STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1021, Charging Party, v. CITY & COUNTY OF SAN FRANCISCO, Respondent.	Case No. SF-CE-981-M PERB Decision No. 2536-M June 30, 2017

Appearances: Dennis J. Herrera and Elizabeth Salveson, Attorneys, for City and County of San Francisco; Weinberg, Roger & Rosenfeld by Kerianne R. Steele, Attorney, for Service Employees International Union Local 1021.

Before Gregersen, Chair; Winslow and Banks, Members.

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions to a proposed decision (attached) by a PERB administrative law judge (ALJ) concluding that the City & County of San Francisco (City) violated the Meyers-Milias-Brown Act (MMBA)[1] by maintaining and enforcing a local rule that banned sympathy strikes. The complaint alleges that on July 16, 2012, the City enforced a local rule contained in the City Charter prohibiting strikes by City employees and that such conduct violated sections 3503, 3506.5, subdivisions (a) and (b), and 3507 of the MMBA and PERB Regulation 32603, subdivision (f).[2]

[1] The MMBA is codified at Government Code section 3500 et seq. All further undesignated code sections refer to the Government Code.

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

The City excepts to this proposed decision and urges the Board to rule, inter alia, that the City's local charter provision supersedes state law, and that the MMBA includes no protected right to strike. The City further asserts error by the ALJ in his conclusion that the no-strike clause in the parties' memorandum of understanding (MOU) did not waive employees' right to engage in a sympathy strike.

The Charging Party, Service Employees International Union Local 1021 (SEIU or Local 1021) also excepts to the proposed decision, arguing that the ALJ should have struck down the entirety of Charter section A8.346 which purports to prohibit all strikes, rather than limiting his consideration of the City's rule only as it applied to sympathy strikes. SEIU also excepts to the ALJ's failure to order the City to cease and desist from requiring employees to sign forms acknowledging receipt and review of Charter section A8.346. Finally, SEIU requests that any posting be circulated to employees electronically. Both parties have requested oral argument.[3]

The Board has reviewed the hearing record in its entirety, including the hearing transcript and exhibits, and the parties' briefs before the ALJ. The Board has considered the issues on appeal raised by the City and Local 1021 in their respective statement of exceptions, briefs in support of exceptions and response thereto in light of applicable law. Based on this review, the Board concludes that the proposed decision is adequately supported by the evidentiary record, well reasoned and consistent with all relevant legal principles. Except as to the proposed remedy, the Board adopts the proposed decision, including its findings of fact and

[3] Historically, the Board has denied such requests when an adequate record has been prepared, the parties had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear as to make oral argument unnecessary. (*Antelope Valley Health Care District* (2006) PERB Decision No. 1816-M; *Arvin Union School District* (1983) PERB Decision No. 300.) Because all of the above criteria are met in this case, we deny the parties' requests for oral argument.

conclusions of law, as the decision of the Board itself as supplemented by the following discussion of the parties' exceptions.

FACTUAL SUMMARY

Local 1021 is the exclusive representative of a bargaining unit of miscellaneous City employees, including those working at the Youth Guidance Center and the Hall of Justice. The Youth Guidance Center (also known as Juvenile Hall) includes detention facilities for juvenile wards. The City is a charter city and county under California law.

Until 2004, the miscellaneous unit included employees of the Superior Court for the County of San Francisco (the Court), who were considered City employees for some purposes. That year the Trial Court Employment Protection and Governance Act[4] became effective, giving PERB jurisdiction over superior courts and their non-judicial employees, at which point the Court became the court employees' separate employer for collective bargaining purposes. Those employees continued to be represented by Local 1021, or its predecessor. There are courtrooms of the Superior Court at Juvenile Hall, so that facility houses some Local 1021 members who are employed by the Court and some who are employed by the City.

The July 16, 2012 Strike

Local 1021 and the Court were engaged in contentious contract negotiations in 2012, the progress of which was reported at Local 1021's membership meetings. Local 1021 filed unfair practice charges accusing the Court of bargaining in bad faith and eventually voted to engage in a one-day unfair practice strike on July 16, 2012.

In the period preceding the strike, there was discussion within the ranks of Local 1021 about how members who were not Court employees might support their fellow workers on the

[4] This act is codified at Government Code section 71600, et seq.

day of the strike by joining a picket line during non-duty hours, refusing to cross the picket line, providing food for the striking workers, wearing SEIU t-shirts on the day of the strike, etc. Several employees expressed concern for their own job security if they refused to cross the picket line and withheld their services for the day. These concerns were prompted by the fact that new hires and those transferring to new positions were required to sign a form acknowledging receipt of a copy of the section of the City Charter provision that not only banned all strikes by City employees, but required the City to initiate dismissal proceedings against any employees who engaged in a strike. Ultimately, SEIU leadership did not specifically declare a sympathy strike, but advised its municipal members that they should follow their consciences in deciding whether to honor the Court employees' picket line.

Employee fears of termination were further stoked by a memo prepared by the City's Employee Relations Director, Martin Gran (Gran) and distributed to unit employees in the late morning of July 16.[5] The memo stated in pertinent part:

> This Memo is to advise you that under the San Francisco Charter, the SEIU 1021 Memorandum of Understanding, and appointment documents signed by you provide that strikes or work stoppages *of any kind* are prohibited.

(Emphasis added.)

The memo also quoted from the MOU:

> Article I.D., paragraph 14 (No Work Stoppage)
>
> "[I]t is mutually agreed and understood that during the period this Agreement is in force and effect the Union will not authorize or engage in any strike, slowdown, or work stoppage. Represented employees are also bound by the above. . . ."

[5] Gran's memo was prepared at the request of Court management staff who sought guidance so the probation department could respond to questions raised by affected employees regarding the strike.

Testimony by a Local 1021 shop steward showed that several City employees decided not to honor the picket line as a result of the Gran memo.[6]

No City employee was disciplined for any protected conduct they engaged in in support of the Court strike.

The City's Prohibition on Strikes

The City Charter has prohibited strikes by City employees since 1976. The first ban was passed by a ballot measure, Proposition B, which added section A8.346 to the Charter. It prohibited strikes, broadly defined to include "concerted interruption of operations or services by employees . . . for the purpose of inducing, influencing, or coercing a change in the conditions of employment."[7] Proposition B further prohibited a willful withholding of services, work stoppage or slowdown undertaken because the employees are "'honoring'" a strike by other municipal employees. Any employee in violation of these provisions was required to be dismissed from employment.

Before 1991, wages in the City were determined through a comparative salary-setting formula pursuant to a survey process conducted by the Civil Service Commission. In 1991, the City sought union agreement to a wage freeze. In exchange, the unions demanded a provision for interest arbitration. After negotiating with the unions over the terms of a proposed ballot measure (*Seal Beach* negotiations)[8] the City submitted another Proposition B to the voters that

[6] The City excepts to the ALJ's ruling that this testimony was not hearsay because he allowed it in the record to show state of mind, not to assert the truth of the matter stated. We agree with the ALJ and reject the City's exception.

[7] The language of Proposition B and the other relevant Charter amendments is set forth in the proposed decision, and will only be summarized here.

[8] So called after the California Supreme Court decision in *People ex rel. Seal Beach Police Officers Association v. City of Seal Beach* (1984) 36 Cal.3d 591 (*Seal Beach*).

provided for "'all or nothing'" interest arbitration. Under this procedure, the arbitrator was limited to selecting the entire last, best and final offer (LBFO) of one of the parties, rather than selecting particular proposals offered by each side. This Proposition B also declared that the earlier ban on strikes "'remained in full force and effect, and shall not be subject to the provisions of this part.'" (Proposed decision, p. 7.)[9] The 1991 Proposition B was passed by the voters with the official support of the San Francisco Labor Council.

After the City lost its first post-1991 interest arbitration in favor of SEIU, the mayor sought to repeal interest arbitration. The City again engaged in *Seal Beach* negotiations with the unions and ultimately placed Proposition F on the ballot. This measure modified interest arbitration to allow the arbitrator to select LBFOs on an issue-by-issue basis. Proposition F also continued the language from 1976 banning strikes and reiterated that an employee engaged in a strike would be subject to dismissal. This proposition passed. Its impasse resolution procedures in the form of binding interest arbitration are in operation to this day.

The relevant provisions of the City Charter provide as follows:

> A8.346 Disciplinary Action Against Striking Employees Other Than Members of Police and Fire Departments.
>
> The people of the City and County of San Francisco hereby find that the instigation of or participation in, strikes against said City and County by any officer or employee of said City and County constitutes a serious threat to the lives, property, and welfare of the citizens of said City and County and hereby declare as follows:
>
> (a) As used in this section the word "strike" shall mean the willful failure to report for duty, the willful absence from

[9] By declaring that the strike ban would not be subject to interest arbitration, we presume that the effect of Proposition B was to prevent the parties from negotiating or submitting to arbitration any proposals to alter the strike prohibition. Although attempts to unilaterally remove negotiable terms and conditions of employment from the bargaining process have been held to violate the MMBA (*Huntington Beach Police Officers' Assn. v. City of Huntington Beach* (1976) 58 Cal.App.3d 492, 503) (*Huntington Beach*), this issue is not before us and we therefore make no ruling on it.

one's position, any concerted stoppage or slowdown of work, any concerted interruption of operations or services by employees, or the willful abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment, *for the purpose of inducing, influencing, or coercing a change in the conditions of employment*; provided, however, that nothing contained in this section shall be construed to limit, impair, or affect the right of any municipal employee to express or communicate a view, grievance, complaint, or opinion on any matter related to the conditions or compensation of municipal employment or their betterment, so long as the same is not designed to and does not interfere with the full, faithful, and proper performance of the duties of employment.

(b) No person holding a position by appointment or employment under the civil service provisions of this Charter, exclusive of uniformed members of the police and fire departments as provided under Section 8.345 of this Charter, which persons are hereinafter referred to as municipal employees, shall strike, nor shall any municipal employee cause, instigate, or afford leadership to a strike against the City and County of San Francisco. *For the purposes of this section, any municipal employee who willfully fails to report for duty, is willfully absent from his or her position, willfully engages in a work stoppage or slowdown, willfully interrupts City operations or services, or in any way willfully abstains in whole or in part from the full, faithful, and proper performance of the duties of his or her employment because such municipal employee is "honoring" a strike by other municipal employees, shall be deemed to be on strike.*

[¶ . . . ¶]

(e) In the event of a strike, or if the Mayor with the concurrence of a majority of the Board of Supervisors determines that a strike is imminent, a special committee shall convene forthwith . . . *Notwithstanding any other provision of law, it shall be the duty of the special committee to dismiss in accordance with the provisions of this section any municipal employee found to be in violation of any provision of this section. . . .*

(Emphasis added.)

No-Strike Clause in the Parties' MOU

Since before 1989, the parties' MOU has contained the no-strike language set forth above at pages 6-7 and quoted by Gran in his June 2012 memo. Bargaining history indicated that beginning in 1989, SEIU attempted without success to add language to Article I.D. that would exempt sympathy strikes from the no-strike provision. Most recently, in 2012 Local 1021 proposed the sympathy strike exemption, but withdrew the proposal in part because it did not believe it was necessary in light of its legal opinion that the existing no-strike clause did not include sympathy strikes. However, Gran testified without contradiction that this belief was never conveyed to the City during the 2012 negotiations.

