STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CITY & COUNTY OF SAN FRANCISCO, Charging Party, v. STATIONARY ENGINEERS LOCAL 39, Respondent.	Case No. SF-CO-129-M PERB Decision No. 2041-M June 29, 2009

Appearances: Office of the City Attorney by Gina Roccanova, Deputy City Attorney, for City & County of San Francisco; Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for Stationary Engineers Local 39.

Before Dowdin Calvillo, Acting Chair; McKeag and Neuwald, Members.

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Stationary Engineers Local 39 (Local 39) of a proposed decision (attached) of an administrative law judge (ALJ). The charge alleged that Local 39 violated the Meyers-Milias-Brown Act (MMBA)[1] by refusing to name a representative to an interest arbitration panel and by refusing to participate in the impasse resolution procedures set forth in the Charter for the City and County of San Francisco (City Charter). The City and County of San Francisco (City) alleged that this conduct constituted a violation of MMBA section 3509, subdivision (b) and PERB Regulation 32604, subdivision (d).[2]

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

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

Local 39 argued that the interest arbitration provisions of the City Charter were unreasonable and, therefore, not enforceable. In the alternative, Local 39 argued that interest arbitration provisions were not mandatory. Consequently, even if these provisions were enforceable, Local 39 did not violate the MMBA when it refused to comply with them. In addition, Local 39 argued that the parties were not legitimately at impasse and, therefore, they were not obligated to participate in the interest arbitration process. Local 39 also claimed the charge was moot because the parties finalized a memorandum of understanding and that the charge was not timely.

With regard to Local 39's defenses, the ALJ ruled that the charges were timely filed and were not moot. With regard to the merits, the ALJ ruled that the interest arbitration provisions were reasonable local rules and, therefore, enforceable. The ALJ also ruled that the provisions were mandatory. Accordingly, the ALJ concluded that Local 39 violated the MMBA by refusing to comply with the impasse provisions in the City Charter.

We have reviewed the entire record in this matter and find the proposed decision well-reasoned, adequately supported by the record and in accordance with applicable law. Accordingly, the Board hereby adopts the proposed decision as a decision of the Board itself, subject to the following discussion regarding the mootness and timeliness issues.

DISCUSSION

A. Mootness

Subsection A (Mootness) of the "Procedural Defenses" section of the "Conclusions of Law" in the proposed decision is hereby replaced with the following discussion.

In *Amador Valley Joint Union High School District* (1978) PERB Decision No. 74 (*Amador*), the Board offered the following definition of mootness:

> A case in controversy becomes moot when the essential nature of the complaint is lost because of some superseding act or acts of the parties. Mere discontinuance of wrongful conduct does not ordinarily end the underlying controversy. There must be evidence that the party acting wrongfully has lost its power to renew its conduct. In cases clarifying the parties' rights and obligations under a new law, the public interest is served by deciding the underlying issue.

[Citations omitted.]

In *Amador*, the school district froze step-and-column wage increases at the beginning of negotiations. In addition, the district released some questionable communications to district employees. Shortly thereafter, the union filed an unfair labor practice charge alleging the district's conduct violated the Educational Employment Relations Act (EERA).[3] After the charge was filed but before the formal hearing was held, the parties finalized a memorandum of understanding. Additionally, the union sought and obtained a superior court judgment to compel payment of the withheld salary increases.

At the formal hearing in *Amador*, the administrative law judge dismissed the complaint as moot because the parties reached agreement on a contract and because the union recovered back wages through a court action. PERB reversed, stating that the administrative law judge failed to appreciate the potential unlawful nature of the employer's alleged coercive bargaining conduct. In particular, the Board noted that neither the resolution of the court order nor the conclusion of bargaining were relevant to the issue of the district's behavior during the course of negotiations with the union. Accordingly, the Board concluded the matter was not moot.

In the instant case, like in *Amador*, the essential nature of the complaint is Local 39's conduct during negotiations. The fact that the parties subsequently finalized an agreement does not end the controversy. To the contrary, there is nothing in the record to suggest

[3] EERA is codified at Government Code section 3540 et seq.

Local 39 will not continue to refuse to participate in the City Charter impasse provisions unless it is compelled to do so by a third party. Accordingly, based on *Amador* and its progeny, we find the issues in this matter are not moot.

B. Timeliness

Subsection B (Timeliness of the Charge) of the "Procedural Defenses" section of the "Conclusions of Law" in the proposed decision is hereby replaced with the following discussion.

Unfair practice charges filed under the MMBA are subject to a six-month statute of limitations. (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1092.) The charging party is required to file a charge within six months of the date it knows, or should have known, of the conduct underlying the charge. (*County of Siskiyou* (2006) PERB Decision No. 1837-M.)

Section 8.409-4, subdivision (b) of the City Charter provides for a three-member arbitration panel to resolve bargaining disputes. This section requires both the City and the recognized employee organization involved in bargaining with the City to designate one member for the panel "[n]ot later than January 20 of any year in which bargaining on an MOU takes place." In addition, Section 8.409-4, subdivision (b) provides that all unresolved bargaining disputes shall be submitted to binding arbitration.

In cases involving violations of local rules, the statute of limitations generally begins to run when the rule is violated. Thus, in this case, the statute of limitations began to run for the first violation in January 2006 when Local 39 refused to designate a member for the arbitration panel. Next, the statute began to run for the second violation in April 2006 when Local 39 refused to participate in the impasse resolution procedures set forth in the City Charter.

Because the unfair practice charge was filed in May 2006, the conduct underlying the charge occurred within the six-month limitation period and is, therefore, timely.

Local 39 argues that the statute of limitations in this case began to run on October 27, 2005, when Local 39 Business Representative, Stephanie Allan (Allan), told the City's Director of Human Resources, Philip Ginsburg, and then-Deputy Director, Micki Callahan, that the union would not participate in the City Charter impasse resolution procedures unless the parties could "reach an agreement in principle" on wages before-hand. Since the charge was not filed until May 10, 2006 -- more than six months from that date -- Local 39 concludes the charge was not timely filed. However, Allan's statement was, at best, a threat of non-compliance with the City Charter and was insufficient, standing alone, to trigger the running of the statute of limitations. We, therefore, find the charge was timely filed.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it has been found that Stationary Engineers Local 39 (Local 39) violated the Meyers-Milias-Brown Act (MMBA) by refusing to name a representative to an interest arbitration panel and by refusing to participate in the impasse resolution procedures contained in the Charter for the City and County of San Francisco (City Charter), in violation of the MMBA section 3509, subdivision (b), and PERB Regulation 32604, subdivision (d) (Cal. Code Regs., tit. 8, § 32604, subd. (d)).

Pursuant to section 3509, subdivision (a), of the MMBA, it hereby is ORDERED that Local 39, and its representatives, shall:

A. CEASE AND DESIST FROM:

1. Refusing to name a representative to an interest arbitration panel; and

2. Refusing to participate in the impasse resolution procedures contained in the City Charter.

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

1. Within ten (10) workdays of the service of a final decision in this matter, post at its offices, employee organization bulletin boards, and all places where notices are customarily placed, copies of the Notice attached hereto as an Appendix, and additionally to distribute copies of the notice to all employees in the bargaining unit through the City and County of San Francisco's internal distribution system if that is the customary method of distributing union literature. The Notice must be signed by an authorized agent of Local 39, indicating that Local 39 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 the Notice is not reduced in size, altered, defaced or covered with any other material.

2. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. Local 39 shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on the City & County of San Francisco.

It is further Ordered that the proposed decision by the administrative law judge in Case No. SF-CO-129-M is hereby AFFIRMED as modified by this Decision.

Acting Chair Dowdin Calvillo and Member Neuwald 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-CO-129-M, *City and County of San Francisco v. Stationary Engineers Local 39*, in which the parties had the right to participate, it has been found that Stationary Engineers Local 39 violated the Meyers-Milias-Brown Act, Government Code section 3509, subdivision (b) and PERB Regulation 32604, subdivision (d) (Cal. Code Regs., tit. 8, § 32604, subd. (d)), when it refused to name a representative to an interest arbitration panel and refused to participate in the impasse resolution procedures contained in the Charter for the City and County of San Francisco (City Charter).

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Refusing to name a representative to an interest arbitration panel; and

2. Refusing to participate in the impasse resolution procedures contained in the City Charter.

Dated: _____ STATIONARY ENGINEERS LOCAL 39

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

CITY & COUNTY OF SAN FRANCISCO, Charging Party, v. STATIONARY ENGINEERS LOCAL 39, Respondent.	UNFAIR PRACTICE CASE NO. SF-CO-129-M PROPOSED DECISION (04/11/07)

Appearances: Office of the City Attorney, by Gina Roccanova, Deputy City Attorney, for City and County of San Francisco; Weinberg, Roger & Rosenfeld, by Stewart Weinberg, Attorney, for Stationary Engineers Local 39.

Before Donn Ginoza, Administrative Law Judge.

PROCEDURAL HISTORY

City and County of San Francisco (City) initiated this action under the Meyers-Milias-Brown Act (MMBA or Act)[1] on May 10, 2006, by filing an unfair practice charge against Stationary Engineers Local 39 (Local 39). On May 12, 2006, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging that Local 39 violated the City's local rules when it refused to name a representative to an interest arbitration panel and refused to participate in the impasse resolution procedures prescribed by said rules.[2] This conduct is alleged to violate section 3509(b) of the MMBA and PERB Regulation 32604(d).[3]

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

[2] PERB denied the City's request for injunctive relief that accompanied the charge.

[3] Section 3509(b) provides:

> A complaint alleging any violation of this chapter or of any rules and regulations adopted by a public agency pursuant to Section

On May 19, 2006, an informal settlement conference was held, but the matter was not resolved.

On June 14, 2006, Local 39 answered the complaint, denying the material allegations and raising certain affirmative defenses.

On January 11, and 12, 2007, a formal hearing was conducted by the undersigned in Oakland.

On March 2, 2007, the matter was submitted for decision following the filing of post-hearing briefs.

FINDINGS OF FACT

The City is a "public agency" within the meaning of section 3501(c). Local 39 is an "employee organization" within the meaning of section 3501(a) and an "exclusive representative" of a bargaining unit of public employees within the meaning of PERB Regulation 32016(b).

