council or its committee during their public sessions.

Based on these findings, we conclude that the City was aware that Local 1319 sought to meet with City representatives to discuss the City's proposed changes to the interest arbitration procedures in the City's rules and regulations for the administration of employer-employee relations. That being so, we conclude further that the City was obliged to meet with representatives of Local 1319, either to discuss and exchange proposals regarding the City's proposed changes to the interest arbitration procedures or to clarify the City's position that the proposed changes to its interest arbitration procedures were a permissive subject of meeting and conferring. This, the City refused to do, on June 20, 2011 and again on July 18, 2011. Therefore, we conclude that the City failed and refused to meet with representatives of Local 1319 in violation of its duty under MMBA section 3507.

We turn now to the issues of waiver and other defenses urged by the City and or discussed by the ALJ.

Waiver

We first review our precedents regarding an employee organization's waiver of the right to meet and confer or to consult. We then address the ALJ's findings and conclusions on waiver and other defenses.

As noted by the ALJ, an exclusive representative may waive its right to bargain over a matter within the scope of representation. (*San Mateo County Community College District* (1979) PERB Decision No. 94.) However, waiver is an affirmative defense, is disfavored and must be clear and unmistakable. (*San Francisco Community College District* (1979) PERB Decision No. 105 (*San Francisco*); *Los Angeles Community College District* (1982) PERB

Decision No. 252 (*Los Angeles*).) An employer raising a waiver defense must establish that: (1) it provided the employee organization clear and unequivocal notice that it would act on a matter, and (2) the employee organization clearly, unmistakably and intentionally relinquished its right to meet and confer in good faith. (*County of Santa Clara, supra*, PERB Decision No. 2321-M; *San Francisco; Los Angeles.*)

The facts, which we summarized above at pp. 34-36, do not support a conclusion that Local 1319 waived its MMBA right to consult in good faith with the City over modification or repeal of the interest arbitration provisions in the City's rules and regulations for the administration of employer-employee relations. We explain.

Local 1319 first requested discussions with the City on this issue in July 2010. The City promptly acknowledged and denied Local 1319's request. In June 2011 the City publicly acknowledged awareness of Local 1319's desire to discuss the issue with the City, but the City confined discussion to participation in public meetings. On July 18, 2011, Local 1319 again requested to meet with the City, but, with more than three weeks remaining until the City's August 12, 2011, deadline to submit the measure to the registrar's office, the City acted unilaterally and thereafter continued to refuse to meet with Local 1319 on the issue. These facts do not reflect waiver by Local 1319 of its MMBA right to consult.

Rather, upon receiving Local 1319's request or becoming aware of Local 1319's wish to meet, the City's obligation was to offer to meet and discuss the City's position that the issue on which Local 1319 sought to meet was beyond the scope of representation. (*City of San Jose, supra*, PERB Decision No. 2341-M; *County of Santa Clara, supra*, PERB Decision No. 2321-M; *Healdsburg School District/San Mateo School District, supra*, PERB Decision

No. 375; *Jefferson*, *supra*, PERB Decision No. 133.) By failing to offer to meet with Local 1319's representatives, the City violated its consultation duty under section 3507.

Nor did the City satisfy its duty to meet by permitting Local 1319's representatives to address the Council, or the Council's PSSC, during public meetings. We conclude, with the ALJ, that like the City's duty to meet and confer in good faith under MMBA section 3505, its duty to consult in good faith under section 3507 is not satisfied merely by permitting organizational representatives to exercise rights accorded to members of the public to address the Council, or its PSSC, in a public session. (*Los Angeles County v. Superior Court*, *supra*, 23 Cal.3d 55.)

We consider now other possible defenses supporting the City's failure to consult with Local 1319 on the issue of repeal of the interest arbitration procedures from the City's Charter.

Other Defenses

Our precedents establish that a party subject to the duty to meet and confer in good faith must fulfill its duty to meet and confer in good faith before changing a matter within the scope of representation. (*County of Santa Clara*, *supra*, PERB Decision No. 2321-M, pp. 13-14, citing *Calexico Unified School District* (1983) PERB Decision No. 357 (*Calexico*).) Likewise, a party subject to this duty may not resort to "self-help" until after exhausting its meet and confer duty. (*County of Santa Clara*, p. 15, citing *Palo Verde Unified School District* (1987) PERB Decision No. 642.) We conclude therefore that absent a valid defense, a party subject to the good faith duty to consult pursuant to MMBA section 3507 must defer action on matters subject to its consultation duty pending exhaustion thereof.

Here, the City acted unilaterally and engaged in "self-help" on July 18, 2011, when, without having consulted to agreement or impasse, it approved a ballot measure to repeal the

interest arbitration procedures in its Charter. The ALJ concluded this action was justified by two conditions, viz., minimal (five to four) support of the Council for the interest arbitration ballot measure, and less-than-full attendance of Council members expected at meetings on July 25, 2011 and August 1, 2011. We are not persuaded.

Two theories which might excuse the City's conduct are inapposite. We discuss each.

In *Compton Community College District* (1989) PERB Decision No. 720 (*Compton*), the Board held that an employer may implement a change prior to completion of bargaining on the effects of a non-negotiable decision but only where: (1) the implementation date was not arbitrary but based on an immutable externally-established deadline, or on an important managerial interest such that delay beyond the chosen date would undermine the employer's right to make the decision at all; (2) the employer gave the union notice of the decision and implementation date sufficiently in advance of the implementation date to allow for meaningful meeting and conferring prior to the implementation; and (3) the employer met and negotiated in good faith on implementation and effects prior to the implementation, and thereafter as to those subjects not resolved by virtue of the implementation.

We deem *Compton, supra*, PERB Decision No. 720 inapposite for several reasons. First, *Compton* concerned the effects of an otherwise non-negotiable matter, while here the City was acting not on a negotiable effect of a non-negotiable decision but rather on a subject which itself falls clearly within the City's consultation duty pursuant to MMBA section 3507. Thus, like matters within the scope of representation for meeting and conferring, the proposed repeal of interest arbitration procedures was within the scope of representation for consultation. For this reason alone, *Compton* is inapposite.

Second, even if it were apposite, *Compton*, *supra*, PERB Decision No. 720 would be unavailing. Despite its awareness on and after June 20, 2011 of Local 1319's desire to meet, the City: (1) failed to meet or consult in good faith prior to the action on July 18, 2011, and (2) failed to establish that action was required on July 18, 2011, because failing to act then would undermine the City's right to make the decision at all. The evidence does not establish that the City's right to act was ever in question, rather merely its ability to secure sufficient votes at a public meeting of the Council, which it had failed to do in July 2010, thereby requiring it to consider the matter in a subsequent election cycle. No evidence suggests that if the City were unable to act in time for the November 2011 election, viz., by August 12, 2011, that it could not again defer action to the next election cycle. Indeed, the Council and its PSSC had considered various possible dates for submission of the ballot measure to voters, including those dates after November 2011.

For all these reasons we conclude that *Compton*, *supra*, PERB Decision No. 720 affords the City no justification for its action on July 18, 2011.

In *Calexico, supra*, PERB Decision No. 357, the Board held that a compelling operational necessity may justify an employer acting unilaterally before completing its bargaining obligation. The employer must demonstrate "an actual financial emergency which leaves no real alternative to the action taken and allows no time for meaningful negotiations before taking action." (*Oakland Unified School District* (1994) PERB Decision No. 1045.)

We likewise deem *Calexico, supra*, PERB Decision No. 357 inapposite. The City failed to establish either the existence of an actual financial emergency or that there was no time for meaningful consultation. The City first considered repeal of interest arbitration procedures from its Charter in July 2010, based on its belief that eliminating interest arbitration

procedures could curtail future costs for salaries and benefits of police and firefighter employees. The City did not establish a financial emergency, but merely its belief that eliminating interest arbitration would, over time, produce less costly salaries and benefits. Moreover, and in any event, on and after June 20, 2011, and even as late as July 18, 2011, there was ample time for meaningful consultation with Local 1319 prior to the City's August 12, 2011 deadline to submit a measure to the Registrar's Office for the November 8, 2011 ballot. We thus conclude that like *Compton*, *supra*, PERB Decision No. 720, *Calexico* affords the City no justification for its action on July 18, 2011.

In sum, we conclude that the City's action of July 18, 2011 was neither justified nor excused.

We turn now to the final issue, to wit, the City's claim on appeal that the ALJ abused his discretion by declining the City's request for additional hearing time to present expert testimony.

Expert Witness Testimony

PERB Regulations clothe an ALJ with the power and duty to: "[i]nquire fully into all issues and obtain a complete record upon which the decision can be rendered" (PERB Regulation 32170, subd. (a)); "[r]egulate the course and conduct of the hearing" (*Id*. at 32170, subd. (d)); "[r]ule on objections, motions and question of procedure" (*Id*. at 32170, subd. (f)); and "[t]ake evidence and rules on the admissibility of evidence" (*Id*. at 32170, subd. (h)). Moreover, in unfair practice cases, "[i]mmaterial, irrelevant, or unduly repetitious evidence may be excluded." (*Id*. at 32176.)