PROPOSED DECISION

The ALJ framed the issue as follows: "Did the City violate the MMBA by adopting and enforcing the provisions in the City Charter prohibiting sympathy strikes?"

Before considering the merits of the complaint, the ALJ addressed the City's argument that the unfair practice charge and complaint were untimely because they were filed more than six months after the City's Charter prohibition on strikes was enacted in 1975. Relying on *Long Beach Unified School District* (1987) PERB Decision No. 608, pp. 11-12 (*Long Beach*) (unreasonable access regulation adopted outside the statute of limitations constitutes a continuing violation), the ALJ rejected the City's timeliness defense. As the ALJ noted: ". . . it is not the 'act' of adopting the policy, but its 'existence' continuing to the time of the hearing that constitutes the offending conduct." (Proposed decision, p. 10.)

The ALJ then considered and rejected the City's argument that the right to strike is not protected under the MMBA. After thoroughly analyzing *County Sanitation District No. 2 v. Los Angeles County Employees' Association* (1985) 38 Cal.3d 564 (*County Sanitation*), the

ALJ concluded, "there can be little doubt that by holding that strikes by public employees are not prohibited by common law, *County Sanitation* also found that such employees have a right to strike, albeit a qualified one." (Proposed decision, p. 14.)

The ALJ then considered the status of sympathy strikes, especially in light of *Oxnard Harbor District* (2004) PERB Decision No. 1580-M (*Oxnard*) and concluded that case recognized a right to engage in a sympathy strike, a right that could be waived by a no-strike clause only if it was clear the clause applied to sympathy strikes as well as primary strikes. *Regents of the University of California* (2004) PERB Decision No. 1638-H (*Regents*), holding that a sympathy strike is an unfair practice only if it violates a no-strike clause, provided additional support for the ALJ's conclusion that the MMBA confers on public employees a right to strike, including a right to engage in a sympathy strike.

The ALJ also considered the City's argument that regardless of a statutory right to strike, it has the authority under its home rule powers (Cal. Const., art. XI, § 5) to enact a local rule that overrides the MMBA. The ALJ rejected this argument, noting that MMBA section 3500 expresses the legislative intent that rules and guidelines for labor relations are a matter of statewide concern, and that, as *County Sanitation, supra*, 38 Cal.3d 564 acknowledged, the right to strike is essential to a "viable and fair system of labor relations because bilateral determination of terms and conditions of employment must rest on a real and perceived equality of bargaining power." (Proposed decision, p. 17.)

The ALJ also rejected the City's contention that because Local 1021 did not authorize a sympathy strike and no employees were disciplined, there is no conflict between the MMBA and the City's charter provision banning sympathy strikes. The ALJ concluded that regardless of whether a sympathy strike was authorized or employees were disciplined, the City's

employees continue to be restrained in their ability to participate in a sympathy strike because the City Charter specifically prohibits employees from willfully withholding their services in order to honor a strike by other municipal employees. He therefore concluded that the City Charter ban on such strikes is incompatible with the MMBA's right to strike.

The ALJ also rejected the City's argument that *City & County of San Francisco* (2009) PERB Decision No. 2041-M (*San Francisco*) governs this case. He concluded it was not controlling because the legality of a ban on sympathy strikes was not at issue.[10] Even if sympathy strikes could be lawfully banned when done in support of an economic strike by a union covered by interest arbitration, the language of the City Charter banning sympathy strikes made no such distinction, according to the ALJ.

Relying on *Oxnard*, *supra*, PERB Decision No. 1580-M, the ALJ also rejected the City's assertion that the parties' MOU bans all strikes and, therefore, waived SEIU's right to engage in a sympathy strike. The ALJ determined that on its face, the no-strike clause simply did not constitute a clear and unmistakable waiver of the right to engage in a sympathy strike.

The ALJ also found that the bargaining history, viz., SEIU's several unsuccessful attempts to insert a specific exclusion for sympathy strikes in the MOU, did not demonstrate that the parties intended that sympathy strikes be included in the general no-strike clause. According to the ALJ, there was no evidence that the City communicated to SEIU its belief that the no-strike clause extended to sympathy strikes when the clause was first negotiated. Thus, SEIU's failed attempts to insert an express exclusion for sympathy strikes could not be construed as a waiver of employees' right to engage in sympathy strikes, according to the ALJ.

[10] *San Francisco, supra*, PERB Decision No. 2041-M rejected a challenge to the City's binding interest arbitration procedure lodged by a union that claimed that compelled arbitration caused a forfeiture of the right to strike. PERB determined that binding interest arbitration was a valid quid pro quo for forfeiting the right to engage in a primary strike.

For these reasons and relying on *International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, 196-206, the ALJ concluded that the City's ban on sympathy strikes conflicts with the MMBA and its fundamental purposes, and the adoption or enforcement of such a ban is an unreasonable regulation in violation of MMBA section 3507 and therefore constitutes an unfair practice. (PERB Regulation 32603, subd. (f).)

The ALJ further concluded that the City unlawfully interfered with rights guaranteed by the MMBA when it distributed Gran's July 16, 2012 memo, because it discouraged employees from honoring the Court employees' picket line. The same conduct also denied SEIU its organizational rights, according to the ALJ.

To remedy these unfair practices, the ALJ ordered the City to cease and desist from adopting and enforcing the prohibition on sympathy strikes. Because the City Charter conflicted with the MMBA, the ALJ deemed it appropriate to order stricken the second sentence of A8.346(b) that defines a strike as including a work stoppage engaged in by employees because they are honoring a strike by other municipal employees.

THE PARTIES' EXCEPTIONS

The City lodged several exceptions to the ALJ's findings of fact, asserting error in the following findings: (1) the ALJ appeared to assume that the City and the Courts are the same employer; (2) the ALJ speculated that municipal employees intended to leave their jobs to support the Court employees; (3) that the Gran memo deterred a sympathy strike; (4) the proposed decision relies on unsupported hearsay regarding Lakisha Benjamin; (5) that the no-strike clause of the MOU was not mutually understood by the parties to bar sympathy strikes; (6) that the ALJ erroneously inferred that employees' intent to participate meant they intended to honor the Court employees' picket line, as opposed to wearing supportive t-shirts; (7) that

the ALJ failed to note the potential public health and security risks caused by a strike of Juvenile Hall employees; and (8) that the City believed there was a question concerning the lawfulness of A8.346. We address these exceptions below in the context of our discussion of the City's exceptions to the conclusions of law.

In support of its exceptions to conclusions of law, the City makes many of the same arguments it made to the ALJ. It claims the charge and complaint were untimely; that neither the MMBA nor common law establishes a right of public employees to engage in sympathy strikes, so the City Charter provision banning such strikes is not an unreasonable local rule; and that the parties' MOU bars all strikes, including sympathy strikes. The City further argues that the proposed decision erroneously overrules *San Francisco*, *supra*, PERB Decision No. 2041-M, which according to the City determined that binding interest arbitration was a reasonable local rule.

The City's exceptions also, for the first time, assert that "there is no genuine conflict here [between the MMBA and the Charter] because the Charter language precluding sympathy strikes with respect to strikes by other municipal workers does not apply to the Court workers, who are not municipal workers." (City's Exceptions, p. 21.)

The City also asserts that the ALJ exceeded his authority by ordering that portions of the City Charter be stricken.

SEIU filed three cross-exceptions. It claims that the proposed remedy did not go far enough, because it should have stricken City Charter section A8.346 in its entirety, not merely the provision banning sympathy strikes. It also asserts that the ALJ should have ordered the City to cease and desist from requiring employees to sign forms acknowledging their receipt and/or review of Charter section A8.346. Lastly, SEIU asserts that the City should be ordered

to issue an e-mail to all City employees notifying them of the City's violation of the MMBA, as opposed to only a physical posting at all work locations in the City.

DISCUSSION

Reduced to its essence, this case presents two critical legal issues: (1) May a charter city maintain a local rule if it conflicts with substantive rights guaranteed by the MMBA? (2) If a charter provision conflicts with the MMBA, what is the scope of PERB's authority to remedy the violation? As we explain below, we agree with the ALJ's conclusion that employees have a right to strike under the MMBA which includes the right to engage in a sympathy strike; that the City Charter section A8.346 as it was applied in this case is an unreasonable local rule maintained and enforced in violation of the MMBA because it interferes with employees' right to engage in a sympathy strike; and that the Gran memo interfered with employee and organizational rights protected by the MMBA. It is no defense that the City is a charter city or that the home rule doctrine permits charter cities and counties to enact laws regarding their municipal affairs. We also conclude that PERB, like the courts charged with enforcing the MMBA prior to 2001,[11] has the authority to declare those portions of the Charter that conflict with substantive provisions of the MMBA void and unenforceable.

Timeliness of the Charge

The unfair practice charge was filed on July 18, 2012, two days after the City disseminated Gran's July 16 memo reminding employees of the provisions in the Charter and the MOU that purportedly banned all strikes. The City renews its contention that this charge was untimely, since the Charter provision in question was adopted in 1976, and SEIU was well aware of this provision long before the events of July 16, 2012. According to the City, *Long*

[11] In 2001, the Legislature transferred the administration and enforcement of the MMBA from the courts to PERB. (MMBA, § 3509.)

Beach, supra, PERB Decision No. 608 does not control because it relied on a theory of continuing violation, which was allegedly discredited by *County of Riverside* (2011) PERB Decision No. 2176-M (*Riverside*). In addition, the City contends that a mere recitation of the 1976 Charter provision cannot be considered an unlawful act.

We agree with the ALJ that the charge is timely for multiple reasons. First, the ALJ correctly concluded that *Long Beach, supra*, PERB Decision No. 608 applies here, not *Riverside, supra*, PERB Decision No. 2176-M. At issue in *Long Beach* was an allegedly illegal access rule revised by the employer seven months before the unfair practice charge was filed. The Board found that the allegations of unreasonable denial of access assert a violation of a continuing nature because it is the very existence of the allegedly illegal rule, not necessarily each instance of enforcement, or the date of enactment that the charging party complained of. The Board further explained that it was unnecessary to show that each act of enforcement of the rule constitutes a new and separate cause of action because "the Association need not demonstrate an attempt to violate the regulation in order to show that the District would enforce it." (*Long Beach*, p. 12.) As the Board subsequently explained, *Long Beach* was based on the recognition that the only way to test the enforcement of the allegedly unreasonable rule was to violate it and risk discipline. (*County of Orange* (2006) PERB Decision No. 1868-M.) In *County of Orange*, the Board declined to extend *Long Beach* to circumstances where it is possible to test a rule without risking discipline, in that case, a local rule regarding decertification petitions. (*Ibid.*)

Reading *Long Beach, supra*, PERB Decision No. 608 and *County of Orange, supra*, PERB Decision No. 1868-M together we conclude that no new wrongful act is required to trigger the statute of limitations where seeking to test an unreasonable rule would risk

discipline.[12] Because section A8.346 contains not only a threat of discipline, but mandates termination of any employee found to be in violation of the rule,[13] challenges to the reasonableness of this rule may be brought at any time by a charging party with standing.