Local 39's bargaining unit includes stationary engineers, stationary engineers – sewage, stationary engineers - water treatment, building and grounds maintenance superintendents, Municipal Railway wire rope mechanics, and chief engineers.

> 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.

PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32604(d) provides that it shall be an unfair practice for a public agency to:

> Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2 or required by any local rule adopted pursuant to Government Code section 3507.

City Charter Impasse Resolution Procedures

Beginning in the late 1970s and continuing to the early 1990s, wages for represented employees of the City were established in accordance with City Charter provisions known as the Salary Stabilization Ordinance. Wages were set pursuant to a salary survey, conducted by the City's Civil Service Commission, which canvassed compensation levels of 50 public and private employers. An aspect about the process noted by one witness in the hearing was that the ordinance dealt solely with wages, and improvements in fringe benefit levels could not be achieved strictly through bargaining or the survey process.[4]

In 1990, the City suffered fiscal challenges as a result of the economic recession at the time. Mayor Art Agnos elected to freeze wages in two consecutive years by vetoing the increases resulting from the survey process. These wage freezes prompted lawsuits by the City's unions. The City is known for its unit proliferation. It has recognized approximately 50 unions for bargaining purposes. In 1991, the City entered into negotiations with all of the unions, seeking to obtain agreement to the 1991-1992 wage freeze and relinquishment of the lawsuits against the mayor's veto for that year.

An idea that surfaced in these negotiations was to replace the Salary Stabilization Ordinance with traditional bargaining together with binding interest arbitration. The police and firefighter unions already had such a procedure by virtue of a 1990 Charter amendment.

Two of the City's larger unions favored this approach: Service Employees International Union, the largest City union comprising three locals, and International Federation of Professional and Technical Employees, Local 21 (Local 21).[5] Carol Isen, a Local 21 senior

[4] See United Public Employees v. City and County of San Francisco (1987) 190 Cal.App.3d 419 [235 Cal.Rptr. 477].

[5] The size of the unions was estimated by the witnesses to be between 12,000 and 15,000 members for the three SEIU locals and between 1000 and 2000 for Local 21.

representative at the time, testified that her union's objective was to achieve the same system in place for the police and firefighter unions. Some of the unions, especially the smaller crafts unions, wanted to retain the salary survey process, fearing limited leverage in bargaining and the high cost of negotiations relative to membership. The majority of unions desired to retain the salary survey process as an option. Local 39 was one of these unions.

Where agreements could be reached in exchange for the wage freeze, written agreements were executed. Local 21 reached agreement to have a City ballot initiative presented to the electorate amending the City Charter to incorporate collective bargaining, mediation and interest arbitration. Local 39's agreement, on the other hand, included recognition of its option to remain under the Salary Stabilization Ordinance and a promise by the City not to propose language removing its unit from the ordinance. As a result of these agreements the City collectively obtained the benefit of a $64 million wage freeze.

Once these negotiations were concluded the City gave notice to all the unions inviting them to participate in negotiations over the language of the proposed Charter amendment to be carried by the City. As Jonathon Holtzman, the City's then-chief labor attorney, explained, the purpose for these negotiations was to comply with People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach (1984) 36 Cal.3d 591 [205 Cal.Rptr. 794] (Seal Beach), which mandates notice and opportunity for bargaining over a city's introduction of charter amendments to the electoral process. The majority of the unions participated in these negotiations. Those who were in favor of the status quo proposed a provision allowing an opting out of bargaining and interest arbitration. These negotiations did not result in any written memorandum of understanding (MOU) and the City did not believe such an agreement was necessary under the Seal Beach decision. There was no evidence directly establishing that Local 39 participated in these negotiations.

The City achieved several goals through the Seal Beach process. Anticipating the administrative challenge of conducting and completing negotiations with its many unions, the City sought and obtained clear and tight timelines for the interest arbitration process. It also achieved more specific guidelines for decisionmaking by the arbitration panel than under the procedures utilized by the police and firefighter unions, as well as clarification of the scope of representation so as to exclude matters addressed by the Civil Service Commission.

The wage bargaining/interest-arbitration initiative was placed on the November 1991 ballot as Proposition B. The proposed ordinance provided that bargaining disputes that "remain unresolved after good faith negotiations . . . shall be submitted to a three-member Board of Arbitrators . . . after an impasse has been declared" by either of the parties. One of the ballot arguments in favor of the measure stated that it would "allow employees the right to negotiate wages and health benefits, like other employees throughout the State" and that it would "require[] binding arbitration for peaceful resolution of labor disputes." The Ballot Simplification Committee's analysis stated that "[e]mployee organizations would have a choice for this extension of collective bargaining or having the terms of employment set as they are now," but that "[t]he decision by an employee organization to choose collective bargaining would be permanent."

Proposition B passed. The language of the proposition pertaining to impasse resolution was adopted within section 8.409-4 of the City Charter.

Section 8.409-4(a) provided that disputes remaining unresolved after good faith bargaining were to be submitted (the word "shall" was employed) to a three-member "mediation/arbitration board" "upon the declaration of an impasse either by the authorized representative of the city and county of San Francisco or by the authorized representative of the recognized employee organization involved in the dispute." Isen, who participated in the

Seal Beach negotiations, testified that these provisions were intended to be mandatory once a union had opted to leave the Salary Stabilization Ordinance process. Similarly, Holtzman testified that once an employee organization opted in for collective bargaining, the impasse resolution procedures accompanied that election.

Proposition B allowed any union the right to remain under the Salary Stabilization Ordinance by requiring a one-time election upon the commencement of the new provisions. It also provided that a union could, with notice, subsequently elect to opt into the new process. These provisions, contained in section 8.409-1, stated that any such election would be irrevocable once made, and once made the salary survey procedures would no longer apply.

Section 8.409-4(b) provided that the three-member board would consist of one neutral chairperson selected by agreement of the parties, and that each party to the dispute would select one member "[n]ot later than January 20 of any year in which bargaining on an MOU takes place." After naming of the parties' representatives, the neutral chairperson would be selected by agreement, or if none, then by the alternate, strike-off procedure.

History of Bargaining under Proposition B

Four unions opted into bargaining, including the SEIU locals and Local 21. Local 39 was not one of them.

In 1995, Proposition F was placed on the ballot and passed by the voters. It eliminated (with minor exceptions not pertinent here) the unions' option to remain under the Salary Stabilization Ordinance.

Proposition F was motivated by the City's dissatisfaction with the original procedures, owing in large part to an expensive arbitration award in 1993. The City was also dissatisfied with the "package," case-presentation format, which prevented the arbitration panel from deciding disputes on an issue-by-issue basis. In addition, the City desired to eliminate the

option to remain under the salary survey process due to what was perceived as the "whipsawing," or leveraging, effect of the competing procedures. Holtzman asserted that the perceived inequity of the system toward small unions has been solved as a practical matter through a form of coalition bargaining, referred to as "pattern" bargaining, where early agreements reached are typically followed by the other unions.

Proposition F was preceded by another round of Seal Beach negotiations before it was placed on the ballot. Sections 8.401 and 8.407, which spelled out the salary survey process, were repealed. Notable changes besides elimination of the option to remain under the salary survey process included issue-by-issue determination in interest arbitration, a requirement that the arbitration panel consider each of a list of specified economic factors, and forfeiture of the right to interest arbitration if the union engages in a strike. These changes were noted in Proposition F's voter information pamphlets.

The impasse resolution procedures, now renumbered section A8.409-4(a) of the Charter, provide in pertinent part:

> Subject to Section [A]8.409-4(g), disputes pertaining to wages, hours, benefits or other terms and conditions of employment which remain unresolved after good faith bargaining between the city and county of San Francisco, on behalf of its departments, boards and commissions, and a recognized employee organization representing classifications of employees covered under this part shall be submitted to a three-member mediation/arbitration board ("the board") upon the declaration of an impasse either by the authorized representative of the city and county of San Francisco or by the authorized representative of the recognized employee organization involved in the dispute; provided, however, that the arbitration procedures set forth in this part shall not be available to any employee organization that engages in a strike unless the parties mutually agree to engage in arbitration under this section. Should any employee organization engage in a strike either during or after the completion of negotiations and impasse procedures, the arbitration procedure shall cease immediately and no further impasse resolution procedures shall be required.

Holtzman testified that in the Seal Beach negotiations over Proposition F the City emphasized that interest arbitration was a quid pro quo for the right to strike. In addition, the declaration of policy in section A8.409 provides that any employee engaging in a strike shall be dismissed from employment. One of the proponent's arguments stated that the initiative proposed to impose a "ban on strikes by city workers."

Subdivision (b) of the section A8.409-4 provides;

> Not later than January 20 of any year in which bargaining on an MOU takes place, representatives designated by the city and county of San Francisco and representatives of the recognized employee organization involved in bargaining pursuant to this part shall each select and appoint one person to the board. The third member of the board shall be selected by agreement between the city and county of San Francisco and the recognized employee organization, and shall serve as the neutral chairperson of the board.

Since 1994, Local 39 has negotiated MOUs with the City on six occasions. On two occasions the parties reached agreement without resort to the impasse resolution procedures. On two others, an agreement was reached during mediation. In the remaining two, an agreement was imposed following interest arbitration. In the 1995 and 2004 negotiations, Local 39 declared impasse, and in 1998, the parties mutually declared impasse. In all but one of these sessions – the one at issue here – Local 39 participated in selecting an arbitrator.

Typically five to six City unions move into the impasse resolution procedures each year. An average of two interest arbitration awards is rendered annually. Local 21 is the union most often resorting to interest arbitration.

2004 Reopener Negotiations

2004 was a mid-term contract year for the parties. The City reopened on wages and retirement contributions. Local 39 as well as other unions had previously agreed to have their members "pick up" (i.e., assume) the City's 7.5 percent contribution to the retirement fund.

This obligation was scheduled to sunset at the end of 2003. The City was interested in extending that arrangement into 2004 and through an additional contract year in 2005. Local 39 Business Representative Stephanie Allan represented the union in these negotiations.