We conclude, with the ALJ, that neither Evidence Code section 801 nor PERB regulations support the City's proffer of, and request for a continuance to adduce, expert witness testimony. We explain.

Evidence Code section 801 provides, in pertinent part:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:
>
> (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
>
> (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

The ALJ concluded that the issues before him involved construing a statute, viz., MMBA section 3507, and not customs or practices of the City or of other public employers subject to the MMBA, regarding their means and methods for obtaining the input of an exclusive representative organization concerning ballot measures to be submitted to City voters. (Proposed decision, p. 5.) Thus, ruled the ALJ, the proffered expert testimony was not appropriate under Evidence Code section 801(a). We concur. We note also that the question before the ALJ was the statutory construction of section 3507, as to which the City's proffered expert testimony was neither "material" nor "relevant" within PERB Regulation 32176, thus affording the ALJ an additional basis for refusing the City's request. Accordingly, we conclude that the ALJ properly excluded the proffered expert testimony and did not abuse his discretion thereby.

CONCLUSION

We conclude that the City violated the MMBA as alleged in the PERB complaint, when, on July 18, 2011, without engaging in consultation in good faith with Local 1319 as required by section 3507, the City approved submission to voters of a ballot measure to authorize repeal of Article V of the Charter, which provided for interest arbitration of collective bargaining disputes concerning the City's police and firefighter employees. We conclude that this conduct likewise violated MMBA sections 3503, 3506, 3507 and 3509, subdivision (b), as well as PERB Regulation 32603, subdivisions (a), (b), and (f).

REMEDY

The City contends that the Board's remedial authority, which arises under MMBA, may not control the City's exercise of its home-rule authority under Article XI of the California Constitution to amend the Charter. California's Supreme Court addressed a like claim in *Seal Beach*, *supra*, 36 Cal.3d 591, concluding that in the MMBA the Legislature established a policy of statewide concern applicable to charter cities notwithstanding their constitutional home-rule rights. We review the Board's remedial authority, and then address the issue of remedy for the violations discussed above.

PERB's Authority

In 1975, the Legislature enacted the Educational Employment Relations Act (EERA),[28] thereby creating and vesting EERB[29] with broad jurisdiction and remedial authority.

EERA section 3541.3 provides, in pertinent part:

> The board shall have all of the following powers and duties:

[28] EERA is codified at Government Code sections 3540 et seq.

[29] Prior to 1978 PERB was known as the Educational Employment Relations Board or EERB.

> (i) To investigate unfair practice charges or alleged violations of this chapter, and take any action and make any determinations in respect of these charges or alleged violations as the board deems necessary to effectuate the policies of this chapter, except that in an action to recover damages due to an unlawful strike, the board shall have no authority to award strike-preparation expenses as damages, and shall have no authority to award damages for costs, expenses, or revenue losses incurred during, or as a consequence of, an unlawful strike.
>
> (j) To bring an action in a court of competent jurisdiction to enforce any of its orders, decisions, or rulings, or to enforce the refusal to obey a subpoena. Upon issuance of a complaint charging that any person has engaged in or is engaging in an unfair practice, the board may petition the court for appropriate temporary relief or restraining order.
>
> (n) To take any other action as the board deems necessary to discharge its powers and duties and otherwise to effectuate the purposes of this chapter.

(Emphasis added.)

EERA section 3541.5 provides, in pertinent part:

> The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. Procedures for investigating, hearing, and deciding these cases shall be devised and promulgated by the board and shall include all of the following:
>
> (c) The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

(Emphasis added.)

In 1995, the California Court of Appeal affirmed PERB's broad authority in a case involving a city charter. (*Local 21, International Federation of Professional and Technical*

Engineers, AFL-CIO v. Thornton C. Bunch, Jr. (1995) 40 Cal.App.4th 670 (*Professional and Technical Engineers*).)[30] We first summarize the facts, and then the holding.

In 1991, San Francisco voters approved a charter amendment authorizing collective bargaining between the City and County of San Francisco and representatives of its employees. The city was empowered by the charter amendment to serve as sole negotiator for collective bargaining with employees in all city departments. Under the charter, the San Francisco Unified School District (SFUSD) was deemed a city department. The union representing SFUSD accountants commenced labor negotiations with the city, but could not reach agreement. An arbitration board was convened pursuant to the 1991 charter amendment, and rendered an arbitration award. After SFUSD refused to implement the arbitrator's award, the union petitioned for a writ of mandate. SFUSD contended that the court lacked jurisdiction, urging that PERB, not the court, had exclusive initial jurisdiction to decide whether the EERA required that labor negotiations for SFUSD employees be conducted by school district representatives.

After agreeing that PERB had jurisdiction, the trial court nonetheless reached the merits, ruling that under the EERA the SFUSD was entitled to its own representative in the negotiations with the union. The Court of Appeal reversed and remanded, with directions to dismiss the action for failure of the union to exhaust its administrative remedies before PERB. Regarding PERB's remedial authority, the appellate court observed:

> PERB possess "broad" remedial powers enabling it "to take action and make determinations as are necessary to effectuate the policies of" the statutes it administers. (*Mt. San Antonio*

[30] See also, *United Public Employees v. Public Employment Relations Bd.* (1989) 213 Cal.App.3d 1119; *Sonoma County Bd. of Education v. Public Employment Relations Bd.* (1980) 102 Cal.App.3d 689.

> *Community College District v. Public Employment Relations Bd.* (1989) 210 Cal.App.3d 178, 189-190.) This case presents no distinct or unusual remedial issues. Nor is this a matter of purely local concern involving issues "neither of jurisdictional interest to PERB nor within its area of expertise." (*Pittsburg Unified School Dist. v. California School Employees Assn*. (1985) 166 Cal.App.3d 875, 888.) As already noted, PERB has issued rulings in similar disputes before judicial review was sought. (See *United Public Employees v. Public Employment Relations Bd*. (1989) 213 Cal.App.3d 1119 [whether certain employees of the San Francisco Community College District were also employees of the city subject to the charter]; *Sonoma County Bd. of Education v. Public Employment Relations Bd*. (1980) 102 Cal.App.3d 689 [whether system for employee relations established by a civil service system conflicted with the EERA].)

(*Professional and Technical Engineers, supra*, 40 Cal.App.4th 670, 679.)

Regarding PERB's authority and competence to adjudicate in the first instance an issue implicating the extent of its own jurisdiction vis-à-vis that of a charter city, the appellate court observed:

> We agree with the trial court that the issues presented in this case-especially the extent to which local regulation of employment matters as prescribed by the [City and County of San Francisco] charter might be superseded by matters of statewide concern as set out in the EERA-is a matter properly decided, in the first instance, by PERB. . . .[31]

(*Professional and Technical Engineers, supra*, 40 Cal.App.4th at p. 676.)

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[31] The Court noted in footnote 6 of the opinion:

> . . . [T]his controversy does not ask PERB to remedy a pure violation of the Education Code, but instead asks for a determination of whether certain collective bargaining activities, as granted by the Education Code and prescribed by the charter, are *arguably prohibited* under the EERA. As already noted, PERB is solely empowered with the "exclusive initial jurisdiction" to determine controversies involving activities "arguably protected or prohibited" under the EERA. (*El Rancho Unified School Dist. v. National Education Assn.* [1983] 33 Cal.3d 946, 960-961.)

(*Professional and Technical Engineers, supra*, 40 Cal.App.4th at p. 678.)

In 2000, five years after the court's decision in *Professional and Technical Engineers, supra*, 40 Cal.App.4th 670, the Legislature vested in PERB jurisdiction and remedial authority over the MMBA. (MMBA, § 3509, subd. (b); *Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) The Legislature wrote, in pertinent part:

> The powers and duties of the board described in Section 3541.3 shall also apply, as appropriate, to this chapter and shall include the authority as set forth in subdivisions (b) and (c). Included among the appropriate powers of the board are the power to order elections, to conduct any election the board orders, and to adopt rules to apply in areas where a public agency has no rule.
>
> (b) A complaint alleging any violation of this chapter or of any rules and regulations adopted by a public agency pursuant to Section 3507 or 3507.5 shall be processed as an unfair practice charge by the board. The initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. . . . The board shall apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter.

(MMBA, § 3509; emphasis added.) The Legislature thus accorded PERB authority to determine in the first instance whether local regulation of employment matters in a charter city is superseded by the MMBA's policies of statewide concern and to prescribe the appropriate remedy. (EERA, § 3541.3, subd. (i); MMBA 3509, subd. (b); *Professional and Technical Engineers, supra*, 40 Cal.App.4th 670.)