The instant charge is also timely because it was filed within days of Gran's memo, which signaled the City's intent to enforce section A8.346. Under *San Dieguito Union High School District* (1982) PERB Decision No. 194 (*San Dieguito*),[14] *State of California (Departments of Personnel Administration, Banking, Transportation, Water Resources and Board of Equalization)* (1988) PERB Decision No. 1279-S, p. 32; *Compton Community College District* (1991) PERB Decision No. 915; and *County of Orange*, *supra*, PERB Decision No. 1868-M, this constitutes a "new wrongful act" within the statute of limitations, and the charge is therefore timely on that basis.

Citing *Riverside*, *supra*, PERB Decision No. 2176-M, the city claims that Gran's memo merely constituted a reiteration of a position taken by the City more than six months before the charge was filed, not a new wrongful act. We disagree that *Riverside* can be read so broadly. In that case, an employee organization requested to become a "registered" employee organization under the employer's local rules. The employer refused on the grounds that the

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[12] To the extent that *County of Orange*, *supra*, PERB Decision No. 1868-M can be read to limit the *Long Beach*, *supra*, PERB Decision No. 608 rule only to interference cases involving access restrictions (*id*., p. 7), we decline to follow such limitation. That restriction was not explained or justified, and we believe that the purposes of the MMBA and the other statutes we administer are better served by permitting challenges to unreasonable regulations without regard to a "new wrongful act" where employees are placed in the untenable position of risking discipline by violating the allegedly unreasonable regulation.

[13] See subdivision (e) of section A8.346.

[14] *San Dieguito*, *supra*, PERB Decision No. 194 articulated three distinct exceptions to the six-month rule: "the charge may still be considered to be timely filed if the alleged violation is a continuing one, if the violation has been revived by subsequent unlawful conduct within the six-month period, or if the limitation period was tolled. . . ." (*Id*. at p. 5.)

request was not sufficient. The employee organization twice requested further clarification regarding the deficiencies in its request, which the employer provided. The unfair practice charge was ultimately filed nearly seven months after the initial refusal, but within six months after the employer's clarifications. The Board held that the clarifications "were merely reiterations of the position" the employer initially took, not independent unfair practices, and that the charge was therefore untimely. (*Id.* At p. 8.)

This case, by contrast, involved two substantially distinct actions: the enactment of section A8.346 and Gran's subsequent threat to enforce that section. There is ample evidence that the City's threatened enforcement of a no-strike rule was an act independent of the original 1976 enactment of a predecessor provision banning strikes or its subsequent amendments. Gran's memo signaled that the City intended to enforce section A8.346 even to the point of threatening employees with dismissal, should they honor the Court employees' picket line. The memo also cited the MOU, claiming that it prohibited employees from engaging in any strike. Thus, independent of section A8.346, Gran's memo represented the City's interference with employees' MMBA right to strike. The charge is therefore timely because the memo is a new wrongful act that occurred within the statute of limitations.

Moreover, the assertion that Gran's memo merely reiterated the content of section A8.346 is inconsistent with the new argument in the City's exceptions that section A8.346 does not even apply to sympathy strikes in support of strikes by non-city employees.[15] If so,

[15] Charter section A8.346, subdivision (a) defines a "strike" as the willful absence from one's position "for the purpose of inducing, influencing, or coercing a change in the conditions of employment." Subdivision (b) prohibits strikes and contains a definition of a sympathy strike: "'honoring' a strike by other municipal employees." (Emphasis added.) As the City points out, the picket line in this case was established by Court employees, who are not "municipal employees."

the Gran memo was an entirely new act undertaken without legal relation to the 1976 Charter provision. Viewed in this light, there is no question that this charge is timely.

For all of these reasons, we conclude the charge was timely filed.

We turn now to consider the merits of this case: (1) whether the City has adopted and enforced an unreasonable regulation in violation of PERB Regulation 32603, subdivision (f) and MMBA section 3507; and (2) whether the City's conduct interfered with employee and employee organization rights in violation of MMBA sections 3503 and 3506 and PERB Regulations 32603, subdivisions (a) and (b).

The Right to Strike Under the MMBA

Repeating arguments it made to the ALJ, the City urges the Board to overturn the ALJ's conclusion that *County Sanitation, supra*, 38 Cal.3d 564 conferred on California's public employees a qualified right to strike. For reasons well explained by the ALJ, we reject these arguments.

The City argues that *County Sanitation, supra*, 38 Cal.3d 564 left open the question of whether public employees have a constitutional right to strike. This may be so, but is irrelevant to the question presented here, which is whether the MMBA establishes a right to strike. We agree with the ALJ's reading of *County Sanitation*, i.e., that by holding that public employee strikes are not prohibited by common law, the Court also established that employees have a right to strike, albeit a qualified one. In *City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597 (*City of San Jose*), the California Supreme Court reaffirmed public employees' right to strike, based on *County Sanitation* and other court decisions: "Public employees have a right to strike unless it is clearly shown that there is a substantial and imminent threat to public health and safety." (*Id.* at p. 606; italics omitted.)

In addition, after exceptions were filed in this case, this Board issued *Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M (*Fresno*). In that case we held that the MMBA guarantee of employees' right to "form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations" provides statutory protection for a qualified right to strike, including the right to strike in protest against unfair practices, except as limited by other provisions of the MMBA and controlling precedent. (*Id.* at p. 33.)[16] This right is qualified in that to maintain its legal and protected status, the strike may not pose an imminent threat to public health and safety. (*Ibid.*)

The City contends that *County Sanitation* does not apply to sympathy strikes, asserting that its holding is limited to a "concerted work stoppage for the purpose of improving [employee's] wages or conditions of employment." (*County Sanitation*, *supra*, 30 Cal.3d at

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[16] *Fresno*, *supra*, PERB Decision No. 2418-M relied in part for this conclusion on *Modesto City Schools* (1983) PERB Decision No. 291, p. 62 (*Modesto*) which noted in comparing protected rights under the Educational Employment Relations Act (EERA) and section 7 of the National Labor Relations Act:

> The only difference we find between the right to engage in concerted action for mutual aid and protection and the right to form, join, and participate in the activities of an employee organization is that EERA uses plainer and more universally understood language to clearly and directly authorize employee participation in collective actions traditionally related to the bargaining process. . . . [W]ork stoppages must also qualify as collective actions traditionally related to collective bargaining. Thus, except as limited by other provisions of EERA, section 3543 authorizes work stoppages.

(*Fresno* at p. 29, quoting *Modesto* at p. 62.) *Modesto* was ostensibly overruled in a divided opinion rendered in *Compton Unified School District* (1987) PERB Order No. IR-50. However, *Fresno* unequivocally overruled *Compton:* "We believe the *Modesto* Board's answer to this question [whether strikes are statutorily protected activity] remains the better rule and therefore overrule *Compton* to the extent it holds that there is no statutorily-protected right to strike." (*Fresno* at p. 33.)

p. 592.) According to the City, because sympathy strikes are not directed to improving the working conditions or wages of the sympathy strikers, *County Sanitation* cannot be read as approving such strikes.

The ALJ was correct in his analysis of PERB's case law regarding sympathy strikes, which reads *County Sanitation, supra*, 38 Cal.3d 564, as making no distinction between a primary strike, i.e. one that seeks to improve wages and working conditions of the striking employees, and a sympathy strike, i.e., withholding services for the purpose of supporting the primary strike of another group of employees, either against the same employer, or as in this case, against a different employer. Both *Oxnard, supra*, PERB Decision No. 1580-M and *Regents, supra*, PERB Decision No. 1638-H, held that sympathy strikes will be considered an unfair practice only if they violate a no-strike clause, since under *County Sanitation*, there is no common law prohibition against strikes.

Moreover, *City of San Jose, supra,* 49 Cal.4th at p. 606 laid to rest any doubt whether the MMBA (as opposed to common law) provided a right to strike.

Although *County Sanitation, supra,* 38 Cal. 3d 564 and *City of San Jose, supra,* 49 Cal.4th 597 involved primary strikes, the right established in those cases to "participate in activities of an employee organization" by means of a strike is broad enough to encompass sympathy strikes undertaken in support of either protected unfair practices strikes or protected economic strikes by other bargaining units.[17] This is consistent with the view of sympathy strikes in the private sector under the NLRA.

[17] PERB has held that strikes in protest of an employer's unfair practices will also be considered protected. (*Modesto, supra*, PERB Decision No. 291.)

Sympathy strikes have long been considered protected activity under the NLRA.[18] As the Ninth Circuit Court of Appeals observed in *NLRB v. Southern California Edison Co.* (9th Cir. 1981) 646 F.2d 1352, 1363, "[a]n integral part of any strike is persuading other employees to withhold their services and join in making the strike more effective." Sympathy strikes are a means by which employees can demonstrate their solidarity with fellow employees and thereby build a stronger labor movement, and are therefore protected concerted activity. (*Children's Hospital Medical Center of Northern California v. California Nurses Association* (9th Cir. 2002) 283 F.3d 1188, 1191.)[19] This point was explained well in the administrative hearing by Henrietta Lee, Local 1021 shop steward for the Juvenile Hall employees, when she was asked about the interest those employees had in supporting the Court workers' strike:

> There was interest in them supporting them because we all felt that, if this could happen to them, it could happen to us as City employees, and we would want them to support us if something [came] down.

[18] The City also takes issue with the ALJ's reliance on private sector precedent to justify his conclusion that employees have a right to engage in sympathy strikes under the MMBA. According to the City, the guarantee of the right to employees to engage in "other concerted activities for the purpose of . . . other mutual aid or protection" contained in section 7 of the National Labor Relations Act (NLRA) (29 U.S.C. § 157), language which is absent from the MMBA, renders private sector precedent of no value in discerning the scope of rights guaranteed by the MMBA. We reject this assertion, having recently reaffirmed *Modesto*, *supra*, PERB Decision No. 291 in its observation that the right to form, join, and participate in the activities of employee organizations for the purpose of representation on all matters of employer-employee relations encompasses the section 7 rights to engage in concerted activity. (*Fresno*, *supra*, PERB Decision No. 2418-M at p. 33.)

[19] Although the NLRA, section 8(b)(4) explicitly protects the right of employees to refuse to cross a picket line of a secondary employer if the employees of such employer are engaged in a strike ratified by a representative organization that the secondary employer is required to recognize, the absence of similar language in the MMBA does not undermine the legitimacy of our reliance on the NLRA. Even before the NLRA included the proviso of section 8(b)(4), sympathy strikes were considered protected activity. (*NLRB v. John S. Swift Co.* (7th Cir. 1960) 277 F.2d 641, 646; *Truck Drivers Union, Local No. 413, Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. NLRB* (D.C. Cir. 1964) 334 F.2d 539, 543.)

(Reporters' Transcript, p. 63.)