Negotiations led to impasse and subsequently to presentation of the dispute to an arbitration panel. Matt Goldberg was the neutral member of the panel. At the conclusion of the parties' presentation to the panel, Goldberg privately informed Local 39's attorney, W. Daniel Boone, from the firm of Weinberg, Roger and Rosenfeld, of his decision in advance of the written opinion. Boone, in turn, conveyed that message to Allan. Goldberg admitted that the union had made its case for its proposed wage increase and cessation of the retirement contribution pick-up. However, Goldberg stated that he would not, and could not, vote in favor of Local 39's position. He cited his unwillingness to break with the "pattern" set by other unions that had agreed to continuation of the employee pick-up in lieu of cost-cutting, specifically through layoffs. As a result of this experience, Local 39 leadership resolved not to participate in the mediation/interest arbitration procedures again. Asked whether Local 39 consented in 2004 to go to interest arbitration, Allan answered, "We didn't have any choice," noting that at the time the MOU incorporated the impasse resolution procedures.

2006 Successor MOU Negotiations

Negotiations for a successor MOU were scheduled to commence in early 2006. On October 27, 2005, the parties met for a preliminary meeting. Department of Human Relations Director Philip Ginsburg and then-Deputy Director Micki Callahan represented the City. Allan represented Local 39. Allan informed Ginsburg and Callahan that based on the union's negative experience with interest arbitration in 2004, Local 39 would negotiate for an agreement but not participate in the impasse resolution procedures. As to the issues in bargaining, Allan focused on wages, asserting that the unit members lagged significantly

behind their private sector counterparts. After outlining the wage demands, Allan told Ginsburg and Callahan that "if [Local 39] could reach an agreement in principle on [the wage disparity issue], the Union would have no objection to going into the impasse arbitration process."

Ginsburg affirmed the City's desire to reach agreement, notwithstanding Local 39's anticipatory refusal to participate in the impasse resolution procedures. In December, Callahan privately signaled the possibility of a significant wage increase but noted contingencies of a political nature. In January 2006, Callahan indicated the City's continued exploration of financial wherewithal for a favorable economic package, but ultimately reported to Local 39 few prospects for a swift resolution. When the subject of impasse resolution procedures was broached, Allan reiterated Local 39's intention not to participate. Callahan proposed to commence bargaining and leave the impasse resolution procedures issue for the attorneys to discuss.

Shortly thereafter, by letter dated January 31, 2006, Deputy City Attorney Gina Roccanova noted Local 39's failure to name its designee to the three-member arbitration panel. She reminded Local 39 of the City's position that the impasse resolution procedures are mandatory, urged Local 39 to submit its representative's name, and threatened legal action to enforce the Charter's provisions. Notwithstanding these concerns, Roccanova pledged the City's intention in the interim to bargain in good faith toward an agreement.

By letter dated February 6, 2006, Boone responded to Roccanova on behalf of Local 39. Boone acknowledged both parties' intention to engage in good faith negotiations. He also asserted that the impasse resolution procedures of the Charter are not mandatory. Local 39 would continue refusing to choose its designated representative. Boone added that

"given the on-going, good faith bargaining," it would be "premature" to select impasse arbitrators.

Negotiations commenced on February 2, and continued through April 7, 2006. There were a total of 11 sessions. Allan began as the spokesperson for Local 39's bargaining team. Local 39 Director of Public Employees Joan Bryant also participated in these negotiations, first as an assistant to Allan, then taking over Allan's seat as the team's spokesperson. Bryant attended all but one of the 11 sessions.

Through her testimony, Allan asserted that the City's team, led by Isen, exhibited a lack of commitment to good faith negotiations and a predisposition to proceed swiftly to impasse. At the first session, Local 39 proposed seven meeting dates in February; Isen agreed to just two (February 3 and February 8). Isen was late for negotiations on numerous occasions. Bryant recalled Isen stating at the first session that the City could declare impasse at any time. Supporting Allan's general views, Bryant characterized Isen as habitually late, unprepared, and cavalier.

At the third session on February 16, Isen, after leading Local 39 to believe the session would last all day, appeared late for a second time and announced she would be leaving early to attend other business. At the time, Isen offered no explanation for her tardiness. While Bryant was out of the room, Isen asked Allan if, as to a future bargaining session, Local 39 would leave its "attack dog at home," referring to Bryant. Local 39 protested Isen's conduct in a letter from Allan to Ginsburg the same day.

Isen was late for the fourth session on February 27. She took a personal call on her cellphone during presentations. By this session, the parties did begin to reach some tentative agreements, which they initialed off. At the fifth session, the City delayed the start of the session by 30 minutes.

The seventh session was cancelled and rescheduled to March 23. This session did not begin until 1:30 p.m. and was interrupted at the outset by a 45-minute City caucus. Allan testified that Isen withheld presentation of the City's economic proposal until this time, which consisted of a wage proposal of 2 percent in each of the three years of the proposed MOU. Allan also testified that Isen refused to put the City's proposal in writing until it was demanded of her.

At the eighth session (March 24), Local 39 offered a package proposal in which it made concessions. The negotiations continued in the package-proposal mode thereafter.

At the ninth session (March 30), the pattern of City tardiness continued. Isen arrived at 12:20 p.m. and called a caucus 15 minutes after her arrival. Bryant indicated that Local 39 was prepared to make additional movement by offering a counterproposal. To facilitate the preparation of this offer, Bryant requested information consisting of data on probationary employees with the purpose of determining how many went into extended probationary periods. The City was proposing to extend the probationary period from six months to one year. In connection with the subject of cable-car employee differentials, Local 39 sought information pertaining to numbers of vacant positions and the attendant salary savings. In connection with fringe benefits, Local 39 requested information about the City's Wellness Program. The City reiterated its March 23, three-year, wage proposal, and offered "additional compensation and pay rates for classifications" of "[0].5" percent.

At the tenth session (April 6), Local 39 presented its second package proposal. Local 39 included a proposal to confirm Isen's prior representation for "most-favored-nations" treatment in exchange for an early agreement. Isen refused to put that offer in writing. The City made no further movement on its wage proposal, which amounted to 6 percent over three years, though it did adjust its offer on the subject of wages for unit members possessing

multiple-licenses (increasing it to 5 percent), acceded to Local 39's sewage classification premium, and made movement toward Local 39's pay increase for specific classifications (chief engineer). Local 39's wage proposal at this time was for 11.5 percent over three years. At this session, Isen indicated she believed the parties were approaching impasse. Bryant did not believe this to be the case, testifying that Local 39 was making movement, had room for more movement, and the City had not yet responded to the outstanding information requests.

At the eleventh and final session (April 7), Isen again arrived late, and the City immediately went into caucus. When Bryant inquired as to the reason for the caucus, she was informed that the City was copying documents. Local 39 was prepared to present a proposal, but Isen declared that the parties were at impasse and threatened to end the session. The City had also not yet formally responded to Local 39's fourth package proposal. Bryant informed the City that Local 39 had room for movement. Local 39 was willing to drop its multiple-license differential, make concessions on a parking proposal, and drop demands concerning overtime and out-of-class compensation for airport employees. The City caucused again without hearing Local 39's presentation, returned and informed Local 39 that the parties were at impasse. In explaining its view for why the parties were at impasse, Isen asserted to Local 39 that the parties were "still far apart on the core issues." She did not explain her position or identify what she believed were the core issues. The session ended, but Bryant did succeed in giving Isen a new (written) package proposal. As to the general wages, Local 39's proposal reiterated its previous proposal from April 6.[6]

The City presented no rebuttal to Local 39's testimony regarding Isen's bargaining conduct.

[6] Bryant was offered the opportunity to compare the April 6 and April 7 proposal on general wages to explain if Local 39 had changed its position. She was unable to identify that there had been actual movement.

Holtzman testified that the term "impasse," as used in the Charter, adopts labor law's commonly understood meaning, namely, the point in negotiations at which the parties are unable to make further progress.

Over the course of bargaining to that date, Local 39 had made approximately 30 proposals during the negotiations, the City offered between 15 and 20. By the last session tentative agreements had been reached on 16 subjects. Eleven of those were based on proposals made initially by Local 39. The City never formally responded to Local 39's last package proposal.[7]

Sometime during bargaining, but no later than April, the City filed a superior court petition to compel interest arbitration. The petition was denied.

On April 11, 2006, Allan wrote to Isen stating Local 39's readiness to continue bargaining, following the City's "walk out" of the April 7 session. By letter dated April 13, 2006, Isen responded to information requests from Local 39. By letter dated April 14, 2006, Isen asserted that the parties were at impasse by virtue of Local 39 having made no movement on wages in its last two proposals, and asserted that impasse would only be broken by "movement on the core economic issues." By letter dated April 18, 2006, Allan disputed this point as being "not reflective of the facts as they occurred at the bargaining table." Two additional letters were exchanged by the parties in which they disputed whether the outstanding information request involving sick leave usage had been satisfied. Sometime after

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[7] Administrative judicial notice is taken of the unfair practice charge filed by Local 39 against the City alleging surface bargaining on the City's part with respect to these negotiations (case no. SF-CE-355-M). That charge was dismissed. On March 12, 2007, PERB's affirmed the board agent's dismissal of the charge for failure to state a prima facie violation. (City & County of San Francisco (2007) PERB Decision No. 1890-M.)

negotiations had ceased, the City also informed Local 39 that it would return to the table if Local 39 agreed to mediation and interest arbitration.

Through the efforts of Bryant and Callahan, the parties eventually reached agreement on a successor MOU sometime after May 2006.

ISSUES

1. Does the fact that the parties adopted a successor agreement to conclude the negotiations render the action moot?

2. Since the City was on notice of Local 39's intent not to participate in the impasse resolution procedures more than six months prior to the filing of the charge, should the action be dismissed under the MMBA's six-month statute of limitations?

3. Are the City's impasse resolution procedures a reasonable local rule?

4. Is interest arbitration under the City Charter mandatory or permissive?

5. If interest arbitration is mandatory, did Local 39 violate the City Charter by failing to select the arbitration panel or was that requirement excused by the City's premature declaration of impasse?