The Appropriate Remedy

We concluded above that the City violated the MMBA by: (1) failing or refusing to perform its duty under section 3507 to consult in good faith over rules and regulations for the administration of employer-employee relations, in particular, interest arbitration procedures for the resolution of collective bargaining disputes, and (2) having failed to consult in good faith

beforehand, placing on the ballot an amendment to the Charter to repeal Article V thereof. Our traditional remedy in a unilateral change case is a cease and desist order, coupled with affirmative relief consisting of an order to restore the prior status quo and an order to meet and confer upon request. (*County of Sacramento* (2009) PERB Decision No. 2044-M; *County of Sacramento* (2008) PERB Decision No. 1943-M.) A policy change subject to the duty to meet and confer and implemented without meeting and conferring, is a fait accompli, which, if left in place, would compel the union to "bargain back" to the status quo (*Desert Sands Unified School District* (2004) PERB Decision No. 1682a, p. 5; *San Mateo County Community College District* (1979) PERB Decision No. 94, p. 15.) and make impossible the give and take that are the essence of good faith consultation. (*Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802 (*City of Vernon*).) Because the MMBA duty to consult in good faith under section 3507 is indistinguishable from the MMBA duty to meet and confer under section 3505, we conclude that the appropriate remedy for a violation of the duty to consult is akin to the remedy for a violation of the duty to meet and confer, viz., a cease and desist order, coupled with affirmative relief consisting of an order to restore the status quo and an order to consult in good faith upon request.

The City objects to such relief. We consider the objections.

First, objects the City, home-rule provisions of the California Constitution, in particular article XI, section 3, subdivision (a),[32] accord charter cities the right to propose charter

[32] Article XI, section 3, subdivision (a) provides:

> For its own government, a county or city may adopt a charter by majority vote of its electors voting on the question. The charter is effective when filed with the Secretary of State. A charter may be amended, revised, or repealed in the same manner. A charter, amendment, revision, or repeal thereof shall be published in the

amendments to the electorate without prior consultation thereon pursuant to MMBA section 3507. We disagree.

In *Seal Beach, supra*, 36 Cal.3d 591, the Supreme Court held that the MMBA duty to meet and confer in good faith is a matter of statewide concern and as such prevails over local enactments of a charter city concerning matters that might otherwise be deemed a strictly municipal affair. (*Id.* at p. 600, citing *Professional Fire Fighters, Inc. v. the City of Los Angeles* (1963) 60 Cal.2d 276, 292; see also *Younger v. Board of Supervisors* (1979) 93 Cal.App.3d 864, 870 [denying enforcement of charter amendments passed by initiative measure but in conflict with superior state law]; *Voters for Responsible Retirement v. Bd. of Supervisors* (1994) 8 Cal.4th 765 [a charter city or county does not expand its powers to affect matters of statewide concern simply because it acts through the mechanism of local initiative rather than by traditional legislative means].) The *Seal Beach* court reasoned that a charter city employer could not avoid its MMBA meet and confer obligations by exercise of its right to propose charter amendments. (*Seal Beach,* p. 602.) Rather, a charter city, like the City here, must comply with its MMBA obligation before referring to voters for approval of a ballot measure on a subject over which the charter city was obliged by MMBA to meet and confer. (*Ibid*.)

The City urges that it is excused from consultation over a City-proposed change to City "rules and regulations for the administration of employer-employee relations" contained in the Charter, because placement of the particular rule or regulations in the Charter means that only the City's voters, and not the City itself, could "adopt" the particular rule or regulation. We

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> official state statutes. County charters adopted pursuant to this section shall supersede any existing charter and all laws inconsistent therewith. The provisions of a charter are the law of the State and have the force and effect of legislative enactments.

conclude this is the same argument advanced to and rejected by the court in *Seal Beach*, *supra*, 36 Cal.3d 591. As in *Seal Beach*, the City here seeks to avoid its MMBA obligation to consult by claiming that the City's voters, not the City itself, is the ultimate actor, and that City voters are not subject to an MMBA duty to consult. However, here it is the City's action to refer to the voters a ballot measure to amend the Charter by repealing the provision for interest arbitration, which was undertaken without compliance with the City's MMBA obligation to consult and which is here challenged. Thus, here the City itself is the "offending party" and well within our remedial jurisdiction.

Relying on *Seal Beach*, *supra*, 36 Cal.3d 591 and *Professional and Technical Engineers*, *supra*, 40 Cal.App.4th 670, we hold that where a charter city without prior good faith consultation acts unilaterally to adopt or amend its rules and regulations for the administration of employer-employee relations, whether the unilateral action is direct by adoption of an ordinance or indirect by referring a charter amendment for voter approval, the unilateral action violates MMBA section 3507 and gives rise under section 3509 to the Board's authority as described in EERA section 3541.5, viz., to 3541.5, "to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter." (EERA, § 3541.5, subd. (c).) Here the "offending party" is the City, not the City's voters as the City suggests when it argues that the voters, not the City itself, amended the Charter and are beyond PERB's remedial authority.

Next, objects the City, having referred to City voters a measure to repeal Article V of the Charter, the City's constitutional home-rule privileges insulate it from PERB's remedial reach. We disagree.

As noted in *Professional and Technical Engineers, supra*, 40 Cal.App.4th 670, 676, "the extent to which local regulation of employment matters as prescribed by the charter might be superseded by matters of statewide concern as set out in the [MMBA]—is a matter properly decided in the first instance, by PERB." (*Ibid*.) Exercising this authority, we decide that our precedents compel the result we reach, viz., that in addition to cease and desist orders, affirmative relief is also appropriate, including an order declaring void the City's action of July 18, 2011, referring to voters a measure to repeal Article V of the Charter, coupled with an order directed to the City itself to consult in good faith upon request.

As a result of the above-described violation, the City has also interfered with the right of employees to participate in an employee organization of their own choosing, in violation of MMBA section 3506 and PERB Regulation 32603, subdivision (a), and has denied Local 1319 its right to represent employees in their employment relations in violation of MMBA section 3503 and PERB Regulation 32603, subdivision (b). The appropriate remedy is to cease and desist from such unlawful conduct. (*Rio Hondo Community College District* (1983) PERB Decision No. 292.)

Finally, it is the ordinary remedy in unfair practice cases that the party found to have committed a violation of the law is ordered to post a notice incorporating the terms of the order at all work locations where notices to unit employees are customarily posted. Thus, the City is ordered to do so in this case. Posting of such a notice, signed by an authorized agent of the City, provides employees with notice that the City acted in an unlawful manner, must cease and desist from its illegal action, and will comply with the order. It effectuates the purposes of the MMBA to inform employees of the resolution of the case. (*Omnitrans* (2010) PERB Decision No. 2143-M.)

ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, it has been found that the City of Palo Alto (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq. The City breached its duty of consultation in good faith with the International Association of Firefighters Local 1319, AFL-CIO (Local 1319) in violation of Government Code section 3507 and 3509, subdivision (b), and Public Employment Relations Board (PERB or Board) Regulation 32603, subdivision (c) (Cal. Code of Regs, tit. 8, § 31001 et seq.) when it failed and refused to meet and consult with the Local 1319 over the City's proposed ballot measure to repeal Article V of the Charter. By this conduct, the City also interfered with the right of unit employees to participate in the activities of an employee organization of their own choosing, in violation of Government Code section 3506 and PERB Regulation 32603, subdivision (a), and denied the Local 1319 the right to represent employees in their employment relations with a public agency in violation of Government Code section 3503 and PERB Regulation 32603, subdivision (b).

Pursuant to MMBA section 3509, subdivision (a) of the Government Code, it is hereby ORDERED that the City's resolution of July 18, 2011 referring to voters the ballot measure to rescind binding interest arbitration is void. The City, its governing board and representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing to meet and consult with Local 1319 prior to adopting ballot measures to voters to establish or modify rules or regulations for the administration of employer-employee relations, including without limitation procedures for the resolution of collective bargaining disputes.

2. Interfering with the right of bargaining unit employees to be represented by an employee organization of their own choosing.

3. Denying Local 1319 their right to represent employees in their employment relations with the City.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

1. Upon request, meet and consult with representatives of Local 1319 over modification or repeal of rules or regulations for the administration of employer-employee relations, including without limitation procedures for the resolution of collective bargaining disputes.

2. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations in the City, where notices to employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the City, indicating that the City will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that this Notice is not reduced in size, altered, defaced or covered with any other material. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the City to communicate with its employees in the bargaining unit represented by Local 1319. (*City of Sacramento* (2013) PERB Decision No. 2351-M.)

3. Within thirty (30) workdays of service of a final decision in this matter, notify the General Counsel of PERB, or his or her designee, in writing of the steps taken to comply with the terms of this Order. Continue to report in writing to the General Counsel, or

his or her designee, periodically thereafter as directed. All reports regarding compliance with this Order shall be served concurrently on Local 1319.