Such interest in mutual aid across bargaining units is no less important in the public sector. (See *County Sanitation*, *supra*, 38 Cal.3d at p. 573: "the MMBA establishes a system of rights and protections for public employees which closely mirrors those enjoyed by workers in the private sector.") Thus, whether the purpose of the strike is to secure better wages and working conditions for the striking employees or to demonstrate solidarity with other employees by refusing to cross a lawful picket line, the MMBA secures to those employees a right to engage in such activity, provided there is no imminent threat to public health or safety.[20]

It was assumed in *Oxnard*, *supra*, PERB Decision No. 1580-M, that sympathy strikes were protected, unless they violated a no-strike clause that unequivocally waived the right to engage in a sympathy strike. We take this occasion to clearly state that the right to participate in the activities of an employee organization for the purpose of representation on all matters of employer-employee relations includes the right to honor the picket line or engage in other acts of solidarity with other employees who are engaged either in a primary strike or an unfair practice strike against their employer.[21] Sympathy strikes are but another tool of employee

[20] We reject the City's exception asserting error to the ALJ's failure to note the potential public health and security risks that could result in a strike by Juvenile Hall employees. The City never sought to enjoin a work stoppage or threatened work stoppage on the basis that these municipal employees are essential to public health and safety. Moreover, neither Gran's memo nor section A8.346 refer to public health and safety, but are instead a blanket prohibition on all strikes. The ALJ did not err in not addressing this issue.

[21] By this holding we do not intend to overrule our decision in *City of San Jose* (2010) PERB Decision No. 2141-M, disapproving of certain secondary activity (picketing a private employer with the object of shutting down private construction sites deemed an unfair pressure tactic against the public employer and not protected).

organizations to show labor solidarity, which potentially improves wages and working conditions for all.

The City Charter and the Home Rule Doctrine

The City asserts that under article XI, section 5 of the California Constitution,[22] the City Charter is "supreme and beyond the reach of competing state legislative enactments." (City's Exceptions, p. 19.) The ALJ rejected this claim, concluding that the Charter provision in question conflicts with the MMBA, a state law addressing matters of statewide concern that is "reasonably related" and "narrowly tailored" to address those statewide concerns. (*California Federal Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 16-17, 24.)

We agree with the ALJ's conclusion and reasoning. We also are guided by the Supreme Court's ruling in *Seal Beach, supra*, 36 Cal.3d at p. 600, which held: "'general law prevails over local enactments of a chartered city, even in regard to matters which would otherwise be deemed to be strictly municipal affairs, where the subject matter of the general law is of statewide concern.'" The process of collective bargaining, the rights of employees and their organizations secured by the MMBA, and the uniform application of that statute are all matters of statewide concern. Courts have recognized this since the inception of the MMBA and have thus, for example, upheld the right of firefighters to organize, despite charter provisions to the contrary. (*Professional Firefighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276.) Likewise, a charter city's attempt to exclude working hours from the scope of

[22] This provision provides in pertinent part: "City Charters adopted pursuant to this Constitution . . . with respect to municipal affairs shall supersede all laws inconsistent therewith." (Cal. Const., art. XI, § 5(a).)

bargaining was ruled invalid in *Huntington Beach, supra*, 58 Cal.App.3d at p. 500. There, the court declared:

> Labor relations in the public sector are matters of statewide concern subject to state legislation in contravention of local regulation by chartered cities.
>
> [¶ . . .¶]
>
> Although the Legislature did not intend to preempt all aspects of labor relations in the public sector, we cannot attribute to it an intention to permit local entities to adopt regulations which would frustrate the declared polices and purposes of the MMB Act.

(*Id*. at pp. 500, 501-502; footnote omitted.)

Quoting Professor Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719, 725, the court observed: "the power reserved to local agencies to adopt rules and regulations was intended to permit supplementary local regulations which are 'consistent with, and effectuate the declared purposes of, the statute as a whole.'" (*Huntington Beach*, *supra*, 58 Cal.App.3d at p. 502.)

The California Supreme Court succinctly articulated a method for evaluating claims that a statewide statute violates the home rule provisions in *State Building & Construction Trades Council of California, AFL-CIO v. City of Vista* (2012) 54 Cal.4th 547, 556 (*City of Vista*):

> "If . . . the court is persuaded that the subject of the state statute is one of statewide concern and that the statute is reasonably related to its resolution [and not unduly broad in its sweep], then the conflicting charter city measure ceases to be a 'municipal affair' pro tanto and the Legislature is not prohibited by article XI, section 5(a) [of the California Constitution], from addressing the statewide dimension by its own tailored enactments."

(*Id*., quoting *California Federal Savings & Loan Assn. v. City of Los Angeles, supra*, 54 Cal.3d 1.)

In explaining the importance of strikes in the collective bargaining process, the Court in *County Sanitation, supra,* 38 Cal.3d 564, eloquently described the importance of equal bargaining power in collective bargaining.

> In the absence of some means of equalizing the parties' respective bargaining positions, such as a credible strike threat, both sides are less likely to bargain in good faith; this in turn leads to unsatisfactory and acrimonious labor relations and ironically to more and longer strikes. Equally as important, the possibility of a strike often provides the best impetus for parties to reach an agreement at the bargaining table, because *both* parties lose if a strike actually comes to pass. Thus by providing a clear incentive for resolving disputes, a credible strike threat may serve to avert, rather than encourage, work stoppages.

(*Id.* at p. 583; footnote omitted; italics in original.)

Because of its importance to the bargaining process, the right to strike is as much a matter of statewide concern as is the duty to bargain in good faith acknowledged in *Seal Beach, supra,* 36 Cal.3d 591.

In order to equalize the parties' bargaining power and thereby render collective bargaining a more efficient method to bring labor peace, the right to strike cannot be categorically prohibited. Protecting the right to strike generally is reasonably related and tailored to the statewide concern for the reasons described in *County Sanitation, supra,* 38 Cal.3d 564. Unilaterally maintaining and threatening to enforce a ban on sympathy strikes stands in direct and irreconcilable conflict with the statewide law as interpreted by the courts and by PERB.[23] Therefore, under *City of Vista, supra,* 54 Cal.4th 547, Charter section A8.346 as applied in this case to discourage and prevent a sympathy strike ceases to be a municipal

[23] Nothing prohibits parties from voluntarily agreeing to limit employees' right to strike.

affair and state law prevails. Charter section A8.346 is not shielded by article XI, section 5 of the California Constitution.

Interest Arbitration as a Quid Pro Quo For a Ban on Strikes

The City argues that it is permitted to ban strikes because it also provides for binding interest arbitration as a method for resolving bargaining impasses. The City's own witness testified that the quid pro quo for a prohibition of primary strikes is the fact that a neutral will make a binding decision on the terms and conditions of employment. This trade-off does not apply to sympathy strikes or unfair practice strikes, where the object of the strike is not to put pressure on the employer to meet the union's demands. We therefore reject this defense to section A8.346 as applied to the facts here.

Similarly, the City also asserts in its exceptions that the proposed decision erroneously overrules a previous decision by the Board, *San Francisco, supra*, PERB Decision No. 2041-M, in which the Board upheld the City's dispute resolution procedures that culminate in binding interest arbitration. We reject this exception. The ALJ did not overrule *San Francisco,* but correctly distinguished it.

Rejecting the union's claim that the City's binding interest arbitration deprived it of the right to strike, PERB determined in *San Francisco, supra,* PERB Decision No. 2041-M that "interest arbitration is a quid [pro quo] for forfeiture of the right to strike." (*Ibid.*, adopting proposed decision at p. 32.)

We agree with the ALJ that the issues involved in *San Francisco, supra,* PERB Decision No. 2041-M and the instant case are different. Sympathy strikes were not at issue in *San Francisco* and therefore their legality was not implicated in, much less decided by, that decision. (*Alameida v. State Personnel Board* (2004) 120 Cal.App.4th 46, 58 ["cases are not

authority for propositions not therein considered"].) Affirming the legitimacy of binding interest arbitration as a method for resolving bargaining disputes over wages, hours and working conditions does not resolve the question presented by this case: whether the City's threat to enforce and apply Charter provision section A8.346 on July 16, 2012 to discourage or interfere with employees' right to engage in a sympathy strike violated the MMBA. Even assuming, arguendo, that binding interest arbitration can legally justify a local rule (as opposed to a mutually agreed-upon MOU) banning primary strikes, that equation does not apply to work stoppages that are undertaken for purposes other than to put pressure on a primary employer to meet a union's demands, e.g. strikes to protest employer unfair practices or sympathy strikes. If municipal employee members of Local 1021 refuse to cross the picket line established by the Court employees who have walked off the job ostensibly in protest of unfair practices by their employer, there is simply no interest to be arbitrated between the City and its Local 1021 municipal employees. For these reasons, our decision today does not overrule *San Francisco.* As we did in *San Francisco*, we reserve for another day resolution of whether the City's ban on economic strikes and its strike penalty provisions constitute an unreasonable local rule. (*Id.*, proposed decision, p. 33, fn. 19.)[24]

[24] There is a basis, however to question whether section A8.346, is in fact the "quid pro quo" for binding interest arbitration. First, the ban on strikes pre-dated the provision providing for arbitration by nearly two decades. Second, as noted in *San Francisco*, *supra*, PERB Decision No. 2041-M, proposed decision, p. 30 section A8.409-4(a) seems to establish a more straightforward quid pro quo by stating that the arbitration procedure will not be available to any organization that engages in a strike. "'Should any employee organization engage in a strike either during or after completion of negotiations and impasse procedures, the arbitration procedures shall cease immediately and no further impasse resolution procedures shall be required.'" (*Ibid.*, italics omitted.) While we do not disturb the holding in *San Francisco*, there can be little doubt in light of *County Sanitation*, *supra*, 38 Cal.3d 564, *City of San Jose*, *supra*, 49 Cal.4th 597, and *Fresno County In-Home Supportive Services*, *supra*, PERB Decision No. 2418-M that the City enforces the penalty provisions of its Charter (A8.346) against employees who engage in a lawful primary strike at its peril.

In sum, we agree with the ALJ that the City has maintained an unreasonable local rule, as its prohibition of sympathy strikes is not consistent with and does not effectuate the purposes of the MMBA. (*International Brotherhood of Electrical Workers v. City of Gridley*, *supra*, 34 Cal.3d at pp. 196-197.) Therefore the City has committed an unfair practice under PERB Regulation 32603, subdivision (f). (*County of Monterey* (2004) PERB Decision No. 1663-M, adopting proposed decision, pp. 28-29.)

Interference

The City asserts that the Gran memo did not deter a sympathy strike and therefore presumably did not interfere with protected rights. According to the City, the memo was merely setting forth "accurate information about the text of the City's Charter. . . ." (City's Exceptions, p. 12.) We reject this exception for several reasons.

In assessing complaints of interference with protected rights, PERB applies a balancing test articulated originally in *Carlsbad Unified School District* (1979) PERB Decision No. 89 (*Carlsbad*). (See also C*ounty of San Bernardino (Office of the Public Defender)* (2015) PERB Decision No. 2423-M, p. 36-37 (*San Bernardino*).) Once a case is established prima facie that the employer's conduct interferes or tends to interfere with protected conduct, the burden shifts to the employer "to articulate a legitimate justification for its conduct. The scrutiny with which the employer's conduct will be examined depends on the severity of the harm." (*San Bernardino*, p. 36.) Where the harm to employees' rights is slight and the employer offers justification based on operational necessity, the competing interests will be balanced. (*Ibid.*) But where the harm is inherently destructive of employee rights, "'the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's

control and that no alternative course of action was available.'" (*Id.* at p. 37, citing to *Carlsbad,* pp. 10-11.)