CONCLUSIONS OF LAW

Local 39 admits the key factual elements of complaint, namely, that it refused to participate in the City Charter's impasse resolution procedures by failing to select the arbitration panel and by refusing to proceed to interest arbitration. However it contends that it was not legally obligated to participate in interest arbitration because that requirement constitutes an unreasonable local rule. The interest arbitration requirement is inconsistent with, and preempted by, MMBA's meet-and-confer obligation and the right to resort to economic weapons (i.e., striking) in the event of bargaining impasse. Even if the requirement withstands scrutiny, the Charter provisions are not mandatory and must be read so as to

preserve a union's right to resort to economic weapons. This conclusion stems from the fact that the Charter states that the impasse resolution procedures cease to be available to the parties if the union engages in a strike, thus affirmatively contemplating the union's option to strike. Moreover, even if the procedures are both reasonable and mandatory, a legitimate bargaining impasse was never reached due to the premature, bad faith, declaration of impasse by the City, and thus the precondition for the impasse resolution procedures never occurred. Lastly, Local 39 asserts that the action is procedurally barred on mootness and statute of limitations grounds.

The City contends that the impasse resolution procedures are reasonable because they are consistent with the MMBA. The procedures are also mandatory, and the preconditions of good faith bargaining and legitimate bargaining impasse were met in this case. The City rejects the procedurally-based defenses as being without merit.

Procedural Defenses

The City first contends that the procedural defenses were waived by Local 39's failure to assert them as affirmative defenses in the answer. I decline to find waiver because the defenses were raised during the hearing and there is no showing of prejudice. (Beverly Hills Unified School District (1990) PERB Decision No. 789, pp. 12-13.) Both defenses were identified in Local 39's opening statement, thereby giving the City the opportunity during the hearing to rebut those defenses, even assuming they were the type of defenses raising issues of evidentiary proof. In fact, the factual underpinnings for the defenses are not disputed, and the City was able to fully brief the issues prior to submission of the case for decision. (Cf. Sonoma County Office of Education (1997) PERB Decision No. 1225, adopting proposed decision of administrative law judge at pp. 10-11 [affirmative defense not raised "during" the hearing].)

A. Mootness

In Amador Valley Joint Union High School District (1978) PERB Decision No. 74, PERB, relying on civil case law precedent, offered the following definition of mootness:

> A case in controversy becomes moot when the essential nature of the complaint is lost because of some superseding act or acts of the parties. Mere discontinuance of wrongful conduct does not ordinarily end the underlying controversy. There must be evidence that the party acting wrongfully has lost its power to renew its conduct. In cases clarifying the parties' rights and obligations under a new law, the public interest is served by deciding the underlying issues. (Id. at p. 5.)

In the cited case, the employer froze step-and-column wage increases at the outset of negotiations. The administrative law judge dismissed the complaint as moot relying on the parties ultimately reaching agreement on a contract and the union having recovered back wages through a court action. PERB reversed, stating that the administrative law judge failed to appreciate the potential unlawful nature of the employer's alleged coercive bargaining conduct, and ordered the case remanded for a hearing on the merits. (Id. at pp. 4-5, 10,)

The Amador Valley case alludes to an exception to mootness applied by courts, particularly appellate courts, where a controversy that is technically moot involves an issue of public importance, which, if not addressed, will evade review or adjudication. (Amador Valley Joint Union High School District, supra, PERB Decision No. 74, p. 5, fn. 4, citing Pittenger v. Home Savings & Loan Assoc. (1958) 166 Cal.App.2d 32 [332 P.2d 399]; see also Sonoma County Board of Education v. Public Employment Relations Bd. (1980) 102 Cal.App.3d 689, 693, fn. 3 [163 Cal.Rptr. 464].) Under this exception, the tribunal addresses the dispute in order to "clarify" the parties' ongoing rights and obligations. (Cf. Paoli v. Cal. & Hawaiian Sugar etc. Corp. (1956) 140 Cal.App.2d 854 [296 P.2d 31].)

This case is technically moot because the parties have entered into an MOU that eliminates the need for Local 39's participation in the impasse resolution procedures – the

impetus for the unfair practice charge. Hence, a remedy for the negotiations now concluded is not necessary should the City prevail. Nevertheless, Local 39's declaration that it will no longer abide by the Charter provisions for interest arbitration means the same controversy will arise, or is likely to arise, in the future. (See County of Riverside (2003) PERB Decision No. 1577a-M, pp. 5-6.) I am called upon to determine whether the construction of the Charter provisions urged by Local 39 comports with the true meaning of those provisions: whether the interest arbitration provisions are mandatory; if mandatory, whether they constitute a reasonable regulation; and whether the absence of a legitimate bargaining impasse constitutes a defense to the complaint. This case fulfills the requirements for adjudication notwithstanding its technical mootness.[8]

B. Timeliness of the Charge

A six-month statute of limitations applies to unfair practice charges filed under the MMBA. (Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd. (2005) 35 Cal.4th 1072, 1092 [29 Cal.Rptr.3d 234].) The charging party is required to file a charge within six months of the date it knows, or should have known, of the conduct underlying the charge. (County of Siskiyou (2006) PERB Decision No. 1837-M, pp. 3-5.)

Local 39 first communicated its intent not to participate in the impasse resolution procedures on October 27, 2005, when Allan met with Ginsburg and Callahan to discuss the upcoming negotiations. The charge was not filed until May 10, 2006, which is more than six months from that date. On this basis, Local 39 argues, the charge was not timely filed.

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[8] Local 39 did not introduce the MOU into evidence. Thus I have no basis to conclude that the City waived its right to prosecute its charge by the terms of that agreement. (See Oakland Unified School Dist. v. Public Employment Relations Bd. (1980) 120 Cal.App.3d 1007, 1010-1011 [175 Cal.Rptr. 105].)

Relying on breach of contract principles – anticipatory breach, specifically – the City responds that the statute of limitations does not run until performance is due, under the rule that the non-repudiating party may elect to immediately sue for performance or wait until performance is due. (Romano v. Rockwell Internat., Inc. (1996) 14 Cal.4th 479, 489 [59 Cal.Rptr.2d 20].) Under the same rules, because the Charter does not require that parties select the arbitration panel until January 20, Local 39 defaulted on its obligation at that subsequent time as well. Alternatively, Local 39 committed a "second" unfair practice when it refused after April 7 to move into the impasse resolution procedures. And finally, since the complaint alleges that Local 39's conduct was "continuing" after the initial breach and Local 39 admitted that allegation, the violation is a continuing one.

In San Dieguito Union High School District (1982) PERB Decision No. 194, PERB adopted the continuing-violation theory from National Labor Relations Act (NLRA)[9] cases, where the duty to bargain is recognized to be a continuously running obligation (either during negotiations or during the life of the relationship). (Id. at pp. 6-9.) Subsequently, PERB applied the theory in two access cases. (Long Beach Unified School District (1987) PERB Decision No. 608, pp. 11-13 [regulation denying access rights]; State of California (Departments of Personnel Administration, et al.) (1998) PERB Decision No. 1279-S, adopting proposed decision of administrative law judge at p. 32 [discriminatory access policy].)

Within the context of continuing violations, the cases also recognize that if the charged party commits some additional act within the limitations period that could be said to "revive" its unlawful conduct, the period commences anew. (San Dieguito Union High School District, supra, PERB Decision No. 194, p. 10.) In a recent application of the rule to a challenge to the reasonableness of a local rule, PERB concluded that an actual controversy had not arisen

[9] The NLRA is codified at 29 U.S.C. section 151, et seq.

during the limitations period and upheld the dismissal of the complaint on lack of timeliness grounds. (County of Orange (2006) PERB Decision No. 1868-M, pp. 3-4 [challenge to super-majority, proof-of-support rule dismissed where charging party failed to submit list of support].)

Unilateral changes, though involving a breach of the duty to bargain, are not continuing violations. (San Dieguito Union High School District, supra, PERB Decision No. 194, pp. 9-10.) The limitations period is also not revived each time the new policy is enforced. (San Dieguito Union High School District, supra, PERB Decision No. 194, pp. 8-10; see also Riverside Unified School District (1985) PERB Decision No. 522.)[10]

Allan testified that following the 2004 interest arbitration Local 39 resolved never to engage in the impasse resolution procedures "again." Although this could be construed as the union's intention to change its policy with respect to interest arbitration, I decline to find that the unilateral change rule on continuing violations applies here because Allan's testimony with respect to her meetings with Ginsburg and Callahan do not establish that she took such an unequivocal position on behalf of Local 39. She testified that she told the City representatives that Local 39 would participate in interest arbitration on one condition: that there be an agreement in principle on the wage disparity issue going into the negotiations. Thus, if Local 39 had indeed intended to establish a new policy, it did not convey that point to the City more than six months prior to the filing of the charge.

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[10] Were the rule otherwise there would be no finality to an employer's decision to change policy. Also a specific rule for the commencement of the limitations period has been applied in unilateral change cases. The period commences when the charging party has "actual or constructive notice of the respondent's clear intent to implement the change [in policy], providing that nothing subsequent to that date evinces a wavering of that intent." (Regents of the University of California (1990) PERB Decision No. 826-H, pp. 7-8.)

I also find that Local 39's refusal to participate in the impasse resolution procedures was a continuing violation because, like the duty to bargain, participation in those procedures is a continuing obligation while the parties seek to reach agreement on a new contract. (See Regents of the University of California (1985) PERB Decision No. 520-H, p. 23.) And it continues into the future with respect to each new MOU negotiations. An actual, continuing controversy existed, or was at least revived in April 2006, when the City declared impasse and Local 39 refused once again to proceed into the impasse resolution procedures. (Cf. County of Orange, supra, PERB Decision No. 1868-M.) Significantly, both parties "agreed to disagree" on the correctness of Local 39's interpretation of the Charter, while they endeavored to complete the scheduled bargaining. As Boone stated in his February 6 letter to Roccanova, selection of the arbitration panel at that time would have been "premature" given the parties' willingness to negotiate. That letter, which arguably asserts in categorical terms that the provisions are not mandatory, is within the limitations period. The charge was timely filed.

Reasonableness of the Impasse Resolution Procedures

A. General Principles and Local 39's Contentions

The MMBA requires public agencies to meet and confer in good faith with employee organizations regarding "wages, hours, and other terms and conditions of employment. . . ." (Sec. 3505.) The meet-and-confer obligation requires that the parties "endeavor to reach agreement on matters within the scope of representation." (Sec. 3505.) The meet-and-confer process is intended 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. . . ." (Sec. 3500(a); see Claremont Police Officers Assn. v. City of Claremont (2006) 39 Cal.4th 623, 630 [47 Cal.Rptr.3d 69].)