Chair Gregersen and Member Banks joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SF-CE-869-M, *International Association of Firefighters, Local 1319, AFL-CIO v. City of Palo Alto,* in which all parties had the right to participate, it has been found that the City of Palo Alto (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq., and the Public Employment Relations Board Regulations by breaching its duty of consultation in good faith with the International Association of Firefighters Local 1319, AFL-CIO (Local 1319) when it failed and refused to meet and consult with Local 1319 over the City's proposed ballot measure to repeal Article V of the City Charter. This conduct also interfered with the right of unit employees to participate in the activities of an employee organization of their own choosing and denied Local 1319 the right to represent employees in their employment relations with a public agency.

As a result of this conduct, PERB has declared the City's action of July 18, 2011, referring to City voters a measure to repeal Article V of the City Charter void. The City has been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Refusing to meet and consult with Local 1319 prior to adopting ballot measures to voters to establish or modify rules or regulations for the administration of employer-employee relations, including without limitation procedures for the resolution of collective bargaining disputes.

2. Interfering with the right of bargaining unit employees to be represented by an employee organization of their own choosing.

3. Denying Local 1319 their right to represent employees in their employment relations with the City.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

1. Upon request, meet and consult with representatives of Local 1319 over modification or repeal of rules or regulations for the administration of employer-employee relations, including without limitation procedures for the resolution of collective bargaining disputes.

Dated: _____ CITY OF PALO ALTO

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 1319, AFL-CIO, Charging Party, v. CITY OF PALO ALTO, Respondent.	UNFAIR PRACTICE CASE NO. SF-CE-869-M PROPOSED DECISION (November 15, 2011)

Appearances: Davis Reno, by Alan C. Davis and Duane W. Reno, Attorneys, for International Association of Firefighters, Local 1319, AFL-CIO; Renne Sloan Holtzman Sakai, LLP, by Charles D. Sakai, Attorney, and Molly S. Stump, City Attorney, for City of Palo Alto.

Before Shawn P. Cloughesy, Chief Administrative Law Judge.

PROCEDURAL HISTORY

This case alleges a public employer's approval of a ballot measure to repeal interest arbitration from its City Charter and holding a "first reading" to approve an ordinance requiring non-binding mediation over bargaining disputes without consultation in good faith with the exclusive representative. The public employer denies any violation of the Meyers-Milias-Brown Act (MMBA)[1] and contends that the Public Employment Relations Board (PERB) does not have jurisdiction over the dispute pursuant to MMBA section 3509(e).

Filing of Unfair Practice Charge and Request for Injunctive Relief

On June 28, 2011, the International Association of Firefighter, Local 1319 (Local 1319) filed an unfair practice charge (charge) against the City of Palo Alto (City).

On August 1, 2011, Local 1319 filed with PERB a request for temporary restraining order and injunctive relief (Injunctive Relief Request No. 601). On August 4, 2011, the City

[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated all statutory references are to the Government Code.

filed its opposition. On August 4, 2011, the parties met informally with a PERB Board agent to discuss the issues of the charge. On August 5, 2011, Local 1319 withdrew its request for injunctive relief without prejudice and requested that the charge be placed in abeyance pending a second scheduled informal meeting on September 13, 2011. On September 7, 2011, Local 1319 renewed its request for injunctive relief (Injunctive Relief Request No. 605) and the charge was removed from abeyance.

On September 7, 2011, the PERB Office of General Counsel issued an unfair practice complaint (complaint) alleging that on July 18, 2011, the City Council approved a ballot measure (Measure D) to repeal Article V of the City Charter (binding interest arbitration) and held a "first reading" to approve an ordinance requiring non-binding mediation over bargaining disputes resulting from bargaining impasse without consulting in good faith with Local 1319. Such actions were alleged to have violated MMBA sections 3503, 3506, 3507, and 3509(b) and PERB Regulation 32603(a), (b), and (f).[2] On the same day, a PERB formal hearing was set for September 26 and 30, 2011.

On September 12, 2011, the City filed its supplemental opposition to Injunctive Relief Request No. 605. On September 15, 2011, the PERB Office of General Counsel notified the parties that the injunctive relief request was denied without prejudice.

Request for Continuance due to Recently Retained Outside Counsel

On September 9, 2011, the City requested a continuance of the hearing dates to the week of November 14, 2011, after the scheduled election of Measure D, on November 8, 2011, as it had just added outside counsel from Renne Sloan Holtzman Sakai to represent it. Local 1319 opposed the request. Absent from the request, was a representation that Measure D

[2] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

could not be removed from the November 8, 2011 election at the request of the City. The Chief Administrative Law Judge (CALJ) would not continue the case to a later date, but would consider earlier dates. Renne Sloan Holtzman Sakai reassigned the case to another partner and the formal hearing proceeded on September 26 and 30, 2011.

Motion to Dismiss

On September 23, 2011, the City faxed a motion to dismiss the complaint based on the assertion that PERB lacked jurisdiction pursuant to MMBA section 3509(e); PERB precedential decisions on judicial appeal, *County of Santa Clara* (2010) PERB Decision No. 2114-M[3] and *County of Santa Clara* (2010) PERB Decision No. 2120-M,[4] decided the same issue; the City never "adopted" a reasonable rule and regulation pursuant to MMBA section 3507; and PERB could not award a remedy to prohibit the election as ballots had been printed and voting would begin shortly. On September 26, 2011, Local 1319 submitted its opposition to the motion at the hearing and the CALJ deferred ruling on the motion until he had an opportunity to independently research the arguments. On September 29, 2011, the CALJ denied the motion to dismiss and denied the request to issue the proposed decision after the election.

On September 26, 2011, the City answered the complaint denying that it violated the MMBA or PERB Regulations. The City also contended that the complaint was inconsistent with PERB precedential decisions; Local 1319 waived its right to consult in good in faith;

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[3] *Santa Clara County Correctional Peace Officers' Assn. v. PERB* and *County of Santa Clara v. PERB* (Sixth Appellant District Case Nos. H035786 and H035791, cases fully briefed).

[4] *Registered Nurses Professional Assn. v. PERB* and *County of Santa Clara v. PERB* (Sixth Appellant District Case Nos. H035804 and H035846, cases fully briefed).

PERB lacked jurisdiction over the dispute pursuant to MMBA section 3509(e); and PERB lacked jurisdiction to grant any relief.

Subsequent Request that CALJ Defer Issuing Proposed Decision Until After Election

On September 30, 2011, the parties met for the second day of formal hearing. The City protested that the matter had been expedited ever since the charge had been filed with PERB and expressed its concerns concerning procedural irregularities with the PERB General Counsel Office's handling of the case. A declaration from County of Santa Clara (County) Election Division Coordinator Leslie A. Smith (Smith) provided that the deadline for jurisdictions to file ballot measures with the County Registrar of Voters Office was August 12, 2011. She declared that 60-day ballots had already been prepared and mailed on September 9, 2011 to domestic and overseas military and civilians eligible to vote; and, as of September 28, 2011, ten overseas ballots had been received. In short, the voting had already begun. Both parties agreed that the election was going to go forward and could not be reversed.

The City requested that the CALJ issue his proposed decision after the November 8, 2011 election as the CALJ could not stop the election from going forward and PERB had the same remedies before the November 8, 2011 election as afterward. The CALJ agreed to reconsider the City's request to issue the proposed decision after the November 8, 2011 election, and requested the parties include briefing on the matter in its post-hearing briefs.

On October 13, 2011, the CALJ issued his ruling deciding to postpone issuing the proposed decision until after the election.

Request for Continuance to Obtain Expert Testimony

On September 30, 2011, the City also requested an additional day of hearing so that it could call two expert witnesses: Daniel Cassidy (Cassidy) and Professor Corey Cook (Prof. Cook). The City asserted that these expert witnesses were not available for the September 30 hearing because of the expedited nature in which the hearing was set (19 days from the hearing notice for the September 26 hearing and 23 days from the hearing notice for the September 30 hearing), but they were available October 17, 18, 24 or 25, 2011. The City set forth an offer of proof that Cassidy, a founding partner of a California public sector labor law firm, had extensive familiarity with a public employer's consultation in good faith obligation and could explain the practical differences between consultation in good faith pursuant to MMBA section 3507 and meet and confer in good faith pursuant to MMBA section 3505. Prof. Cook, an Associate Professor of Political Science at the University San Francisco, could testify as to the formation of political consensus and the importance of timing in the political and electoral process, including the impact of engaging labor unions at the local political level. He would further testify as to what point in time a union should be involved with a municipality which desires to propose an amendment to a City Charter. Local 1319 objected to these experts as "consultation in good faith" was to be defined by legal precedent and the timing of the political process was already governed by existing precedential decisions concerning the waiver of bargaining rights.

Evidence Code section 801(a) provides that an expert can be called if the testimony would be "[r]elated to a subject that is sufficiently beyond common experience" and the opinion would "assist the trier of fact." The determination of the meaning of "consultation in good faith" (MMBA, § 3507) is not to be determined by practice, but by law. Additionally, while Prof. Cook's testimony may be appropriate for a legislative hearing which sought to

clarify the process by amending the MMBA, it is inappropriate to use for determining the interpretation of a statute as to the social/political appropriateness of the timing of an exclusive representative's input into a municipality's vote to place a proposed amendment (or repeal) of a City Charter on the ballot. The City was certainly free to argue the impact of any election codes upon the MMBA. For these reasons, the experts would not assist the trier of fact in resolving the disputes before him and were denied.