A finding of interference, coercion or restraint does not require evidence of any ill will or unlawful motive on the part of the employer, or that any employee felt subjectively threatened or intimidated. (*Clovis Unified School District* (1984) PERB Decision No. 389, pp. 14-15 (*Clovis*); *Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231-M, pp. 18-19.)

Given our conclusion that employees have a qualified right to strike, including the right to engage in sympathy strikes, Gran's memo was inherently destructive of employee rights. The memo unequivocally declared that "the San Francisco Charter, the SEIU 1021 Memorandum of Understanding and appointment documents signed by you provide that strikes or work stoppages of *any* kind are prohibited." (Emphasis added). It further advised that under Charter section A8.346, "any employee who has engaged in such a job action is subject to dismissal."

The City suggests that Gran's memo was merely "informational," in that it notified employees of "potentially relevant provisions," without "direct[ing] how these provisions would be applied, or that it was a protected statement of opinion under *Rio Hondo Community College District* (1980) PERB Decision No. 128. However, the accuracy of the memo is questionable,[25] particularly in light of the City's belated argument that because the primary

[25] For instance, the memo quoted from section A8.346(a), defining a strike as "[t]he willful failure to report for duty," but omitted the portion of that section that reads "for the purpose of inducing, influencing or coercing a change in the conditions of employment." It is, in fact, subdivision (b) that prohibits sympathy strikes, at least when the primary strike involves other municipal employees. In addition, the memo erroneously pinpoints subdivision (a) as the source of authority to dismiss any employee engaging in a strike prohibited by the Charter. The correct subdivision is (e).

strike did not involve City employees, section A8.346 does not actually apply in this case. In other words, the City now implies that it interfered with a protected right based either on a whim or a mistaken reading of its own rule. Whether section A8.346 did or did not apply, however, makes no difference. Gran's memo suggested the possibility of dismissal from employment based on either: (1) a correct reading of a Charter section that we have found inconsistent with the MMBA to the extent it prohibits a potential sympathy strike; or (2) a misrepresentation of the Charter section. Because an unlawful motive is not necessary to prove interference (*Clovis, supra*, PERB Decision No. 389, pp. 14-15), either possibility is sufficient to establish interference with employee rights.[26]

We also reject the City's arguments that it should be exonerated because no employee was deterred from engaging in a sympathy strike and because SEIU did not call a strike but instead left it to each individual employee to decide whether to honor the Court employees' picket line. SEIU's failure to formally call a sympathy strike is not relevant, because the right to refuse to cross a picket line is viewed as an employee right. (*Children's Hospital Medical Center of Northern California v. California Nurses Association, supra,* 283 F.3d 1188, 1193.) Nor as a matter of law, is it relevant whether any employee was deterred by the Gran memo. (*Clovis, supra*, PERB Decision No. 389, p. 14-15, quoting *NLRB v. Triangle Publications, Inc.* (3d Cir. 1974) 500 F.2d 597, 598 ["the test of coercion and intimidation is not whether the misconduct proves effective. The test is whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."].) In any event, as a matter of fact, the evidence

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[26] We also reject the City's claim that the MOU included a clear and unmistakable waiver of employees' rights to engage in a sympathy strike, as explained in more detail below.

shows that at least several SEIU unit members were deterred from honoring the Court's picket line when they learned of the Gran memo.

Because the memo was inherently destructive of employee rights, the City must demonstrate that its conduct was "'occasioned by circumstances beyond the employer's control and that no alternative course of action was available.'" (*San Bernardino*, *supra*, PERB Decision No. 2423, p. 37.) The City has not done so. There is, in fact, no dispute that dissuading employees from honoring the picket line against the Court was precisely what the memo set out to do. The memo was addressed to "All Employees Represented by SEIU 1021 Working at Locations Affected by Superior Court Job Actions." Gran explained that he knew that Court employees had established a picket line "and the question was what, if anything, would the City workers do . . . [A]t the time all I knew was that there was an action which could have some impact on City employees because they could be drawn into a work stoppage, and they needed to know the rules around that." (Reporter's Transcript, pp. 184-185.) Gran wrote the memo in response to a manager's request made after she arrived at work and saw the Court employees' picket line and became concerned about Juvenile Hall employees possibly honoring the picket line. The City believed these employees might honor the Court employees' picket line and the purpose (and the natural and probable consequence) of the memo was to dissuade them from doing so. (*Carlsbad*, *supra*, PERB Decision No. 89, p. 13.)

In sum, the City has failed to meet its burden to justify maintaining and threatening to enforce its ban on sympathy strikes. Therefore, we affirm the ALJ's conclusion that the City committed an unfair practice by interfering with both employees' and SEIU's rights guaranteed by the MMBA.

The MOU Does Not Waive the Right to Engage in Sympathy Strikes

In its exceptions the City repeats the same arguments it made to the ALJ, asserting that the no-strike clause in the MOU waives the right to engage in sympathy strikes, and that such a waiver is evidenced by SEIU's unsuccessful attempts to negotiate an exception for sympathy strikes.[27]

For reasons explained by the ALJ, we agree that the language of the MOU does not constitute a clear and unmistakable waiver of the right to engage in a sympathy strike. The City seeks to distinguish *Oxnard*, *supra*, PERB Decision No. 1580-M, pointing to the fact that the MOU in this case defines strikes more broadly than did the MOU in *Oxnard.* It is true that the language in *Oxnard* defined banned work stoppages as those undertaken for the purpose of inducing or influencing a change in compensation or the rights, privileges or obligations of employment. Because a sympathy strike is not undertaken to influence the employer of the striking employees to change compensation or working conditions, *Oxnard* concluded there was no waiver. By contrast, the MOU at issue here refers to "any strike, slowdown or work stoppage."

Despite these differences, we agree with the ALJ that the MOU in this case did not evidence a clear and unmistakable waiver of a statutory right by Local 1021. As was noted in *Children's Hospital Medical Center of Northern California v. Nurses Association*, *supra*, 283 F.3d at p. 1195:

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[27] The relevant MOU article I.D. paragraph 14 provides in part:

> It is mutually agreed and understood that during the period this Agreement is in force and effect the Union will not authorize or engage in any strike, slowdown, or work stoppage. Represented employees are also bound by the above. . . .

> Since the Union's waiver of the employees' statutory rights must be clear and unmistakable, the extrinsic evidence must manifest a clear *mutual* intent to include sympathy strikes within the scope of the no-strike clause or else the clause will not be read to waive sympathy strike rights . . . A broad no-strike provision by itself is not sufficient to waive the right to engage in sympathy strikes.

Indianapolis Power & Light Company v. NLRB (7th Cir. 1990) 898 F.2d 524, 526 (*Indianapolis Power*) is instructive on this point. The no-strike clause in that case was worded very much like the parties' MOU Article I.D. here. It read in pertinent part: "the Union and each employee covered by the agreement agree not to . . . take part in any strike. . . ." The court noted: "A broad no-strike provision by itself is not sufficient to waive the right to engage in sympathy strikes if extrinsic evidence of the parties' intent does not demonstrate that the parties' [*sic*.] mutually agreed to include such rights within the breadth of the no-strike clause." (*Id.* at p. 528.) The burden is on the employer to show the mutual intent to waive this right. The court then considered the extrinsic evidence regarding the parties' intent.

Similar to the facts in this case, the parties' no-strike clause in *Indianapolis Power, supra*, 898 F.2d 524 had been initially negotiated decades before the controversy arose. During the initial negotiations, long discussions took place on whether the proposed no-strike clause included sympathy strikes, with neither side persuading the other. This disagreement continued in later negotiations, and on two separate occasions, the union proposed amendments to the clause that would specifically exclude sympathy strikes from its ban. Those proposals were rejected by the employer, and it later argued that these unsuccessful proposals proved mutual agreement to include sympathy strikes in the no-strike clause. Both the National Labor Relations Board (NLRB) and the Court of Appeal rejected the employer's claim because the unsuccessful proposals could also be interpreted as evidence of the parties' on-going dispute over the scope of the no-strike clause. The Court noted:

> Moreover, although it is undisputed that . . . the Union made proposals dealing directly and indirectly with the right to participate in sympathy strikes, the law is clear that the Union did not waive its statutory rights through the mere act of unsuccessfully seeking contractual rights which parallel statutory rights.

(*Indianapolis Power, supra*, 898 F.2d at p. 530, citing Chevron *USA, Inc.* (1979) 244 NLRB 1081.) Based on these facts and the union's testimony that the purpose of the proposals was to clarify what it thought it already had, the court agreed with the NLRB that the parties had agreed to disagree about the scope of the no-strike clause. (*Indianapolis Power, supra*, 898 F.2d at p. 530.)

The facts in the case before us are sufficiently similar to those in *Indianapolis Power, supra*, 898 F.2d 524 to justify the ALJ's reliance on that case to conclude that the City and Local 1021 agreed to disagree about the scope of their no-strike clause. The City urges the Board to consider the multiple attempts by Local 1021 to amend the MOU to permit sympathy strikes as proof of alleged mutual intent that the MOU prohibits sympathy strikes. We reject this argument based on *Indianapolis Power* and our own longstanding precedent. As we have previously held, the mere withdrawal of a proposal during negotiations does not mean that the proposing party has waived its bargaining rights on the subject matter of the proposal:

> Where . . . a union attempts to improve upon or . . . codify the status quo in the contract and fails to do so, the status quo remains as it was before the proposal was offered. . . . [T]he union has not relinquished its statutory right to reject a management attempt to unilaterally change the status quo . . . A contrary rule would both discourage a union from making proposals and management from agreeing to any proposals made, seriously impeding the collective bargaining process.

(*Los Angeles Community College District* (1982) PERB Decision No. 252, pp. 13-14. See also *San Mateo County Community College District* (1985) PERB Decision No. 486, p. 6; *Regents*

of the University of California (2012) PERB Decision No. 2300-H, p. 28; *Pine Manor Nursing Home* (1977) 230 NLRB 320, enf'd *NLRB v. Pine Manor Nursing Home, Inc.* (5th Cir. 1978) 578 F.2d 575 [no waiver where union withdrew proposal as a bargaining tactic].)

Accordingly, we join the ALJ in rejecting the City's reliance on the treatise, *Fairweather's Practice and Procedure in Arbitration* (4th Ed. 1999) p. 252 for the proposition that unsuccessful proposals made in bargaining may not be inserted into the contract by arbitral decisions interpreting ambiguous contract language. Whatever the merits of this rule, it does not apply here. Any waiver of a statutory right—such as the right to strike and the right to bargain—must be established either by clear and unmistakable agreement or by bargaining history showing that the issue was fully discussed and consciously explored, and that the union intentionally yielded its interest in the matter. (*Metropolitan Edison Co. v. NLRB* (1983) 460 U.S. 693, 708; *Fresno, supra*, PERB Decision No. 2418-M, pp. 41-42.) This means that unless the bargaining history shows that SEIU intended to agree that the no-strike clause prohibits sympathy strikes, any ambiguity in the no-strike clause is interpreted in favor of the right to engage in a sympathy strike.