The MMBA authorizes public agencies to "adopt reasonable rules and regulations for the administration of employer-employee relations," including "additional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment," and "any other matters that are necessary to carry out" state law. (Sec. 3507(a)(5).) It also "does not prescribe the manner in which an agreement between a local government and employee organization should be put into effect. . . ." (United Public Employees v. City and County of San Francisco, supra, 190 Cal.App.3d 419, 423.)

Where a local rule adopted by a public agency conflicts with the MMBA and its fundamental purposes, enforcement of such a rule will be denied. (International Brotherhood of Electrical Workers v. City of Gridley (1983) 34 Cal.3d 191, 196-206 [193 Cal.Rptr. 518].) The City of Gridley court noted that the scope of authority to supplement provisions of the statute must be "consistent with, and effectuate the declared purposes of, the statute as a whole." (Id. at p. 202, citation omitted.) There, a rule sanctioning an unlawful strike by decertifying the recognized union was found to be unreasonable. (Id. at pp. 199-206; see also Huntington Beach Police Officers' Assn. v. City of Huntington Beach (1976) 58 Cal.App.3d 492, 502-503 [129 Cal.Rptr. 893] [removal of a negotiable subject from the scope of representation]; Santa Clara County Counsel Attnys. Assn. v. Woodside (1994) 7 Cal.4th 525, 538-542 [28 Cal.Rptr.2d 617] [rejecting a local policy restricting the employees' right to sue to enforce the MMBA over issues of impasse].) The burden of proving unreasonableness is on the party challenging the rule. (City & County of San Francisco, supra, PERB Decision No. 1890-M, p. 7.)

Local 39 contends that interest arbitration conflicts with the MMBA's "intent that agreements be reached by bargaining, rather than being imposed by the unilateral declaration of one side of the bargaining process." Agreements should be the result of compromise and a

"reasonable accommodation of the needs of both parties." Unclear is whether Local 39 claims that interest arbitration is antithetical per se to the purposes of the MMBA. On the one hand, Local 39 asserts:

> Mandatory interest arbitration does not result in an agreement between the parties. The resulting conditions are imposed on both sides. The conditions imposed by the Board of Arbitration were proposed by one or the other side. This is not a case where the parties agreed in advance to abide by the decision of the Board of Arbitration. In this case there is no agreement to be bound by the decision of the Board of Arbitration.

At the same time, Local 39 contends that what also causes the Charter to conflict with the MMBA so as to be preempted is that the Charter, as interpreted by the City, "permits either side to declare an 'impasse' cutting off further negotiations and having a third party dictate wages, hours, and conditions of employment . . . [which] is not negotiating."[11] Apart from whether the procedures themselves, or their construction and application, result in unreasonableness, Local 39 contends they violate the MMBA by depriving a union of its right to strike.

As noted above (fn. 7, *ante*), Local 39 filed a bad faith bargaining unfair practice charge against the City arising from these negotiations. The charge was dismissed at the investigation stage, and the board agent's dismissal was upheld. (City & County of San Francisco, supra, PERB Decision No. 1890-M.) One of Local 39's arguments was addressed in the Board's decision. Against the argument that the impasse resolution procedures constitute a "contract of adhesion" and are facially unreasonable because they "insulate the

[11] Local 39 contends that the Charter's interest arbitration procedures are preempted by the MMBA. Its argument is that preemption results from irreconcilable conflict, not the Legislature's intent to occupy the field of impasse resolution procedures to the exclusion of all local rulemaking. (See Bishop v. City of San Jose (1969) 1 Cal.3d 56, 62 [81 Cal.Rptr. 465]; Los Angeles County Firefighters Local 1014 v. City of Monrovia (1972) 24 Cal.App.3d 289, 295 [101 Cal.Rptr. 78].)

[City] from any Union proposal which it unilaterally deems to be objectionable," PERB held that the Charter provisions are reasonable on their face. (Id. at pp. 6, 9.) Local 39 based its argument on the claim that the provisions are drafted in such a way as to allow the City to declare impasse in bad faith or when no legitimate impasse exists. (Id. at p. 6.) Citing references in the Charter to the parties' obligation to meet and confer in good faith, PERB concluded that its provisions must be read so as to "restrict the use of the impasse procedure to situations where disputed issues remain unresolved after good faith bargaining." (Id. at p. 9.) PERB also held that the procedures were not invalid as applied because Local 39's proffered evidence failed to demonstrate bad faith bargaining. (Id. at pp. 6, 9-10.)

Because the issue of facial unreasonableness based on the ability to prematurely declare impasse has been decided, I will only address Local 39's other two arguments here.

B. Accommodation of the Right to Meet and Confer

In County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn. (1985) 38 Cal.3d 564 [214 Cal.Rptr. 424], cert. den. (1985) 474 U.S. 995 (County Sanitation), our supreme court made the following observation:

> [T]he MMBA contains no clear mechanism for resolving disputes. It merely provides that if the parties fail to reach an agreement, they *may* agree to appoint a mediator or use other impasse resolution procedures agreed upon by the parties. (Id. at p. 572, fn. 14, original italics.)

Expanding on the point, County Sanitation made a second, more general observation, quoting former Justice Grodin's analysis of the MMBA:

> The entire subject of strikes and impasse resolution procedures [under the Act] is avoided, except for the declaration that the parties may elect to engage a mediator. What emerges is a rather general legislative blessing for collective bargaining at the local governmental level without clear delineation of policy or means for its implementation. The courts have, on the whole, done an admirable job of exegesis, but their decisions cannot help but reflect the underlying weakness of the text. (Id. at p. 572, fn. 15,

> citing Grodin, Public Employees Bargaining in California: The Meyers-Milias-Brown Act in the Courts (1972) 23 Hastings L.J. 719, 761.)

The California Supreme Court recently struck down statewide legislation mandating police and firefighter interest arbitration for county governments on grounds that it violated two provisions of the state constitution. In doing so however, the court acknowledged that public entities are permitted to voluntarily establish provisions for interest arbitration. (County of Riverside v. Superior Court (2003) 30 Cal.4th 278, 284 [132 Cal.Rptr.2d 713] (County of Riverside); see also sec, 3548.5; cf. Bagley v. City of Manhattan Beach (1976) 18 Cal.3d 22, 27, fn. 1 [132 Cal.Rptr. 668] [general-law cities prohibited from delegating wage setting].) A number of charter cities in California have adopted interest arbitration. (See Zerger, et al., California Public Sector Labor Relations (Matthew Bender 2006) p. 12-19, fn. 3; see also Lab. Code, sec. 1164 [interest arbitration enacted in 2002 under Agricultural Labor Relations Act].) The Bagley court observed in 1976 that "[p]robably no issue in recent years has been presented to the Legislature more frequently than proposed arbitration of public employee salaries . . . ." (Bagley v. City of Manhattan Beach, supra, 18 Cal.3d at p. 26.)

As noted, County Sanitation, supra, 38 Cal.3d 564, observed that the Legislature provided little guidance on how bargaining impasses are to be resolved, while noting the statute's express language authorizing parties to agree to mediation and "other" impasse resolution procedures. (Id. at p. 572; see secs. 3502.2, 3505.4.) But County Sanitation, and County of Riverside's comment of similar note, in no way express an intent that public agencies are prohibited from adopting mandatory impasse resolution procedures. (Sec. 3507(a)(5) ["Additional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment."]; sec. 3505 [adequate time should be allocated "for resolution of impasses where specific procedures for such resolution are contained in local

rule, regulation or ordinance"].) Indeed, offering specific evidence to the contrary, section 3505.4 reveals that the Legislature contemplated interest arbitration, either as a result of contractual agreement or local ordinance. It provides, in pertinent part:

> If after meeting and conferring in good faith, an impasse has been reached between the public agency and the recognized employee organization, and *impasse procedures, where applicable, have been exhausted, a public agency that is not required to proceed to interest arbitration may implement its last, best, and final offer*, but shall not implement a memorandum of understanding. . . . (Italics added.)[12]

Nor does the fact that Local 39 historically opposed collective bargaining and interest arbitration by itself render the local rule unreasonable. Under Seal Beach, it is contemplated that local rules will be implemented through the electoral process (and thus sometimes over the objection of unions), subject to judicial review for unreasonableness. Implicit in Local 39's argument is the notion that the MMBA embodies an anti-majoritarian principle whose imperative is heightened in the context of the City's many small unions. However, I find nothing inherent in the purposes of the MMBA or labor law more generally that forbids imposition of interest arbitration over the opposition of such unions in charter cities. (See Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507]; San Francisco Fire Fighters v. City and County of San Francisco (1977) 68 Cal.App.3d 896, 902-903 [137 Cal.Rptr. 607]; Hess Collection Winery v. Agricultural Labor Relations Bd. (2006) 140 Cal.App.4th 1584, 1597-1601 [45 Cal.Rptr.3d 609].) To the extent that Local 39 opposed interest arbitration in lieu of the salary survey process, its argument is diminished by the fact that interest arbitration includes some of the same economic factors as the salary survey process, holds the prospect of leveling the bargaining field for small unions, allows the union a

[12] But see Bagley v. City of Manhattan Beach, supra, 18 Cal.3d at pp. 25-26, 27, fn.1 (questioning statutory support for interest arbitration within the MMBA).

direct role in choosing the decisionmakers, and follows full collective bargaining over a wider range of economic issues than under the previous process. As indicated in this case, it is commonly known that many unions believe interest arbitration to serve their interests.[13]

The language of the statute cited by Local 39, requiring parties to meet and confer in good faith for the purpose of reaching a contract agreement, is also not inconsistent with interest arbitration. The role of impasse resolution procedures in general is well established in California public sector labor law. They are intended to produce resolution in bargaining disputes *after* good faith negotiations fail to achieve their intended purpose so as to prevent disruption of important governmental services to the public. (See Modesto City Schools (1983) PERB Decision No. 291, pp. 34-36, overruled on other grounds in Compton Unified School District (1987) PERB Order No. IR-50; City & County of San Francisco, supra, PERB Decision No. 1890-M, p. 9; San Diego Teachers Assn. v. Superior Court (1979) 24 Cal.3d 1, 8 [154 Cal.Rptr. 893].) Impasse resolution procedures are in some sense a sine qua non feature distinguishing the public sector from the private sector. (See Modesto City Schools, supra, PERB Decision No. 291, pp. 34-36.) The value of interest arbitration in producing reasonable contract terms while avoiding strikes cannot be gainsaid. (Sec. 3500(a) [MMBA's purpose to "promote the improvement of personnel management and employer-employee relations"].)