Many times during the hearing and after the hearing, the City renewed its request to call these expert witnesses. The requests were all denied.

Request for Interlocutory Appeal

Also during the September 30, 2011 hearing, the City submitted a request for interlocutory appeal of the CALJ's denial of the City's motion to dismiss pursuant to PERB Regulation 32200. On October 5, 2011, Local 1319 filed its opposition to the request as it would not "materially advance the resolution of the case." (PERB Reg. 32200(c).) On October 6, 2011, the CALJ refused to join in the City's request for interlocutory appeal as it would not "materially advance the resolution of the case" if the proposed decision would be issued immediately after the election and the motion did not have sufficient merit.

Post-hearing Briefing and Request for Official Notice

At the end of the September 30, 2011 hearing, post-hearing briefs were set to be submitted by October 10, 2011. As the transcripts would not be ready by that time, the CALJ provided the parties with a compact disc (CD) of the audio recordings of the September 26 and 30, 2011 formal hearings. On October 13, 2011, the CALJ allowed the parties to file reply briefs with the aid of the transcripts by October 24, 2011. Both parties elected to do so.

On November 3, 2011, the CALJ wrote the representatives asking them if they objected to the CALJ taking official notice of the November 8, 2011 election results of Measure D. Neither party objected. Official notice is hereby taken of the results.

FINDINGS OF FACT

Jurisdiction

The City is a public agency under MMBA section 3501(c) and PERB Regulation 32016(a). Under PERB Regulation 32016(b), Local 1319 is the exclusive employee organization of an appropriate unit of employees within the City.

Background

In August 2010, the City Council of Palo Alto consisted of nine members including Councilmembers Sid Espinosa (Espinosa), Patrick Burt (Burt), Karen Holman (Holman), Gail Price (Price), Yiaway Yeh (Yeh), Larry Klein (Klein), Nancy Shepherd (Shepherd), Gregory Scharff (Scharff) and Greg Schmid (Schmid). James Keene (Keene) was the City Manager and Gary Baum (Baum) was the City Attorney. After Baum left City employment, Molly Stump (Stump) became the City Attorney. Marcie Scott (Scott) was the Assistant Director of Human Resources responsible for labor relations and bargaining, and Darrell Murray (Murray) was a professional negotiator retained by the City to negotiate successor agreements.

Anthony Spitaleri (Spitaleri) has been Local 1319's President for the past 33 years[5] and Barry Marchisio (Marchisio) has been Local 1319 Secretary for the past 20 years.

City Charter

Article V, of the City Charter "Compulsory Arbitration for Fire and Police Department Employee Disputes," added in July 1978, provides in pertinent part:

[5] Interestingly, Spitaleri is also a City Councilmember with the City of Sunnyvale.

Section 4. Impasse resolution procedures.

All disputes or controversies pertaining to wages, hours, or terms and conditions of employment which remain unresolved after good faith negotiations between the city and either the fire or police department employee organization shall be submitted to a three-member board of arbitrators upon the declaration of an impasse by the city or by the recognized employee organization involved in the dispute.

At the conclusion of the arbitration hearings, the arbitration board shall direct each of the parties to submit, within such time limit as the board may establish, a last offer of settlement on each of the issues in dispute. The arbitration board shall decide each issue by majority vote by selecting whichever last offer of settlement on that issue it finds most nearly conforms with those factors traditionally taken into consideration in the determination of wages, hours, and other terms and conditions of public and private employment, including, but not limited to, changes in the average consumer price index for goods and services, the wages, hours, and other terms and conditions of employment of other employees performing similar services, and the financial condition of the city and its ability to meet the cost of the award.

Council's 2010 Vote to Repeal Article V

On April 12, 2010, Keene issued a "Preview of the City Manager's Proposed Budget for Fiscal Year 2011" which forecasted a $8.3 million budget shortfall for the City. The report included proposals for service reductions, cost recovery, revenue generation and position elimination. On May 13, 2010, the County Civil Grand Jury issued a report, "Cities Must Rein in Unsustainable Employee Costs." The report set forth the problem that personnel costs of municipalities within the County were outpacing the revenues collected and proposed ways in which they could better manage this problem. The report recommended that the San Jose City Council prepare a ballot measure asking voters to repeal the City Charter section addressing binding interest arbitration. That same month, the City and Local 1319 began to bargain over a successor Memorandum of Agreement as the prior agreement was set to expire on June 30, 2010.

On July 19, 2010, the Council met and directed City staff to prepare a measure to be placed on the November 2010 ballot which would repeal Article V of the City Charter, which would be discussed at the July 26, 2010 Council meeting.

On July 22, 2010, Attorney Alan Davis (Davis) sent a letter to Keene and City Human Resources Director Russell Carlsen (Carlsen) on behalf of the Palo Alto Police Managers Association (PMA) regarding the Council's interest in repealing Article V, which provided in pertinent part:

> In the City Attorney's attachment to Agenda Item No. 4, he neglects to advise the City Council that it is the City's obligation to comply with the meet and confer requirements of the Meyers-Milias-Brown Act prior to any action on a proposed Charter measure to repeal binding arbitration. See The People ex rel. Seal Beach Police Officers Association et al., v. City of Seal Beach et al. (1984) 36 Cal.3rd 591. Respectfully, and in behalf of the Police Managers Association, I must insist that the City comply with the State law meet and confer requirements confirmed by the California Supreme Court in *Seal Beach*. Even the City of Vallejo, which narrowly repealed its Charter Arbitration provisions in June, complied with these meet and confer (they call them "*meet and consult*") requirements prior to voting to submit the issue to the voters. . . .

(Emphasis in original.)

On July 23, 2010, Spitaleri sent a letter to Keene and Carlsen regarding the repeal of Article V:

> I join in the statements made by Mr. Davis on behalf of [the Police Managers Association] in insisting that the City must comply with the State law meet and confer requirements confirmed by the California Supreme Court in The People ex rel. Seal Beach Police Officers Association et al., v. City of Seal Beach et al. (1984) 36 Cal.3rd 591, prior to any action to place the repeal of binding arbitration on the ballot for a vote. I urge you to consult with an experienced labor lawyer on this matter. As Mr. Davis observed in the Palo Alto Police Managers Association letter, even the City of Vallejo complied with the

> *Seal Beach* meet and confer requirements before deciding to place a repeal measure on the [November] 2010 ballot.
>
> . . . . . .
>
> Interest Arbitration measures have unfairly become a whipping boy because of concerns of the City of Palo Alto and other municipalities have over financial constraints imposed by the ongoing recession. I urge you to step back, take a deep breath and, if you believe it is important to review the Article V requirements, begin a dialogue with us and with other labor organizations which would be affected by any effort to remove or modify the Article V requirements.

(Emphasis added.)

On July 26, 2010, Carlsen responded to Spitaleri's letter stating:

> The Council will discuss this issue[, repealing binding interest arbitration,] further at the July 26, 2010 meeting and will consider placing the proposed measure on the ballot at its August 2, 2010 meeting.
>
> Interest arbitration provisions are a permissive, not mandatory, subject of bargaining (see *DiQuisto v. County of Santa Clara* (2010) 181 Cal.App.4th 236, 255-57[6]; *City of Fresno v. Fresno Firefighters, IAFF Local 753* (1999) 71 Cal.App.4th 82, 96-97). As such, meet and confer is not required. However, if you have any questions or comments about the Council's proposal you may contact me or attend the Council meetings on July 26 and August.

(Emphasis added.)

On July 26, 2010, City Attorney Baum sent a letter, which was also sent to Keene and Carlsen, advising the Council about the proposed ballot measure to repeal Article V. After citing the same cases cited by Carlsen, he opined that the City did not have a meet and confer requirement with Local 1319 and that *The People ex rel. Seal Beach Police Officers Association et al., v. City of Seal Beach et al.* (1984) 36 Cal.3d 591 (*Seal Beach*) did not apply

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[6] *DiQuisto v. County of Santa Clara* (2010) 181 Cal.App.4th 236, was decided on January 22, 2010. Petition for review to the California Supreme Court was denied on May 17, 2010.

as it only applied to a proposed ballot measure which fell within the scope of bargaining, which did not include a permissive subject of bargaining such as repealing interest arbitration. The letter was silent as to the consultation in good faith requirement under MMBA section 3507.

On August 2, 2010, the Council met to discuss the repealing of binding interest arbitration. When a motion was made to place the repeal of Article V on the ballot, it failed.[7] Subsequent to this motion failing, another motion was made to direct City staff to return the next fall with a timeline for considering the repeal of Article V.