The facts in this case support the ALJ's conclusion that there was no conscious exploration and discussion at the bargaining table regarding a potential waiver of the right to honor a picket line or otherwise engage in a sympathy strike. Rather, SEIU's abandoned attempts to negotiate a sympathy-strike exception simply left the no-strike clause in status quo, lacking a clear and unmistakable waiver of the right to engage in a sympathy strike.

The City further urges the Board to distinguish *Oxnard, supra*, PERB Decision No. 1580-M on the ground that the union in that case actually declared a sympathy strike, whereas here Local 1021 did not declare any strike and allegedly did not urge its municipal

members to withhold their services.[28] We do not consider this a legally significant difference. The point of *Oxnard* is that the MOU in question did not waive employees' right to engage in a sympathy strike. The qualified right to strike established by *County Sanitation, supra*, 38 Cal.3d 564 and assumed by *Oxnard* is a right that belongs both to employees and their representative organizations. (*Fresno, supra*, PERB Decision No. 2418-M, pp. 25-27; *Modesto, supra*, PERB Decision No. 291, pp. 66-69.) The fact that Local 1021 did not formally declare a strike, but instead informed its municipal members that they should follow their consciences and determine individually whether to honor the picket line has no bearing on our conclusion that the MOU language did not waive the employees' or their union's right to engage in a sympathy strike.

The Remedy

Having concluded that the charter provision prohibiting sympathy strikes violated the MMBA, the ALJ ordered the City to cease and desist from enforcing that regulation and further ordered that the second sentence of section A8.346(b) that defines a strike to include a work stoppage caused by employees honoring a "strike by other municipal employees" be stricken from the Charter. Both parties except to this remedy. We first address SEIU's exception, which asserts that the Board should strike down section A8.346 in its entirety and not restrict the remedial order only to sympathy strikes.

The complaint alleged that on or about July 16, 2012, the City "enforced section A8.346 of [the] City Charter" and then quoted as the "relevant part" of this provision the

[28] It is worth noting that the City does not contend that any of the employee actions in this case were a "wildcat" action, unauthorized or disapproved of by Local 1021, in which case they might have been unprotected. (See *San Ramon Valley Unified School District* (1984) PERB Order IR-46, pp. 11-12.)

preamble; subdivision (a), which defines a strike as one which is undertaken for the purpose of "inducing, influencing, or coercing a change in the conditions of employment" and its subdivision (b) which contains the prohibition on striking, and also prohibits sympathy strikes as defined as honoring a strike by other municipal employees.

SEIU's opening statement to the ALJ began by asserting that employees covered by the MMBA have a right to strike and that right includes the right to participate in a sympathy strike, citing PERB's decision in *Oxnard*, *supra*, PERB Decision No. 1580-M. "That [the right to participate in a sympathy strike] is the fundamental law at issue here." (Reporter's Transcript at p. 8.) SEIU also referenced *San Francisco*, *supra*, PERB Decision No. 2041-M, where the City's interest arbitration procedures were affirmed, but then pointed out how this case differed from *San Francisco* because this case involved a "secondary strike." (Reporter's Transcript at p. 10.)

The evidence in this case and reasonable conclusions that can be drawn from it show that by issuing the Gran memo the City sought to stop a potential sympathy strike, not a primary strike.[29] The only City employees who were potentially going to withhold their services on July 16, 2012, were those who contemplated honoring the strike undertaken by the Court employees. Although the Gran memo was overly broad and incorrect in its representation of section A8.346, it was directed only at municipal employees the City believed intended to honor the Court employees' picket line.[30] The City was not attempting to

[29] In addition to honoring the Court employees' picket line, SEIU members also discussed supporting the Court employees in other ways that were undoubtedly protected such as joining the Court picket lines during their off hours, wearing SEIU t-shirts, and providing food to the striking employees. There is no evidence that the City tried to stop or otherwise interfere with these protected activities.

[30] We reject as groundless the City's exception that the ALJ implied that the City and the Court were the same employer.

enforce its Charter provisions against a primary economic strike, because the municipal employees were not threatening to engage in a primary strike. Therefore, the ALJ properly limited his decision to the issue as he articulated it: "Did the City violate the MMBA by adopting and enforcing the provisions in the City Charter prohibiting sympathy strikes?" (Proposed decision, p. 9.) This is the issue dictated by the facts of the case and in the most part by SEIU's litigation of the case.[31] (*County of Riverside* (2010) PERB Decision No. 2097-M, p. 6-9; *Barstow Unified School District* (1996) PERB Decision No. 1138a, p. 10.) Accordingly, we reject SEIU's assertion that the remedy is too narrow.

Remedy for Maintaining and Enforcing an Unreasonable Local Rule

The City excepts to this order on two grounds. First, it asserts that the portion of the Charter ordered stricken was not even implicated by this case because it does not apply where municipal employees honor a picket line established by non-municipal employees.[32] Second, according to the City, PERB lacks the authority to "rewrite" the City's duly enacted charter provisions, as any modification of the Charter requires approval of the electorate.

It is unclear whether the City now takes the position that a sympathy strike by municipal employees would not be prohibited under the City Charter if the primary strike was undertaken by non-City employees. Given the overall arguments put forth by the City in the remainder of its exceptions defending its right to ban all strikes by its employees, we doubt

[31] The opening sentence of Local 1021's post-hearing brief to the ALJ declares: "Employees of the City and County of San Francisco . . . have the right to honor a picket line that is established in front of their workplace, without risking dismissal or other reprisal." Although the brief explained that the Charter provision has been superseded by *County Sanitation, supra*, 38 Cal.3d 564 and other cases, its focus can fairly be described as being on the right to honor picket lines.

[32] This argument was not presented to the ALJ, so he did not have an opportunity to rule on it.

that is the City's position. Left unexplained by the City is why Gran referred to section A8.346 and effectively threatened dismissal in a memo addressed to employees he believed intended to honor the picket line of non-City employees if he did not intend to invoke the Charter's general prohibition of strikes. Regardless of the literal meaning of the second sentence of section A8.346(b), it is clear from the facts of this case that the City relied on the general language of section A8.346 banning strikes to interfere with municipal employees' qualified right to engage in a sympathy strike when it circulated Gran's memo advising them that "work stoppages of any kind are prohibited." The portion of section A8.346 that bans sympathy strikes and prohibits any employee from causing, instigating, or affording leadership to a sympathy strike is invalid on its face. It is therefore appropriate to address that language, regardless of whether it literally applies to a sympathy strike in support of non-municipal employees.

However, we agree with the City's assertion that PERB lacks the authority to order the City to rescind or "re-write" its charter. As the Court of Appeals noted in a recent decision, *City of Palo Alto v. Public Employment Relations Board* (2016) 5 Cal.App.5th 1271, 1310, review den. (Mar. 15, 2017) (*City of Palo Alto*), PERB, acting as a quasi-judicial agency, cannot compel legislative action by a city or county without violating the separation of powers doctrine.

PERB's remedial authority is broad, but not limitless. MMBA section 3509, subdivision (b) provides: "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." EERA section

3541.3, subdivision (i)[33] confers upon the Board the power to "take any action and make any determinations in respect of [unfair practice charges] as the board deems necessary to effectuate the policies of this chapter."

Despite the City's post hoc assertion that section A8.346(b) was not applicable to this particular potential sympathy strike, it is apparent from Gran's memo that the City relied on section A8.346 in its entirety to discourage employees from honoring the Court employees' picket line. Moreover, the second sentence of subdivision (b) is, as we have concluded, overbroad to the extent it prohibits sympathy strikes that do not threaten public health or safety. It is therefore appropriate to order the City to cease and desist from enforcing or threatening to enforce section A8.346(b) and (e) to interfere with or prohibit employees from exercising their protected right to engage in sympathy strikes that do not threaten public health and safety.

It is also appropriate and within PERB's authority to declare void and unenforceable portions of the Charter that conflict with the MMBA. Unlike ordering the language "rescinded," such an order does not amount to "rewriting" the Charter, but merely enjoins enforcement of the illegal regulation. This is precisely how courts have treated local provisions, including charter provisions, that conflict with superior state law. (*City of Palo Alto, supra*, 5 Cal.App.5th 1271; *International Brotherhood of Electrical Workers v. City of Gridley*, *supra*, 34 Cal.3d 191; *Younger v. Board of Supervisors* (1979) 93 Cal.App.3d 864, 870; *Los Angeles County Federation of Labor v. County of Los Angeles* (1984) 160 Cal.App.3d 905 [enjoining enforcement of voter-adopted charter amendment prohibiting charter county from granting improvements in wages or working conditions to employees represented by a

[33] This section of the Educational Employment Relations Act is made applicable to the MMBA by MMBA section 3509.

union involved in a strike]; *International Ass'n of Fire Fighters Union v. City of Pleasanton* (1976) 56 Cal.App.3d 959, 964, 977 [order enjoined city from implementing resolutions made in violation of the MMBA]; *Independent Union of Public Services Employees v. County of Sacramento* (1983) 147 Cal.App.3d 482, 490 [charter county enjoined from applying rule passed in violation of the procedural requirements of the MMBA; rule declared void]; *Cerini v. City of Cloverdale* (1987) 191 Cal.App.3d 1471, 1481 [city resolution declared "invalid" because city failed to comply with MMBA before passing resolution regarding employee discipline]; *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 807-808 [court enjoined charter city from certifying election results where at-large municipal election violated state voting rights act].)

We therefore alter the proposed order to clarify that the City is not required to strike or re-write any language in Charter section A8.346. Instead, we declare void and unenforceable the second sentence of section A8.346(b).

Although we have held in two previous cases that PERB does not have the authority to overturn a municipal election as a remedy for a local agency's failure to bargain over a proposed initiative prior to placing it before the voters, we view this case differently.[34] In both of those cases, unlike in the present case, the employer had failed to complete the procedures required by the MMBA before submitting a ballot measure to its voters. In this case, by contrast, it is not the procedure by which section A8.346 was added to the Charter that is unlawful, but the substantive content of that provision itself.

[34] Those cases were *City of Palo Alto* (2014) PERB Decision No. 2388-M (replaced by PERB Decision No. 2388a-M) and *City of San Diego* (2015) PERB Decision No. 2464-M, the latter of which is pending before the California Supreme Court.

In our previous decisions, we relied on *International Association of Fire Fighters v. City of Oakland* (1985) 174 Cal.App.3d 687 (*City of Oakland*), to conclude that PERB did not have the authority to overturn the results of an election in order to remedy a failure of procedure required by the MMBA. As *City of Oakland* stated:

> Since an action in the nature of quo warranto will lie to test the regularity of proceedings by which municipal charter provisions have been adopted, it follows that, once those provisions have become effective, their procedural regularity may be attacked only in quo warranto proceedings.

(*Id*. at p. 694, cites omitted.)