C. Forfeiture of the Right To Strike

Forfeiture of the right to strike in exchange for interest arbitration is the second prong of Local 39's attack on the local rule. Based on the lack of a common law prohibition of the right to strike, it has been held that there is in effect a qualified right of public employees to

[13] Current proposed legislation in Congress to amend the NLRA, known as the Employee Free Choice Act, includes mediation and arbitration for first bargaining contracts if the parties fail to reach agreement within certain time periods. It has been noted that the bill (H.R. 800) is supported by unions and opposed by business groups. (Lab. Relations Rptr. (Bur. of Nat. Affairs, Apr. 2, 2007) vol. 181, pp. 292-293.)

strike under the MMBA. (County Sanitation, supra, 38 Cal.3d at pp. 572-573, 585; see also Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen (1960) 54 Cal.2d 684, 689 [8 Cal.Rptr. 1].) County Sanitation rejected the common-law prohibition theory in part because of the absence of empirical evidence that public employee strikes resulted in employer capitulation to unreasonable demands, and because a number of services provided by public employees are not "essential" functions. (County Sanitation, supra, 38 Cal.3d at pp. 577-579.) Whether or not such strikes are frequent or effective, as a practical matter unions do exercise leverage in public sector bargaining as a result of the threat of striking.

The courts have never held that MMBA impasse resolution procedures effectively eliminating this right to strike are reasonable local rules, as the issue has not been presented in this fashion. And true, unlike the interest arbitration process, the impasse resolution procedures under the Educational Employment Relations Act (EERA)[14] and Higher Education Employer-Employee Relations Act (HEERA)[15] do not culminate in a binding decision on contract terms, thus enabling the union to exercise its qualified option to strike following exhaustion of the impasse procedures. (Secs. 3548-3548.8, 3589-3594; see Compton Unified School District (1987) PERB Order No. IR-50.)[16] Further, the statement in County of Riverside, supra, 30 Cal.4th 278, that public agencies may voluntarily adopt interest arbitration

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[14] The EERA is codified at section 3540, et seq.

[15] The HEERA is codified at section 3560 et seq.

[16] The Ralph C. Dills Act (codified at sec. 3512 et seq.) (Dills Act) contemplates that PERB will make impasse determinations, but no additional procedures are prescribed. If PERB appoints a mediator, the mediator will report to PERB when mediation efforts have been exhausted and impasse exists, setting the stage for the State's implementation of its last, best and final offer.

is only dicta as to the issue here. That said, as Local 39 acknowledges, there is a "strong public policy in California favoring peaceful resolution of employment disputes by means of arbitration." (Fire Fighters Union v. City of Vallejo, supra, 12 Cal.3d 608, 622.) In 2003, the Legislature amended the statewide interest arbitration statute for police and firefighters (Code of Civ. Proc., sec. 1299 et seq.) in the wake of County of Riverside to preserve use of the procedure as a means of impasse resolution. (Stats. 2003, ch. 877; see Code of Civ. Proc., sec. 1299.7, subd. (c).) Charter cities continue to be required to have interest arbitration for police and firefighters, if they did not already have such provisions. (Code of Civ. Proc., sec. 1299.9, subd. (a).) And while binding grievance arbitration is not quasi-legislative like interest arbitration, it has long been recognized as a means of resolving the meaning of contract terms during the life of the contract through a form of "continuous bargaining," and thus a mechanism promoting labor peace in a manner equitable to both sides. (United Steelworkers of America v. Enterprise Wheel & Car Corp. (1960) 363 U.S. 593, 596 [46 LRRM 2423]; United Steelworkers of America v. Warrior & Gulf Navigation Co. (1960) 363 U.S. 574, 581-582 [46 LRRM 2416].)[17] The Legislature has placed a premium over the years on labor peace in the public sector, and labor's "sacrifice" here is tempered by its potential to achieve contract terms not even ensured by striking.

I conclude that mandatory binding interest arbitration does not conflict with the MMBA, its meet-and-confer obligation or its qualified right to strike, and is therefore not unreasonable. (See also City & County of San Francisco, supra, PERB Decision No. 1890-M [premature-declaration-of-impasse argument rejected].)

[17] The quasi-legislative characterization has arisen in the more limited context of unlawful delegation of powers. (See, e.g., Bagley v. City of Manhattan Beach, supra, 18 Cal.3d 22; County of Riverside, supra, 30 Cal.4th 278.)

Interest Arbitration as Mandatory or Permissive

Local 39 reads the language of the impasse resolution procedures so as to preserve a union's option to strike rather than be bound by an interest arbitration award; hence, interest arbitration is not mandatory. Local 39 reasons that Proposition F resulted in maintenance of the right to strike, as evidenced by the following language of A8.409-4(a):

> *[P]rovided, however,* that the arbitration procedure set forth in this part shall not be available to any employee organization that engages in a strike *unless the parties mutually agree to engage in arbitration* under this section. Should any employee organization engage in a strike either during or after the completion of negotiations and impasse procedures, *the arbitration procedures shall cease immediately and no further impasse resolution procedures shall be required.* (Italics added.)

Local 39 contrasts the language under A8.409-4(a), the provisions introducing the arbitration panel but containing the "provided however" language, with section A8.409-4(d), the provisions on submission of disputes to the arbitration panel, which are stated in language that is mandatory throughout.[18]

The basic canon of statutory interpretation is that the intent of the legislating body is to be effectuated. (Long Beach Police Officers Assn. v. City of Long Beach (1988) 46 Cal.3d 736, 741 [250 Cal.Rptr. 869].) Ascertaining legislative intent begins with examination of the

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[18] Section A8.409-4(d) provides:

> In the event no agreement is reached prior to the conclusion of the arbitration hearings, the board *shall* direct each of the parties to submit . . . a last offer of settlement of each of the remaining issues in the dispute. The board *shall* decide each issue by majority vote. . . . In addition, the board *shall* issue written findings on each and every one of the above [economic] factors as they may be applicable to each and every issue determined in the award. Compliance with the above provisions *shall* be mandatory. (Italics added.)

See also section A8.409-4(b).

words of the statute. (Ibid.) Statutory language is first to be given its usual and ordinary meaning. (Halbert's Lumber, Inc. v. Lucky Stores, Inc. (1992) 6 Cal.App.4th 1233, 1240 [8 Cal.Rptr.2d 298].) If possible, significance is given to every word, phrase, sentence and part of a statute. (Harroman Co. v. Town of Tiburon (1991) 235 Cal.App.3d 388, 394-395 [1Cal.Rptr.2d 72].) Particular language must be construed with reference to the entire statutory scheme of which it is a part. (Select Base Materials v. Board of Equal. (1959) 51 Cal.2d 640, 645 [196 Cal.Rptr. 38].) To resolve ambiguity, reference may be made to the statute's legislative history and statutory context. (Long Beach Police Officers Assn. v. City of Long Beach, supra, 46 Cal.3d at p. 743.) In construing an initiative measure adopted by the electorate, the intent of the framers of the measure and the situation intended to be remedied, as well as the ballot arguments submitted to the electorate explaining the measure, may be considered. (Carter v. Seaboard Finance Co. (1949) 33 Cal.2d 564, 579, 582 [203 P.2d 758]; In re Quinn (1973) 35 Cal.App.3d 473, 483 [110 Cal.Rptr. 881].)

Section A8.409-4(a) states that unresolved disputes "shall" be submitted to binding arbitration. The use of "shall" generally connotes a mandatory obligation. (Cole v. Antelope Valley Union High School Dist. (1996) 47 Cal.App.4th 1505, 1511-1513 [55 Cal.Rptr.2d 443].)

The language of section A8.409-4(a) cited by Local 39, reasonably read in the context of the entire ordinance of which it is a part, provides that interest arbitration is forfeited by any union engaging in a strike. Stated differently, the penalty for striking is the union's inability to proceed to interest arbitration, unless the City chooses to ignore the strike. The language serves to deter pre- as well as post-impasse-resolution-procedures strikes. Local 39's focus on the language "unless the parties mutually agree to engage in arbitration" removes a selected phrase from the context of its surrounding language. The cited language

does not reasonably suggest that interest arbitration is an "alternative" approach to impasse resolution. Such a construction would render the provisions largely ineffective. (Cole v. Antelope Valley Union High School Dist., supra, 47 Cal.App.4th at pp. 1512-1513, citing Hogya v. Superior Court (1977) 75 Cal.App.3d 122, 134 [142 Cal.Rptr. 325]; Frances v. Superior Court (1935) 3 Cal.2d 19, 28 [43 P.2d 300]; Posner v. Grunwald-Marx, Inc. (1961) 56 Cal.2d 169, 180 [14 Cal.Rptr. 297].)

Furthermore, the City's view of the intent of the Charter language, as explained by Holtzman, that interest arbitration is a quid quo pro for forfeiture of the right to strike, was not contradicted by any extrinsic evidence from Local 39. Isen, though not a disinterested witness, confirmed this understanding from Local 21's perspective, one of the unions originally seeking interest arbitration. The City's understanding comports with the notion that a contractual no-strike clause is the quid pro quo for binding grievance arbitration during the life of the contract and that arbitration exists in tandem with the continuing duty to bargain in regard to filling in the meaning of disputed contract terms. (Boys Market Inc. v. Retail Clerk's Union (1970) 398 U.S. 235, 247-248 [74 LRRM 2257]; see also Posner v. Grunwald-Marx, Inc., supra, 56 Cal.2d at pp. 183-185; United Steelworkers of America v. Enterprise Wheel & Car Corp., supra, 363 U.S. 593, 596; United Steelworkers of America v. Warrior & Gulf Navigation Co., supra, 363 U.S. 574, 581-582.) More important perhaps than the subjective understanding of the drafters of initiatives is the language of the Charter itself and the ballot arguments submitted to the electorate. (See Mazzola v. City and County of San Francisco (1980) 112 Cal.App.3d 141, 152 [169 Cal.Rptr. 127].) As even Local 39 acknowledges, section A8.409 ("Declaration of Policy") declares that strikes by City employees are not in the public interest. Proposition F emphasized this point, adding the language authorizing the termination of employees who engage in a strike. (Id.; see

Fire Fighters Union v. City of Vallejo, supra, 12 Cal.3d at pp. 613-614, fn. 3.) The ballot arguments for Proposition F specifically noted that the right to strike was being eliminated by the initiative. The legislative history confirms that the right to proceed to interest arbitration (or benefit from any award) is forfeited by the union that engages in a strike, not that interest arbitration and striking are options available to the union from the outset.[19]

I find that interest arbitration under the Charter is mandatory for Local 39.