May 10, 2011 Committee Meeting

On May 3, 2011, the City's Interim Human Resource Director Sandra Blanch (Blanch) sent a letter via email to Spitaleri informing him that:

> This letter is to inform you that on May 10, 2011 at 7 pm the Policy and Services Standing Committee[8] of the City Council will begin discussion on a potential measure to be placed on a future ballot for City voters to decide whether to amend or repeal Article V of the City Charter (binding interest arbitration). If you wish to meet and discuss regarding this issue please contact Marcie Scott in Human Resources . . . .

(Emphasis added.)

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[7] Four members, Burt, Holman, Scharff and Schmid voted for it and Price, Klein, Shepherd, Yeh and Espinoza voted against it.

[8] The Policy and Services Committee (Committee) consists of four of its City Councilmembers: Chairperson Price, Burt, Klein and Holman. According to Palo Alto Municipal Code section 2.04.220 "Committee on policy and services:"

> It shall be the duty of the committee on policy and services to consider and make recommendations on matters referred to it by the council relating to parliamentary and administrative procedures and policy matters pertaining to intergovernmental relations, personnel policies, planning and zoning, traffic and parking, public works, and community and human services.

On that same day, Spitaleri sent an email to Scott informing her that he had received the letter and inquired whether this was a request to meet and confer with Local 1319 prior to May 10. The email was not delivered to Scott as her email box was full. Spitaleri also left a voice-mail message with Blanch whether they would be meeting, but her voice-mail was busy. Spitaleri did not attempt to follow-up in any other manner.

On May 3, 2011, PMA Representative Police Lieutenant Ron Watson (Lt. Watson) received the same letter from Blanch as Spitaleri. Lt. Watson asked to "meet and discuss" with the City once it appeared more certain what decision the Committee would make, but he reserved the option to "meet and confer" at a later time. On May 9, 2011, Scott responded that the City could meet with him whenever he wanted, but viewed the meeting as a meet and discuss and not a meet and confer. She invited Lt. Watson to speak to her about those issues also.

City staff prepared a Staff Report for the May 10, 2011 Committee meeting. The Staff Report discussed that if the Committee was not satisfied with Article V, it could either repeal or modify it. The report also provided:

> Within Santa Clara County, only 3 of 15 cities provide binding interest arbitration: Gilroy, Palo Alto and San Jose. There is a recent trend toward eliminating interest arbitration as a method for resolving impasse with public safety units among cities that currently have arbitration as a requirement. . . . In addition, the May 20 Santa Clara County Civil Grand Jury Report also recommended repealing binding interest arbitration provision to provide cities with greater control over employee costs.

The Staff Report, although acknowledging there was not a set timeline for Council action, specified that it had deadlines for Council approval of ballot language if it wanted to get the measure on the ballot. Specifically, if the Council wanted to get the measure on the November 8, 2011 ballot, it needed to be approved by the Council by August 1, 2011. The subsequent election dates were April 10, 2012; June 5, 2012 and November 6, 2012, but they

were substantially more costly to the City than the November 8, 2011 election date.[9] The report also mentioned that the City of San Jose had recently modified its City Charter interest arbitration language.

On May 10, 2011, the Committee met. City Attorney Stump advised the Committee that the City would have to meet and confer with the impacted employee organizations if the Council were to place an initiative of the repeal of the interest arbitration provision on the ballot based upon *Seal Beach*. When asked how long it would take to meet and confer with the employee organization, Stump replied that it depended upon the availability of the parties and what they could achieve. Burt replied that the time it took to meet and confer could impact the Council's decision. At the close of the meeting, the Committee directed staff to return with more options (modifying versus repealing interest arbitration) and provide detailed information from cities outside the County and California. Local 1319 Representative Marchisio and Local 1319 attorney Davis attended the Committee meeting. Marchisio did not address the Committee.[10]

Post-Impasse Negotiations over Successor Agreement

Impasse was declared by the City over successor agreement negotiations in February 2011. However, Local 1319 and the City met to continue negotiations for a successor agreement on May 23, mid-June and July 1, 2011. At no time during the negotiations did Local 1319 or the City discuss or offer proposals concerning Article V of the City Charter.

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[9] Specifically, the estimated cost to the City for the November 8, 2011 election was $50,000; for the April 10, 2012 election - $550,000; for the June 6, 2012 election - $550,000; and for the November 6, 2012 election - $250,000.

[10] Spitaleri does not attend the Committee meetings because they were scheduled on Tuesdays, which is the same day that the City of Sunnyvale City Council meets.

June 7, 2011 Committee Meeting

On June 3, 2011, Scott sent an agenda packet to Spitaleri for the June 7, 2011 Committee meeting regarding Article V. She invited him to contact her if he had any questions. On June 5, 2011, Lt. Watson responded stating that he wished to meet and confer once the City had set a course on the direction it was going to proceed.

On June 7, 2011, the Committee met again to discuss changes to Article V. The Committee was to report to the Council whether it recommended to take no action, repeal or modify Article V. The Committee also discussed the timing of its actions based on the upcoming November 8, 2011 election and the deadlines for submission and associated costs depending on the date of election chosen, including waiting until November 2012. The conversations among the Committee members ranged between repeal and modification. Klein mentioned that the City should review San Jose's Charter modifications and prepare draft language for the November 2012 election. The Committee finally passed a motion to refer the matter to the full Council for decision whether to place on the ballot repealing or substantially modifying Article V; refer back to the Committee if the Council's decided to modify Article V; and provide guidance as to when the measure should go on the ballot. Spitaleri asked that Local 1319's attorney, Davis, attend the meeting on behalf of Local 1319. Additionally, Marchisio attended the meeting, but did not address the Committee. Spitaleri became aware that the matter was referred to the Council.

On June 16, 2011, PMA Representative Lt. Watson again requested to meet and confer over changes to Article V. Lt. Watson asked for a proposal from the City stating which direction they wanted to proceed. Scott replied that she did not know what direction the Council was taking, but once they did know, Scott would contact Watson. Spitaleri did not make a similar request.

June 20, 2011 Council Meeting

On June 18, 2011, Scott notified Spitaleri of the Council's agenda for June 20, 2011. Scott highlighted an agenda item regarding the Committee's referral to the Council to take action on Article V. Scott closed the email by inviting Spitaleri to contact her with any questions.

On June 20, 2011, the Council met to discuss the repeal or modification of Article V. Scott discussed several modification options including changes to the format of the arbitration (the arbitrator also serving as a mediator); requiring mediation prior to the interest arbitration, reducing the scope of the matters to arbitrate, amending the factors to be considered by the arbitrator, increasing public access to the arbitration, imposing timelines, and providing for judicial review. Price stated that the Committee was evenly split as to repealing or modifying Article V.

Spitaleri addressed the Council as the Local 1319 President. Spitaleri opposed the repeal of the provision, but admitted that Article V may need review and modification. He requested the matter be returned to the Committee where all affected labor organizations could participate in deliberations to update the provision and provide recommendations to the Council and that "denying the labor organizations an opportunity to express their ideas and assist in formation of an improved policy could damage employee relations." Marchisio also spoke as a member of Local 1319 and urged the Council to return the matter to the Committee "where a committee of stakeholders could be established" and those most affected by the changes could have an opportunity to design the necessary modifications. Klein noted the absence of Councilmember Shepherd and because of the split vote of the previous year, it would be difficult for the Council to come to a decision at this meeting.

The Council finally passed a motion to refer the matter back to the Committee and draft a significant modification to Article V, provide language for repeal and a recommendation as to when the election should be scheduled. The Committee was to return on July 25, 2011 with recommendations for full Council consideration. The motion passed unanimously. Klein stated he understood labor representatives wanted to negotiate modifications to Article V and opposed meeting to negotiate with them, but specified that input should be received both from the employee organizations and the public.[11]

Not one Councilmember spoke in favor of maintaining the existing Article V. Price wondered whether the time frame was too short to provide meaningful discussions with all stakeholders. Holman was not sure whether to place it on the ballot for 2011 or 2012. Scharff supported a repeal of interest arbitration and moved to repeal Article V, but later withdrew that motion. Keene expressed his desire to work with the Committee to formulate ideas as soon as possible. Marchisio attended the meeting, but did not address the Committee.

Spitaleri testified that Local 1319 did not put forth a proposal because he was not invited or requested to do so; Local 1319 was still not aware of the direction the Council was proceeding (repeal or modification); and he was instructed by Klein to address their issues during the public comment period with the rest of the public who have to limit their comments/input to three minutes, which did not afford Local 1319 the ability to dialogue with the Council as to the issue.[12]

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[11] The City Council Procedures Handbook states that oral communications shall be limited to three minutes per speaker and thirty minutes for all speakers combined. Spokespersons who are representing a group of five or more people may be allowed to speak for ten minutes.

[12] Spitaleri admitted that in the past he has provided a letter to the Council or a Committee to advocate on behalf of Local 1319.