Since it is courts, not administrative agencies, which have jurisdiction to hear quo warranto actions or petitions for writs of mandate, the Board does not believe that its remedial powers extend to considering matters that have been determined to lie exclusively with an action in quo warranto or writ of mandate. "It is also well-established that, absent constitutional or statutory regulations providing otherwise, quo warranto is the only proper remedy [to challenge procedural irregularities of an election]." (*City of Oakland*, *supra*, 174 Cal.App.3d at p. 694.) [35]

However, here we are faced with a different issue. No party seeks to "test the regularity of proceedings by which municipal charter provisions have been adopted." (*City of Oakland, supra*, 174 Cal.App.3d at p. 694.*)* Instead substantive rights of employees guaranteed by the MMBA were abrogated by the passage of Charter amendments ultimately resulting in section A8.346. That this abrogation was approved by the voters of San Francisco

[35] The court in *City of Palo Alto* agreed, noting, ". . . an action in quo warranto is the exclusive remedy to challenge the ballot initiative to repeal article V of the city charter. (*City of Palo* Alto, *supra*, 5 Cal.App.5th 1271, 1319.) Nevertheless, the court determined that PERB did have the authority to declare void the City's action that was found to be an unfair practice.

does not immunize the City from PERB's remedial powers and authority, as we explain further.

In 2000, the Legislature amended the MMBA to provide that PERB, not the courts, would have initial jurisdiction to administer the Act, including the power to "take any action and make any determinations in respect of . . . alleged violations [of the Act] as the board deems necessary to effectuate the policies of this chapter." (EERA § 3541.3, subd. (i), made applicable to the MMBA by MMBA § 3509). MMBA section 3509, subdivision (b) explicitly provides that the initial determination of whether a charge of unfair practice is justified and if so, "the appropriate remedy necessary to effectuate the purposes of this chapter" is within the exclusive jurisdiction of the Board. In transferring jurisdiction over the MMBA from the courts to PERB, the Legislature directed PERB to interpret and apply the MMBA in a "manner consistent with and in accordance with judicial interpretations of this chapter." (MMBA, § 3510, subd. (a).)

Judicial precedent teaches three lessons pertinent here: (1) only the courts have the power to overturn elections held in violation of MMBA procedural requirements to bargain with employee organizations before placing matters before the electorate that change terms and conditions of employment; (2) courts have exercised their authority to void charter provisions whose substance violates the MMBA; and (3) PERB has the authority to declare void and unenforceable municipal actions that violate the MMBA. (*City of Palo Alto*, *supra*, 5 Cal.App.5th 1271.)

We have exercised the remedial powers granted to the Board without question when necessary to stop a local agency from enforcing a substantive rule that conflicts with the MMBA. (*County of Imperial* (2007) PERB Decision No. 1916-M; *Tehama County Superior*

Court (2008) PERB Decision No. 1957-C; *County of Amador* (2013) PERB Decision No. 2318-M.) Were we prevented from doing so, the Legislature's intent to cede to PERB administrative authority to determine and remedy unfair practices under the MMBA would be nearly a pointless act.

Moreover, if PERB were unable to remedy instances of charter cities and counties maintaining unreasonable local rules that violate the MMBA simply because voters passed the local rule, California public sector labor relations could easily become a patchwork of conflicting rules, depending on whether the employer was a charter entity. PERB would undoubtedly have jurisdiction to remedy unfair practices in non-charter jurisdictions, but it would be left to the courts to determine and remedy those unfair practices that alleged a conflict between local rules and the MMBA where the electorate passed the offending rule. Such a situation is precisely what the Legislature sought to avoid when it gave to PERB the initial exclusive jurisdiction to determine and remedy *all* unfair practices, without regard to whether the employer was a charter entity.

We see no reason to refrain from exercising our power to declare void and unenforceable a local rule that violates the MMBA simply because that rule has been passed by the voters. Given that the MMBA has been determined in several cases to address matters of statewide concern, charter cities or counties are not free to pass local legislation, either by their governing boards or by voter initiative, that would deny rights and duties established by the MMBA. (*Professional Fire Fighter Fighters v. City of Los Angeles*, *supra,* 60 Cal.2d 276, 295; *Seal Beach*, *supra,* 36 Cal.3d at pp. 600-601*; Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 781.)

To permit a local agency to insulate itself from recognizing a basic right secured by the California Supreme Court over 30 years ago simply by arranging a vote to amend a charter would upend the supremacy of state policy and eviscerate the MMBA, and render a nullity the legislative transfer of power over the MMBA from the courts to PERB in 2000.

Remedy for Interference

The appropriate remedy for conduct that interferes with protected rights is to order the employer to cease and desist from such conduct and to make whole any employees adversely affected by the action. (*San Bernardino, supra*, PERB Decision No. 2423-M; *City of Redding* (2011) PERB Decision No. 2190-M; *Omnitrans* (2010) PERB Decision No. 2143-M; *Santee Elementary School District* (2006) PERB Decision No. 1822; *San Marcos Unified School District* (2003) PERB Decision No. 1508; *Rio Hondo Community College District* (1983) PERB Decision No. 292.)

As noted previously, by advising municipal employees that "strikes or work stoppages of any kind are prohibited" and by threatening to dismiss any employee who has engaged in a strike, the City interfered with its employees' protected right to engage in a sympathy strike and with SEIU's right to represent its bargaining unit members.

By distributing Gran's memo asserting that "strikes or work stoppages of any kind are prohibited," when this particular threatened sympathy strike was not prohibited by the literal terms of section A8.346, the City applied a new rule that was broader than the plain meaning of the Charter. It is therefore appropriate to order that the City rescind this memo and that it cease and desist from such conduct.

Employee Acknowledgement Forms

The City requires all new employees and those who are promoted to sign a document that essentially repeats the City's prohibition on striking as contained in section A8.346(b). Because we order the City to cease and desist from enforcing its prohibition on sympathy strikes, it is also appropriate to order the City to cease requiring new hires or any other employees to sign this acknowledgement document until and unless it is revised to delete reference to sympathy strikes, or honoring a strike by other employees, whether those employees are "municipal" employees or otherwise employed.

Electronic Posting of the Notice

It is appropriate to order an electronic posting of the Order in this case, as per *City of Sacramento* (2013) PERB Decision No. 2351-M notifying all employees of the Order. We do not confine this posting to bargaining unit members. The City has maintained an unreasonable rule which affects all City employees, not only those represented by Local 1021. It is therefore appropriate that all employees be notified of our order partially invalidating A8.346 as it applied to lawful sympathy strikes. (See *County of Imperial* (2007) PERB Decision No. 1916-M; *City of Livermore* (2017) PERB Decision No. 2525-M.)

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it has been found that the City and County of San Francisco (City) violated the Meyers-Milias-Brown Act (MMBA). The City maintained and enforced an unreasonable regulation in violation of Government Code section 3507 and Public Employment Relations Board (PERB or Board) Regulation 32603, subdivision (f) (Cal. Code of Regs., tit. 8, § 31001 et seq.) By this conduct, the City also interfered with the right of City employees to participate in the activities

of an employee organization of their own choosing, in violation of Government Code section 3506 and PERB Regulation 32603, subdivision (a), and denied Service Employees International Union, Local 1021 (SEIU) its right to represent employees in their employment relations with a public agency, in violation of Government Code section 3503 and PERB Regulation 32603, subdivision (b).

Pursuant to section 3509, subdivision (a) of the Government Code, it hereby is ORDERED that the second sentence of Charter section A8.346(b) is void and unenforceable. Charter section A8.346(e) is also void and unenforceable to the extent it applies to sympathy strikes. The City and County of San Francisco, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Adopting and enforcing City Charter section A8.346 to the extent it prohibits sympathy strikes.

2. Interfering with bargaining unit members' right to participate in the activities of an employee organization of their own choosing.

3. Denying SEIU its right to represent employees in their employment relations with the City.

4. Requiring employees to sign an acknowledgment document that includes any reference to a prohibition of sympathy strikes.

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 all work locations in the City, where notices to employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an

authorized agent of the City, indicating that the City will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material. In addition to the physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and any other electronic means customarily used by the City to communicate with it employees.

2. Within thirty (30) workdays of service of a final decision in this matter, notify the General Counsel of PERB, or his or her designee, in writing of the steps taken to comply with the terms of this Order. Continue to report in writing to the General Counsel, or his or her designee, periodically thereafter as directed. All reports regarding compliance with this Order shall be served concurrently on SEIU.

Chair Gregersen joined in this Decision.

Member Banks' concurrence and dissent begins on page 48.

BANKS, Member, concurring and dissenting: I agree with the majority that a provision in the Charter of the City and County of San Francisco (City) prohibiting City employees from honoring a picket line by other municipal employees is inconsistent with the provisions, policies and purposes of the Meyers-Milias-Brown Act,[1] and that, by promulgating, maintaining and enforcing this provision, the City engaged in unfair practices in violation of the MMBA and PERB Regulations.[2] I agree with the majority that, under both PERB's analysis for interference and judicial opinions interpreting the MMBA, whether the employees' representative Service Employees International Union Local 1021 (Local 1021) called a sympathy strike, whether any City employees participated in a sympathy strike, and whether any employees were actually deterred from honoring a picket line by employees of another employer has no bearing on whether the City interfered with protected rights in this case. (*Carlsbad Unified School District* (1979) PERB Decision No. 89 (*Carlsbad*), pp. 10-11; *Santee Elementary School District* (2006) PERB Decision No. 1822 (*Santee*), pp. 10-12; *Los Angeles County Federation of Labor v. County of Los Angeles* (1984) 160 Cal.App.3d 905, 908-910 (*County of Los Angeles*).)

Unlike the majority, I think the issues alleged in the complaint, argued by the parties before the administrative law judge (ALJ), and briefed to the Board are not limited to whether one part of one sentence in the City's Charter unlawfully prohibited City employees from striking in sympathy with other employees. At issue is whether Charter section A8.346 is so permeated with unlawful provisions that the appropriate remedy is for the Board to declare that section void *in its entirety*. I write separately to explain my disagreement with the majority's

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[1] The MMBA is codified at Government Code section 3500 et seq. All further undesignated code sections refer to the Government Code.

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

failure to consider the full scope of issues alleged in the complaint and properly before the Board on appeal.

Scope of the Complaint

The complaint quoted extensively from Charter section A8.346, including its prefatory language and the entirety of subdivisions (a) and (b). These provisions declare, as City policy, that "the instigation of or participation in, strikes against [the] City and County by any officer or employee of [the] City and County constitutes a serious threat to the lives, property, and welfare of the citizens of [the] City and County." These provisions also define prohibited strikes broadly to include:

> the willful failure to report for duty, the willful absence from one's position, any concerted stoppage or slowdown of work, any concerted interruption of operations or services by employees, or the willful abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment, for the purpose of inducing, influencing, or coercing a change in the conditions of employment; …

Subdivision (a) acknowledges that City employees may "express or communicate a view, grievance, complaint, or opinion on any matter related to the conditions or compensation of municipal employment or their betterment," so long as the exercise of such right "is not designed to and does not interfere with the full, faithful, and proper performance of the duties of employment." Otherwise, nothing in the language of subdivision (a) quoted above, or in any other portion of section A8.346, attempts to limit or clarify the above definition of a "strike" with respect to statutorily protected and unprotected conduct.