The City's Declaration of Impasse

A. Defense of Premature Declaration of Impasse

Local 39, both here and in its charge against the City, argued that the City Charter, as interpreted and applied by the City, sacrifices the union's bargaining rights because the City can prematurely declare impasse. In fact, Local 39 argues that the Charter permits the City to declare impasse *at any time*, triggering without more the impasse resolution procedures. Local 39 argues this theory as an alternative to its claim, discussed below, that the Charter must be read as requiring that impasse be legitimate, not merely based on the arbitrary or subjective judgment of one party, in order for the imposition of interest arbitration to be reasonable. As noted above, PERB rejected the argument that the procedures were inconsistent with the MMBA for this reason, on their face and as applied. PERB found that the Charter contains a duty to meet and confer in good faith, which impliedly requires that a declaration of impasse be made in good faith. (City & County of San Francisco, supra, PERB Decision No. 1890-M, p. 9.)

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[19] The impasse resolution procedures provide the City with the option to impose its last, best and final offer and terminate striking employees if the union engages in a strike. Local 39 suggests that the legality of these provisions is questionable in light of County Sanitation, supra, 38 Cal.3d 564. I need not address whether the Charter's strike penalty provisions constitute an unreasonable local rule because that issue is not before me. The legislative intent of the electorate is the salient point derived from this evidence.

It is true that the Charter does not provide a definition of impasse. It only states that the impasse resolution procedures are triggered when one party declares impasse in the negotiations. However, since impasse is a term of art in labor relations, because the only extrinsic evidence in the record is that from Holtzman, who testified its traditional meaning in labor relations was the meaning intended by the drafters, and because it makes logical sense, I find that impasse has the meaning ascribed to it by Holtzman. If the electorate had intended to allow an anomalous meaning (such that either party is free to declare impasse regardless of whether it meets the traditional standard of a bargaining stalemate), it would have indicated so in clear language. There is nothing in the record to indicate that was the case. Local 39 does not unequivocally reject this intended meaning, as it argues that under this definition, the parties in fact had not reached impasse. This also conforms to the reading given the term by PERB in its recent decision. (City and County of San Francisco, supra, PERB Decision No. 1890-M, p. 9.)

That said, nothing in City & County of San Francisco, supra, PERB Decision No. 1890-M, specifically prevents Local 39 from raising bad faith declaration of impasse and/or lack of impasse in the traditional labor relations sense as a defense to the complaint here. Though the evidentiary theories in the two cases parallel each other, a narrower issue is presented here, and a factual record of the matters previously alleged by Local 39 has been fully developed after a formal hearing. (See State of California (Department of Industrial Relations) (1998) PERB Decision No. 1299-S, pp. 8-14.) I am called upon to decide whether such facts raise a valid defense to the City's charge of refusal to participate in the impasse resolution procedures while giving full effect to the Board's rationale.

It is useful first to observe that parties in negotiations often disagree whether they have

arrived at a bargaining impasse. This is true both in the private sector and the public sector. Under EERA, HEERA and the Dills Act, PERB plays a gatekeeper role in determining whether impasse procedures may be invoked. This gatekeeper function is a substantial deterrent to premature and arbitrary declarations of impasse. (See Regents of the University of California, supra, PERB Decision No. 520-H (hereafter Regents).) No such gatekeeper function exists under the MMBA or the Charter.

In Regents, supra, PERB Decision No. 520-H, PERB addressed the issue whether a premature declaration of impasse could constitute a per se failure to meet and confer in good faith. PERB affirmed the administrative law judge's findings that under the objective standard he applied the parties were at impasse and that the party that sought to proceed to the impasse procedures was entitled to suspend further negotiations because it believed in good faith that impasse existed. (Id. at pp. 14-18.) PERB agreed that the record in the case failed to demonstrate that the union's declaration of impasse was made in bad faith. (Id.) PERB also held that (a good faith) declaration of impasse, which is in fact unfounded, should not be deemed a per se unfair practice. (Id. at pp. 23-24.) Nonetheless, both parties at least in theory are required to continue bargaining until a legitimate impasse occurs. (Id. at pp. 28-29, dis. opn. Member Hesse.) Regents did not reject the theory that a bad faith declaration of impasse could constitute a per se violation, though it was not required to reach that issue under the facts presented. (Id. at pp. 14, 23-24.) City & County of San Francisco, supra, PERB Decision No. 1890-M, follows Regents in finding that the assertion that one party is able to prematurely declare impasse does not render the local rule at issue here unreasonable on its face. But it did not address whether any remedy existed for a party that declared impasse prematurely, in bad faith or otherwise.

In Regents, PERB noted and implicitly endorsed the administrative law judge's treatment of the premature declaration as evidence of bad faith in terms of the surface bargaining allegation. (Regents, supra, PERB Decision No. 520-H, p. 14.) In this context, PERB concluded that a party must be privileged to claim impasse (rightly or wrongly) and will not be found to have committed a per se violation of the duty to bargain as a result because such a declaration at worst only momentarily suspends bargaining. (Id. at pp. 23-24; see also Public Employees Assn. v. Board of Supervisors (1985) 167 Cal.App.3d 797, 807 [213 Cal.Rptr. 491] [invoking impasse is protected activity]; Campbell Municipal Employees Assn. v. City of Campbell (1982) 131 Cal.App.3d 416, 422 [182 Cal.Rptr. 461] [same as to impasse resolution procedures].) That conclusion does arise in a setting where a neutral third-party procedure overseeing the impasse determination provides a forum for the party opposing the impasse declaration.

Regents aside, Local 39 is correct in its point that good faith bargaining is a precondition for the parties reaching a bona fide impasse. (City & County of San Francisco, supra, PERB Decision No. 1890-M, p. 9; see also Seattle First National Bank v. NLRB (9th Cir. 1983) 638 F.2d 1221, 1227 [106 LRRM 2621]; NLRB Pacific Wheel Grinding Co., Inc. (9th Cir. 1978) 572 F.2d 1343, 1349 [98 LRRM 2246]; NLRB v. Big Three Industries, Inc. (5th Cir. 1974) 497 F.2d 43, 48 [86 LRRM 3031].)[20]

Resolution of the issue here must take into consideration that no third-party determination exists under the City Charter or under the MMBA generally. There is no prompt administrative procedure or "remedy" directing or compelling the resisting party to move into the impasse resolution procedures. A party could seek to compel interest arbitration by filing a

[20] Guidance from cases of under the NLRA, where applicable, is appropriate under the MMBA. (Fire Fighters Union v. City of Vallejo, supra, 12 Cal.3d at p. 616; McPherson v. Public Employment Relations Bd. (1987) 189 Cal.App.3d 293, 306 [234 Cal.Rptr. 428].)

petition pursuant to the Code of Civil Procedure. This record does not indicate why the City failed in that attempt, although the defense of PERB's initial exclusive jurisdiction is noted in PERB's recent decision as at least one basis for that outcome. (City & County of San Francisco, supra, PERB Decision No. 1890-M, pp. 3-4, fn. 4 [noting the matter is now pending in the court of appeal]; Financial Institution Employees, Local 1182 v. NLRB (9th Cir. 1984) 738 F.2d 1038, 1043 [117 LRRM 2139] [few issues in industrial relations better suited to the expertise of the labor board than the determination of impasse]; see also Fire Fighters Union v. City of Vallejo, supra, 12 Cal.3d at p. 611, fn. 1.) A party could also seek PERB's injunctive relief, though the outcome of that process is problematic, and PERB denied the City's request in this case as well. (But see Public Employment Relations Bd. v. Modesto City Schools (1982) 136 Cal.App.3d 881 [186 Cal.Rptr. 634].)

Added to the prospect of lengthy delay at the expense of expediting the conclusion of negotiations is the fact that under the MMBA, as well as the other acts administered by PERB, there appears to be no precedent specifically preventing a party objecting to impasse declaration (bad faith or otherwise) from raising what amounts to a technical refusal to proceed to the impasse resolution procedures. Such a claim would have to be adjudicated ultimately in the context of an unfair practice complaint like the one here.

On the other hand, the problem for the party protesting a premature impasse declaration under the City Charter, as urged by Local 39 here, is that an unwarranted declaration prior to completion of face-to-face negotiations invokes procedures intended not merely to assist the parties in reaching agreement but to conclude all issues in the negotiations through a decision

binding on the parties.[21]

With these competing interests in mind, I find by parity of reasoning that if a party is privileged to claim impasse, the other party must be privileged to dispute that claim. This is particularly true where it is claimed that the declaration was made in bad faith. Were it otherwise, the offending party could skirt its legal obligation to bargain fully and in good faith. And if the Charter must be read as only engaging the impasse resolution procedures after good faith bargaining, compelling those procedures prematurely, in bad faith, would conflict with the local rule itself. (City & County of San Francisco, supra, PERB Decision No. 1890-M, p. 9.)