June 28, 2011 Committee Meeting

On June 28, 2011, the Committee met to discuss the repeal or modification of the Article V. City staff provided a packet which included draft language repealing Article V and extensive options on how Article V could be modified. For the first time, Burt brought up the idea of substituting mediation for interest arbitration. Stump stated they could place mediation in the Charter or pass it as an Ordinance. The discussion of the various options was extensive and draft language was requested of staff for the repeal of interest arbitration; an ordinance requiring mediation at impasse and a substantial modification to Article V. Marchisio attended the Committee meeting, but did not provide any input at the Committee meeting.

July 12, 2011 Committee Meeting

On July 11, 2011, Scott sent an email to Spitaleri notifying him that the Committee was meeting the next day to continue the discussion on Article V. The documents attached to the email included a draft resolution for a ballot measure to repeal Article V, a draft ordinance requiring labor impasse mediation, and draft language to substantially modify Article V. Scott invited Spitaleri to contact her if he had any questions.

At the July 12, 2011 meeting, City staff presented the draft documents to the Committee. The Committee passed a motion to forward the proposed language with mandatory mediation effective upon the repealing of Article V. The Committee also passed a draft resolution to repeal Article V to go to the Council for action. The Committee had extensive discussions regarding substantial modifications to Article V. Finally, the Committee passed the draft resolution of some Article V modifications to be forwarded to the Council. Marchisio attended the Committee meeting, but did not provide any input.

July 18, 2011 Council Meeting

On July 17, 2011, Scott sent an email to Spitaleri stating the Council would be considering "binding interest arbitration at their meeting" and provided a link to the agenda packet. Scott again invited Spitaleri to contact her if he had any questions.

A report from the City Attorney's office included the Committee's recommendations and draft resolutions/language. The report also stated that the City Clerk and the Santa Clara County Registrar of Voters estimated the total cost to the City to put one measure on the ballot was $121,800. Included in that report was a section "Consultations with Labor" which provided:

> As discussed in the June 20 staff report, meet and confer over a charter change on binding interest arbitration is not required because interest arbitration is a permissive, not mandatory subject of bargaining. *DiQuisto v. County of Santa Clara* (2010) 181 Cal.App.4th 236. However, staff provided the fire and police organizations the opportunity for informal discussion and comment by informing them of the dates the Policy & Services Committee reviewed the item and providing copies of the reports. No oral or written comment was received from those organizations at the meetings.[13]

On July 18, 2011, the Council held a meeting to discuss the Committee's recommendations. After Stump gave an overall description of the recommendations, Spitaleri made a statement,[14] which was reflected in the minutes:

> Tony Spitaleri requested the Council adhere to the California Government Code. Government Code [section] 3507 which was a part of the Meyers-Milias-Brown Act stating that a public agency must consult in good faith with representatives of a recognized employee organization before adopting procedures for the resolution of disputes involving wages, hours, and other terms of condition of employment. He noted Government Code

[13] The report was silent as to any obligation of the City to consult in good faith with the affected employee organizations pursuant to MMBA section 3507.

[14] Spitaleri also testified that the minutes accurately reflected what he said.

> [section] 3507[(a)] and other sections under 3500 deemed any public agency needed to provide reasonable written notice to each recognized employee organization [a]ffected of any Ordinance, Resolution, rule or regulation directly relating to the matter of scope of representation proposed of being adopted by the governing body, the designated Board or Commission, and shall give the recognized employee organization the opportunity to meet with the party of the Boards or Commission.

(Emphasis added.)

After other public comment, Klein made a motion to place on the November 8, 2011 ballot the modified Article V language, however, it did not receive a second and another motion was made to repeal Article V along with passing a companion ordinance to require non-binding mediation for impasses in labor negotiations. After extensive discussion by the Council, the motion was passed five to four.

Immediately after the meeting, Spitaleri saw City Negotiator Murray in the hallway outside Council chambers. Spitaleri asked Murray to respond to his request to meet and confer over the proposed repeal of Article V. Murray asked Spitaleri to send the request to him via email.

The Council had two other Council meeting dates before the August 12, 2011 deadline to submit the measure to the Registrar's Office for the November 8, 2011 ballot: July 25 and August 1, 2011. Scott was told by the City Clerk that the deadline for submitting the measure to the registrar was August 1. One Councilmember was going to be absent from the July 25, 2011 meeting and another Councilmember would be absent from the August 1, 2011 meeting, which would not allow the full Council to vote on it.

Post July 28, 2011 Events

On July 19, 2011, Spitaleri emailed Murray:

> I am requesting the city [to] abide by California [Government] Code [section] 3500-3511 as required in sections 3504.5(a) and

> 3507(a). As you know I made the same request at the city council meeting of July 18[,] 2011.

(Emphasis added.)

On July 27, 2011, Spitaleri sent another email to Murray stating:

> Am I to assume that since I haven't heard from you concerning my request, the city wishes not to meet and consult on the repeal of Binding Interest Arbitration as required by the California [Government] Code [section] 3500-3511.

Murray replied that he asked Scott to send a staff report which set out the City's position. This was the same staff report which stated that the City's position was it did not have to meet and confer over the issue because interest arbitration was a permissive subject of bargaining.

On July 28, 2011, Local 1319 filed its charge with PERB.

On August 1, 2011, Stump faxed a letter to Local 1319's attorney explaining that it appeared from the charge that Local 1319 wanted to meet over the proposed mediation ordinance. Stump further explained:

> The mediation ordinance has not been finally adopted by the Council. An ordinance is adopted only after two readings at least 10 days apart. (Palo Alto Municipal Code section 2.04.270[15].) The mediation ordinance had been placed on tonight's Council agenda for a second reading and final adoption. To provide an

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[15] Palo Alto Municipal Code section 2.04.270(b) "Introducing ordinances and resolutions for passage and approval" provides:

> Second Reading of Ordinance. With the sole exception of ordinances which take effect upon adoption, no ordinance shall be passed by the council on the day of its introduction nor within ten days thereafter, nor at any other time than at a regular or special meeting. Ordinances presented to the council for second reading shall be agendized as consent items and may be removed for debate and discussion only upon a majority vote of the council members present and voting. This section shall not prevent council members from making short comments on consent items.

> additional opportunity for a meaningful exchange with IAFF and any other labor group that wishes to provide further input, staff has removed the mediation ordinance from tonight's agenda.

On the same day, Scott provided Spitaleri with the proposed ordinance on mediation and a similar letter as provided to Local 1319's attorney. On August 15, 2011, the parties met over the proposed mediation ordinance but have not yet concluded such meetings. A second reading of the ordinance has not occurred.

Local 1319 and the City began interest arbitration over a successor agreement on September 20, 2011.

On November 8, 2011, an election was held regarding the repealing of the Article V. The majority of voters cast their votes to repeal Article V.

ISSUES

1. Does MMBA section 3509(e) divest PERB of jurisdiction over the allegations that the Council's action of submitting the repeal of Article V to the voters without consulting in good faith with Local 1319?

2. Are PERB Decisions *County of Santa Clara* (2010) PERB Decision No. 2114-M and *County of Santa Clara* (2010) PERB Decision No. 2120-M dispositive of the failure to consult in good faith allegations regarding Article V?

3. Did the City violate MMBA section 3507 by failing to consult in good faith with Local 1319 before adopting a motion to submit to the voters a ballot measure repealing Article V?

4. Did the City violate MMBA section 3507 by holding a "first reading" to approve a proposed ordinance to require non-binding mediation over bargaining disputes after impasse?

CONCLUSIONS OF LAW

MMBA sections 3500, 3504.5(a), 3505, 3507 and 3509(b) and (e) provide in pertinent part:

> 3500(a) It is the purpose of this chapter to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations. . . .
>
> 3504.5(a) Except in cases of emergency as provided in this section, the governing body of a public agency, and boards and commissions designated by law or by the governing body of a public agency, shall give reasonable written notice to each recognized employee organization affected of any ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the governing body or the designated boards and commissions and shall give the recognized employee organization the opportunity to meet with the governing body or the boards and commissions.
>
> 3505 The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.
>
> "Meet and confer in good faith" means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. . . .
>
> 3507(a) A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of a recognized employee organization or organizations for the administration of employer-employee relations under this chapter.

> The rules and regulations may include provisions for all of the following:
>
> (5) Additional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment.
>
> 3509(b) A complaint alleging any violation of this chapter or of any rules and regulations adopted by a public agency pursuant to Section 3507 or 3507.5 shall be processed as an unfair practice charge by the board. The initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. The board shall apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter.
>
> (e) Notwithstanding subdivisions (a) to (c), inclusive, consistent with, and pursuant to, the provisions of Sections 3500 and 3505.4, superior courts shall have exclusive jurisdiction over actions involving interest arbitration, as governed by Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure, when the action involves an employee organization that represents firefighters, as defined in Section 3251.

(Emphasis added.)

MMBA Section 3509(e)

As set forth earlier, MMBA section 3509(e) vests the superior courts with exclusive jurisdiction over "actions" involving interest arbitration as governed by Code of Civil Procedure section 1280 et seq, when that action involves firefighter employee organizations. Civil Procedure section 1280 sets forth the various aspects of arbitration used in the State of California, the conduct of those proceedings, petitions to compel arbitration and confirmation of arbitration awards.

In *City of San Jose v. International Association of Firefighters, Local 230* (2009) 178 Cal.App.4th 408, the only case interpreting such section, the Court of Appeal found that the Superior Court had jurisdiction over determining whether the proposals put forth by the employee organization during collective bargaining were outside the scope of bargaining in an

interest arbitration and therefore could not arbitrated. PERB asserted it had exclusive initial jurisdiction. The employee organization notified the Court of Appeal of a recent amendment to MMBA section 3509(e). The Court of Appeal applied this amendment to the pending action and found that the Superior Court had exclusive jurisdiction over a petition to compel arbitration. Since the action filed involved interest arbitration it was considered the exclusive jurisdiction of the Superior Court.

In the instant case, an interest arbitration action was never filed. Instead, the issue was the passing of a motion to place on the ballot, the repealing of interest arbitration as an impasse resolution "process" from the City Charter without consulting in good faith with an affected exclusive representative. As this case does not involve an individual interest arbitration action, PERB has exclusive initial jurisdiction over this matter. (MMBA, § 3509(b).)

County of Santa Clara cases

In *County of Santa Clara, supra,* PERB Decision Nos. 2114-M and 2120-M, PERB held that the County did not violate MMBA section 3505 by approving a ballot measure modifying a binding interest arbitration measure previously placed on the ballot. The decisions were both analyzed under MMBA section 3505 and not section 3507. No violation of section 3505 was found as interest arbitration was deemed to be a permissive subject of bargaining by the courts and therefore outside the scope of representation. As the decisions do not discuss or analyze whether MMBA section 3507 was violated, both cases are not dispositive of the instant case.

Repeal of Article V of the City Charter and MMBA Section 3507

The complaint alleges in part:

> 3. On or about July 18, 2011, Respondent, through its City Council adopted a motion to submit to the voters a ballot measure which would completely repeal Article V of the City Charter, which provides, in part, for binding interest arbitrations over bargaining disputes where there is an impasse in bargaining.

> 5. Respondent engaged in the conduct as described in paragraph 3 [] without first consulting in good faith with Charging Party and, as such, violated Government Code section 3507 and committed an unfair practice under Government Code section 3509(b) and PERB Regulation 32603(f).

MMBA section 3507(a)(5) requires that a public agency adopt reasonable rules regarding additional procedures for the resolution of disputes regarding matters within the scope of representation after "consultation in good faith" with representatives of recognized employee organizations. This section stands apart from MMBA section 3504.5, 3505 which requires the public agency to meet in confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of recognized employee organizations. However, the "consultation in good faith" obligation has been found to be no different that the "meet and confer" process in MMBA section 3505. (*Independent Union of Public Service Employees v. County of Sacramento* (1983) 147 Cal.App.3d 482, 488; *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 821; and *International Assn. of Fire Fighters Union v. City of Pleasanton* (1976) 56 Cal.App.3d 959, 976.)

Applying the meet and confer process therefore to the instant case,[16] the public agency had an obligation to provide reasonable written notice to each employee organization affected by a proposed rule along with an opportunity for the recognized employee organization to meet with the public agency. (MMBA, § 3504.5.) The parties shall have the mutual obligation to: (1) meet and confer promptly upon request by either party, (2) continue for a reasonable period

[16] MMBA section 3507(a) sets forth a consultation in good faith obligation over reasonable rules and regulations covering the administering of employer-employee relations in nine enumerated areas. The statute does not list a qualifier of "wages, hours, and other terms and conditions of employment" (scope of representation) in order to trigger the consultation in good faith obligation, but rather whether the regulation or rule falls within one of the nine enumerated areas. Therefore, in applying the meet and confer process to MMBA section 3507(a) cases, scope of representation will not be included as a required element.

of time in order to exchange freely information, opinions, and proposals,[17] and (3) endeavor to reach an agreement. (MMBA, § 3505.) Since this case involves proposing an amendment to a City Charter, the meet and confer should conclude before the Council votes on the amendment. (*Seal Beach, supra,* 36 Cal.3d 591, 602.)

An initial inquiry is whether the City provided reasonable written notice to Local 1319 allowing for an opportunity to meet with the City and conclude within a reasonable period of time. Blanch/Scott had been providing notices to Spitaleri regarding Council and Committee meetings on May 3, June 3, 18, 28, July 11, and 17, 2011 about a change that was going to be discussed regarding Article V. On the May 3, 2011, Blanch emailed Spitaleri and he was offered to "meet and discuss" the issue. While the Council may not have been certain as to its direction prior to June 20, 2011, after June 20, the City was going to propose a change to Article V (repeal or modification). Indeed, on June 20, 2011, Scharff moved to repeal Article V, but had to withdraw the motion. Spitaleri's awareness that a change was going to occur was confirmed by his plea to have the matter remanded back to the Committee where all labor organizations could have an opportunity to participate in deliberations and provide recommendations. The earliest Council meeting after these Committee meetings was July 18, 2011. By June 20, 2011, the City had provided written and/or actual notice[18] that a

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[17] This exchange is not satisfied by a legislative's body public hearing where an employee is allowed to comment on a matter. (*Los Angeles County Civil Service Commission v. Superior Court* (1978) 23 Cal.3d 55, 61.)

[18] As stated in *San Diego Adult Educators, Local 4289 v. Public Employment Relations Board* (1990) 223 Cal.App.3d 1124, 1136:

> Notice need not, however, be formal to be effective. When a union official with authority to act has actual notice of the intended change, together with adequate time to decide whether to demand negotiation before a final decision is made the union will be deemed to have received adequate notice.

change was going to be proposed to Article V and as well as a reasonable time to negotiate such a change.

After receiving reasonable written notice, the burden shifts to Local 1319 to demonstrate that they requested to consult in good faith. (*Stockton Police Officers' Assn. v. City of Stockton* (1988) 206 Cal.App.3d 62, 65 (*Stockton*).) The public agency does not have an obligation to invite the recognized employee organization to bargain. (*Ibid.*, pp. 65-66; *Metropolitan Water District of Southern California* (2009) PERB Decision No. 2055-M, p. 5.) Additionally, the party demanding negotiations bears the burden of clearly communicating that request to the other party. (*El Centro School District* (1996) PERB Decision No. 1154.) However, Local 1319 does not demonstrate that it ever requested to consult in good faith with the City. The closest it came to such a request was on July 18, 2011, when Spitaleri requested that the City "adhere" to the "California Government Code" and that MMBA 3507(a) stated that the City consult in good faith with a recognized employee organization before it adopted such a procedure. However, this was not a demand to bargain, but a "request to adhere." Any verbal request to Murray to meet and confer after July 18, 2011 was after Local 1319 had received reasonable written notice and after the Council acted on the proposed amendment to the Charter. Such a request is therefore untimely. (*Stockton, supra,* 206 Cal.App.3d 62 and *Seal Beach, supra,* 36 Cal.3d 591.)

However, even if Spitaleri's statement at the July 18, 2011 Council meeting is considered a demand to meet and consult, it is still untimely. A public agency's obligation to provide reasonable written notice coupled with its obligation to allow a reasonable period of time to meet over the matter (MMBA, § 3505) includes a mutual obligation on behalf of the recognized employee organization to timely demand to meet and consult over the matter within a reasonable period of time to conclude such negotiations, especially when a reasonable

deadline loomed. The cost of a November 8, 2011 election was substantially less than those elections after November 8, 2011, and Council meetings after July 18, 2011 would not be fully attended by nine Councilmembers.

By June 20, 2011, Spitaleri was aware of the approaching August 1, 2011 deadline for the Council to propose the City Charter amendment for the November 8, 2011 ballot. Two committee meetings scheduled for June 28 and July 12, 2011 came and passed without a demand to bargain. Not until the last minute, during the Council meeting as the Council was preparing to vote on the proposed amendment did Spitaleri request that the City adhere to Government Codes. Such a last minute request is tantamount to a waiver by inaction to consult in good faith with the agency and, as such, it is not found that the City adopted a motion to submit to the voters a ballot measure which would completely repeal Article V without fulfilling its obligation to consult in good faith with Local 1319 and this allegation is dismissed.

Mediation Ordinance and MMBA Section 3507

The City argues that it never adopted the mediation ordinance as an employer-employee relations rule as it only adopted a first reading and Palo Alto Municipal Code section 2.04.270(b) requires a second reading to take effect. A second reading has never taken place as the matter was pulled off the August 1, 2011 Council agenda and the City engaged in negotiations with Local 1319 over the matter. The City's argument is persuasive and is buttressed by its municipal code and subsequent action(s). As such, the allegation that the City violated MMBA section 3507 by adopting a first reading of the mediation ordinance is dismissed.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. SF-CE-869-M, *International Association of Firefighters, Local 1319, AFL-CIO v. City of Palo Alto*, are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135, subdivision (d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)

Shawn P. Cloughesy
Chief Administrative Law Judge