The more debatable issue is whether a failure to reach impasse in the absence of a bad faith claim should also be deemed a defense to refusal to participate in the impasse resolution procedures. Given the absence of expedited procedures for neutral impasse determination, it would be arbitrary to find that the party opposing the impasse declaration may not also raise the technical defense when the impasse is only unfounded under an objective standard. (Public Employment Relations Bd. v. Modesto City Schools, supra, 136 Cal.App.3d at pp. 889-902 [refusal to bargain not predicated on bad faith showing, where impasse resolution procedures have been exhausted but the parties disagree whether a factfinding report resulted in changed circumstances that trigger resumption of the duty to negotiate]; Trustees of the California State University (1999) PERB Decision No. 1333-H [parties do not determine existence of impasse under the HEERA]; NLRB v. Andrew Jergens Co, Inc. (9th Cir. 1949) 170 F.2d 130 [24 LRRM 2096], cert. den. (1949) 338 U.S. 827 [24 LRRM 2561] [legitimate

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[21] Under the NLRA, once legitimate impasse is reached, either party may refuse to negotiate further, the employer may implement its last, best and final offer, and the union may resort to a strike. (See Dallas General Drivers v. NLRB (D.C. Cir. 1966) 355 F.2d 842 [61 LRRM 2065]; Fine Organics, Inc. (1974) 214 NLRB 158 (88 LRRM 1130].)

impasse is a defense to unilateral implementation of final offer terms]; Cuyamaca Meats Inc. v. San Diego and Imperial Counties Butchers' and Food Employers' Pension Trust Fund (9th Cir. 1987) 827 F.2d 491, 496 [126 LRRM 2193] [same]; Dallas General Drivers v. NLRB, supra, 355 F.2d at pp. 844-845 [same].) In some cases, the rule has been stated that a party's good faith is simply one factor in determining whether a true impasse has occurred. (See Regents, supra, PERB Decision No. 520-H, p. 19; Taft Broadcasting Co. (1967) 163 NLRB 475, 478 [64 LRRM 1386], rev. den. *sub nom.* American Federation of Television & Radio Artists v. NLRB (D.C. Cir. 1968) 395 F.2d 622 [67 LRRM 3032].) Furthermore, the imposition on the party seeking to declare impasse resulting from exhaustively exploring all proposals is relatively minor, and such a rule will encourage the parties to self-police impasse determination in the absence of a third-party neutral. (See Walnut Creek Honda Associates 2, Inc. v. NLRB (9th Cir. 1996) 89 F.3d 645, 649 [152 LRRM 2847] [impasse is often a "temporary deadlock or hiatus in negotiations"]; Public Employment Relations Bd. v. Modesto City Schools, supra, 136 Cal.App.3d at p. 889 [same].)

I find that failure to reach a bona fide impasse under the circumstances of this case is a defense to a party's alleged refusal to participate in the impasse resolution procedures.

B. The City's Impasse Declaration

Local 39 contends that if interest arbitration is mandatory the meaning of impasse in the Charter must be the meaning ascribed to it by traditional labor law, but that the City's interpretation of the term in this case belies that in practice. As explained above, I have found that the traditional meaning of impasse is the meaning incorporated in the Charter. It should be noted that PERB's conclusion that impasse must be reached after good faith bargaining also serves to confirm the reasonableness of the requirement of mandatory interest arbitration.

Local 39's contends that the City's conduct at the table flouts the traditional meaning of impasse as demonstrated by the fact that the Isen declared impasse on April 7 without hearing Local 39's presentation of its proposal, despite Local 39's repeated assurances that it had further movement to make, and in the face of unfulfilled information requests.

The City responds that impasse had been reached over the course of the 11 bargaining sessions and after the exchange of more than 45 proposals and several package proposals. By April 7 there were tentative agreements on sixteen proposals, eleven of which had been made initially by Local 39. As of that session, the parties were still far apart on their major wage proposals, a difference of 5.5 percent over three years. There had been no movement on the three-year wage proposals by either side over the last two bargaining sessions.

PERB has defined impasse in the following terms: "[I]mpasse exists where the parties have considered each other's proposals and counterproposals, attempted to narrow the gap of disagreement and have, nonetheless, reached a point in their negotiations where continued discussion would be futile." (Mt. San Antonio Community College District (1981) PERB Decision No. Ad-124, p. 5.) PERB's analysis has focused on a number of objective factors, including the number and length of negotiating sessions, the extent to which the parties have made and discussed counter-proposals to each other, the number of tentative agreements, and the number of unresolved issues. (Cal. Code of Regs., tit. 8, sec. 32793(c); but see Regents, supra, PERB Decision No. 520-H, p. 19 [good faith negotiating considered].)

Similarly under the NLRA, impasse has been defined as a "state of facts in which the parties, despite the best of faith, are simply deadlocked." (Walnut Creek Honda Associates 2, Inc. v. NLRB, supra, 89 F.3d at p. 649.) The National Labor Relations Board considers such matters as the good faith of the parties, the number of meetings between the parties, the length of those meetings, the period of time that has transpired between the start of negotiations and

their breaking off, the importance of the issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations. (Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co, Inc. (1987) 484 U.S. 539, 544 [127 LRRM 2657]; Taft Broadcasting Co., supra, 163 NLRB 475, 478.)

I find in this case that by the final bargaining session there was substantial disagreement on the core economic issues, centered on the competing three-year wage proposals. Allan asserted to Ginsburg and Callahan several months before negotiations had formally commenced, that a wage increase was Local 39's primary objective in the bargaining. She quantified the goal then, giving the City bargaining representatives an opportunity to resolve that issue internally.

The record shows that the parties had considered each other's proposals and attempted to narrow their disagreements. A substantial number of tentative agreements had been reached by the final session. (Mt. San Antonio Community College District, supra, PERB Decision No. Ad-124.) Although the record suggests that tentative agreements had yet to be reached on a number of non-economic subjects, even Local 39 points to its potential movement on wages as the key to further progress. Moreover, the parties were in the package-proposal mode of bargaining at this time, and the City had rejected four such proposals from Local 39. The concessions Local 39 were prepared to make on the multiple-license differential, parking benefits, and out-of-class compensation are not quantified in the record and fail to establish that they would have constituted movement on the economic issues sufficient to prompt further concessions by the City. (See Regents, supra, PERB Decision No. 520-H, pp. 19-20 [impasse reached based on significant differences on wages, which are not closing].)

I do acknowledge the evidence that Isen gave appearances of being dismissive toward Local 39's bargaining team, but I am not convinced this demonstrates sufficient bad faith to

overcome the record of the parties' efforts to narrow their differences and the remaining distance between their final economic proposals. After April 7, the City continued its efforts to complete the information exchange and informed Local 39 that it would return to the table if there were "movement on the core economic issues" by the union.

Although the parties were not in agreement on April 7 that they were at impasse (a factor I accord lesser weight), the subsequent exchanges fail to demonstrate that the parties were capable of moving toward closure of the outstanding issues without the assistance of a mediator. Hence, the fact that Local 39 still had room to move on economic issues, that the information request issues were not fully resolved, and that the City's bargaining team did not appear fully engaged at times, fails to establish that impasse had not in fact been reached, or that the City declared impasse in bad faith. (Regents, supra, PERB Decision No. 520-H, p. 17, citing NLRB v. Tomco Communications (9th Cir. 1978) 567 F.2d 871, 881 [97 LRRM 2660] [wages and related benefits were economic issues looming so large as to cause stalemate]; American Federation of Television & Radio Artists v. NLRB, supra, 395 F.2d 622, 627, fn. 13 [same].)

I find that Local 39 was not excused from participating in the impasse resolution procedures based on the City's conduct at the bargaining table or its alleged premature declaration of impasse.

For all of the reasons set forth above, I find that Local 39 has violated section 3509(b) and PERB Regulation 32604(d) by refusing to name a representative to an interest arbitration panel and by refusing to participate in the Charter's impasse resolution procedures.

REMEDY

Pursuant to section 3509(a), the PERB under section 3541.3(i) is empowered to:

> . . . 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.

Local 39 has violated section 3509(b) and PERB Regulation 32604(d) by refusing to name a representative to the interest arbitration panel and by refusing to participate in the impasse resolution procedures set forth in the City Charter. It is appropriate to order Local 39 to cease and desist from its unlawful conduct. (Rio Hondo Community College District (1983) PERB Decision No. 292, pp. 30-33; Mt. San Antonio Community College Dist. v. Public Employment Relations Bd. (1989) 210 Cal.App.3d 178, 189 [258 Cal.Rptr. 302].)

It is also the ordinary remedy in PERB cases that the party found to have committed an unfair practice be ordered to post a notice incorporating the terms of the order. Such an order ordinarily is granted to provide bargaining unit employees with a notice, signed by an authorized agent that the offending party has acted unlawfully, is being required to cease and desist from its unlawful activity, and will comply with the order. Thus, it is appropriate to order Local 39 to post a notice incorporating the terms of the order herein at its offices, employee organization bulletin boards, and all places where notices are customarily placed, and additionally to distribute copies of the notice to all employees in the bargaining unit through the City's internal distribution system if that is the customary method of distributing union literature. Posting of such notice effectuates the purposes of the MMBA that employees be informed of the resolution of this matter and Local 39's readiness to comply with the ordered remedy.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it has been found that Stationary Engineers Local 39 (Local 39) violated the Meyers-Milias-Brown Act (Act) by refusing to name a representative to an interest arbitration panel

and by refusing to participate in the impasse resolution procedures contained in the City Charter of the City and County of San Francisco (City), in violation of Government Code section 3509, subdivision (b), and PERB Regulation 32604(d) (Cal. Code of Regs, tit. 8, sec. 32604(d)).

Pursuant to section 3509, subdivision (a), of the Government Code, it hereby is ORDERED that Local 39, and its representatives, shall:

A. CEASE AND DESIST FROM:

1. Refusing to name a representative to an interest arbitration panel.

2. Refusing to participate in the impasse resolution procedures contained in the City Charter.

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

1. Within ten (10) workdays of the service of a final decision in this matter, post at its offices, employee organization bulletin boards, and all places where notices are customarily placed, copies of the Notice attached hereto as an Appendix, and additionally to distribute copies of the notice to all employees in the bargaining unit through the City's internal distribution system if that is the customary method of distributing union literature. The Notice must be signed by an authorized agent of Local 39, indicating that Local 39 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 the Notice is not reduced in size, altered, defaced or covered with any other material.

2. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the Sacramento Regional Director of the Public Employment Relations Board (PERB or Board) in accord with the director's instructions.

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 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 95814-4174
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 of Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Cal. Code of Regs., tit. 8, secs. 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(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 of Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code of Regs., tit. 8, secs. 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 of Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Donn Ginoza
Administrative Law Judge