Charter section A8.346, subdivision (e), which is not specifically quoted in the complaint, makes it the duty of a special committee consisting of various City officials to "dismiss … any municipal employee found to be in violation of any provisions of [section

A8.346]." The failure of any appointing officer to discharge this duty or any other duties imposed upon him or her by section A8.346 is considered official misconduct. (Charter, § A8.346, subds. (e), (g).)

The consequences for striking, as defined by section A8.346, are also spelled out in Charter section A8.409, which includes mandatory interest arbitration procedures adopted by City voters in the 1990s.[3] Section A8.409 reiterates the statement of policy found in section A8.346 that *all* strikes by City employees are contrary to the public interest and requires dismissal of any officer or employee of the City who engages in a strike, as defined by section A8.346, subdivision (a).[4] Like section A8.346, section A8.409's prohibition against strikes by City employees makes no distinction between statutorily protected and unprotected conduct, including the rights of City employees to "form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." (MMBA, §§ 3502, 3502.1, 3506, 3506.5, subd. (a); City Charter, §§ 16.207, 16.213, subd. (a).)[5] Like section A8.346, section A8.409 leaves City officials no discretion to forego dismissal or to impose any lesser form of discipline in the

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[3] As discussed below, the City's mandatory interest arbitration procedure is also the subject of some controversy to the extent it operates as a complete and permanent forfeiture of the statutorily-guaranteed rights of employees and employee organizations to strike.

[4] Specifically, section A8.409 states: "If any officer or employee covered by this part engages in a strike as defined by section A8.346(a) of this Charter against the [City], said employee *shall be dismissed* from his or her employment *pursuant to Charter section A8.346*." (Emphases added.)

[5] Charter section 16.207 incorporates substantially the same employee rights as those found in the MMBA, while section 16.213, subdivision (a), makes it an unfair practice for the City to "[i]nterfere with, restrain or coerce employees in the exercise of the rights recognized or granted in this ordinance."

event City employees instigate or participate in a "strike" as defined broadly under section A8.346.

The complaint also alleged that the City's enforcement of section A8.346 on or about July 16, 2012 was unreasonable, in violation of MMBA section 3507 and PERB Regulation 32603(f), and interfered with employee and organizational rights protected by the MMBA.

In Adopting the Proposed Decision, the Majority Improperly Ignores Allegations Included in the Complaint and Briefed by the Parties before the ALJ and the Board

The ALJ framed the issue narrowly as whether the City had violated the MMBA by adopting and enforcing language in section A8.346 prohibiting City employees from "'honoring' a strike by other municipal employees." After determining that PERB and judicial authority interpret the MMBA to provide a qualified right of public employees to strike in sympathy with other employees, the ALJ concluded that the above language was unreasonable, and that the City's enforcement of this provision also interfered with employee and organizational rights. As evidence of its enforcement, the ALJ relied on the strike penalty language found in Charter sections A8.346 and A8.409,[6] and on a memo from City Employee Relations Director Martin Gran, which advised employees that under Charter section A8.346 "strikes or work

[6] Although Charter section A8.409 (providing for dismissal of "any" officer or employee of the City who engages in a strike) was not recited in the complaint, it was discussed extensively in the parties' briefs before the ALJ and cited by the City as support for its argument that section A8.346 is reasonable and consistent with prior Board precedent. For example, in its reply to the City's post-hearing brief, Local 1021 advised the ALJ that it was "challenging the Charter's impasse procedure to the extent that it refers to or incorporates Section A8.346 (the Charter's strike penalty provision)." (Reply Brief, p. 1.) The City's brief in support of its exceptions also contends that Charter section A8.409 operates in conjunction with section A8.346 to prohibit strikes by employees in the miscellaneous bargaining unit. (pp. 16-17.) Although the City disagrees with the proposed decision as to the lawfulness of this prohibition, it apparently concedes that consideration of section A8.409 is appropriate for deciding this case, regardless of whether that section was specifically cited in the complaint.

stoppages of any kind are prohibited," and which was distributed to City employees on July 16, 2012 in response to the Superior Court for the County of San Francisco (Court) employees' picket line. In support of his findings and conclusions that that the City's enforcement of section A8.346 was unreasonable and in violation of the MMBA and PERB Regulations, the ALJ also expressly relied on the City's personnel policy, pursuant to Charter section A8.346, subdivision (i), of requiring all City employees on their date of appointment or reappointment to sign a form acknowledging receipt of the strike prohibitions found section A8.346. By this conduct, the ALJ concluded that the City had maintained and enforced an unreasonable rule and interfered with protected rights. (Proposed decision, pp. 11, 18.) In addition to a cease-and-desist order and posting requirement, the ALJ ordered that the language in section A8.346, subdivision (b), prohibiting City employees from honoring a strike by other municipal employees be removed from the City Charter. (Proposed decision, pp. 27, 29.)

The proposed decision did not address Local 1021's contention that Charter section A8.346's declaration of policy and unqualified definition of a strike, as set forth in the prefatory language of section A8.346 and subdivision (a), are facially inconsistent with *County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn.* (1985) 38 Cal.3d 564 (*County Sanitation*) and other authorities holding that strikes by public-sector employees are not prohibited at common law, unless it has been clearly determined *on a case-by-case basis* that they involve "essential" employees whose absence from work poses a substantial and imminent threat to public health and safety. (*Id*. at pp. 586-587; see also *Sacramento County Superior Court (United Public Employees Local 1*) (2015) PERB Order No. IR-59-C (*Sacramento Co. Superior Court*), p. 2; *County of Trinity (United Public Employees of California, Local 792)* (2016) PERB Decision No. 2480-M (*County of Trinity*), adopting

warning letter at p. 3.) Nor did the proposed decision address Local 1021's argument that the Charter's unqualified prohibition against "any" strikes, as defined broadly in subdivision (b), is likely to chill various forms of protected conduct, including conduct involving no actual work stoppage.

The majority repeats and affirms these omissions, by focusing exclusively on language in the second sentence of subdivision (b) of section A8.346 prohibiting City employees from honoring a picket line by other municipal employees and by largely ignoring the implications of the broad strike prohibition *quoted in the complaint* and discussed extensively in the parties' briefs before the ALJ and the Board itself. Local 1021 advised City employees to "follow their conscience," but, as the majority concedes, it never called on City employees to honor the Court employees' picket line. The majority also concedes that no City employees engaged in any work stoppage on the day of the Court employees' strike. Despite the majority's assertion to the contrary, there is also scant evidence that any City employee was deterred from honoring the Court employees' picket line, which Local 1021 had never called on City employees to do in the first place. Moreover, the majority acknowledges that, strictly speaking, the language of subdivision (b) prohibiting City employees from honoring a picket line "by other municipal employees" is not even applicable to the facts of this case, because the July 16, 2012 strike involved employees of the Superior Court, who are not municipal employees. Under these circumstances, it is unclear why the majority chooses to focus *exclusively* on whether one part of one sentence in section A8.346, which the majority admits is not applicable, unlawfully prohibits sympathy strikes, rather than on the broader allegations included in the complaint and raised in the parties' briefs. In particular, I see no reason to ignore the plain language of the complaint and whether the Charter's ban on *all* strikes by City employees, including but not limited to

sympathy strikes by other City employees, is facially inconsistent with the MMBA and PERB and judicial precedent.

By declaring as City policy, that "the instigation of or participation in, strikes against [the] City and County by any officer or employee of [the] City and County constitutes a serious threat to the lives, property, and welfare of the citizens of [the] City and County" the prefatory language of section A8.346 is facially inconsistent with *County Sanitation* and PERB precedent holding that strikes by public employees (other than peace officers and fire fighters) cannot be enjoined as unlawful, unless it has been clearly demonstrated *on the facts of each case* that the employees' participation in a strike poses an imminent and substantial threat to public health and safety. (*County Sanitation, supra*, 38 Cal.3d at pp. 586-587; *City of San Jose v. Operating Engineers* (2010) 49 Cal.4th 597, 606 (*City of San Jose*); *Sacramento Co. Superior Court, supra,* PERB Order No. IR-59-C, pp. 2-3.)

First, the Charter's prohibition against "any" strike quite obviously implicates a broad array of work stoppages other than the right to strike in sympathy with other employees discussed in the proposed decision and the majority opinion. As we noted in *Fresno Co. IHSS Public Authority*,[7] a threatened or actual strike whose purpose is, in whole or in part, to protest an employer's unfair labor practices is statutorily protected (*Id.* at p. 33), as is an economic strike occurring after exhaustion of statutory or other applicable impasse-resolution procedures. (*County of Trinity, supra,* PERB Decision No. 2480-M, adopting warning letter at p. 3; *Modesto City Schools* (1983) PERB Decision No. 291 (*Modesto*), p. 39; see also *City of San Jose* (2013) PERB Decision No. 2341-M, pp. 39-40 [parties' rights and duties upon exhausting impasse procedures identical to those in the private sector].) Similarly, "grievance"

[7] *Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M (*Fresno Co. IHSS Public Authority*).

strikes of short duration may also be protected under our statutes. (*Modesto, supra*, at pp. 62-64; *San Ramon,* PERB Order No. IR-46, pp. 12-13.)[8]

Our precedents hold that a broad prohibition against a general category of conduct that includes both protected and unprotected activity, but makes no distinction between the two, is overly broad and presumptively invalid on its face. (*Los Angeles Community College District* (2014) PERB Decision No. 2404 (*LACCD*), p. 6; *San Marcos Unified School District* (2003) PERB Decision No. 1508, pp. 36-40; *Los Angeles County Federation of Labor v. County of Los Angeles* (1984) 160 Cal.App.3d 905, 908-910.) Absent a knowing and voluntary waiver by the employees' representative, subdivision (a) of section A8.346 is facially unlawful to the extent it prohibits employees and employee organizations from engaging in "***any*** concerted stoppage or slowdown of work, ***any*** concerted interruption of operations or services by employees, or the willful abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment ***for the purpose of*** inducing, influencing, or coercing a change in the conditions of employment," (Emphases added; see, e.g., *Fresno Co. IHSS Public Authority, supra*, PERB Decision No. 2418-M, p. 37.) In short, the Charter's categorical ban on "any" strikes, without distinction between protected and unprotected activity, creates a presumption of invalidity, which the City has not rebutted,[9] and which

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[8] See also *Wal-Mart Stores, Inc.* (2016) 364 NLRB No. 118, slip op. at p. 1; and *NLRB v. Washington Aluminum Co.* (1962) 370 U.S. 9, 15.)

[9] Far from arguing that Charter section A8.346 distinguishes between protected and unprotected conduct, the City's briefs before the ALJ and the Board argue, contrary to Board precedent, that the Charter properly prohibits *all* strikes because the MMBA includes no protected right to strike.

clearly extends well beyond the one category of sympathy strikes which, strictly speaking, was not even implicated by the facts of this case, but which, nonetheless, is the *exclusive* focus of the majority's opinion.

In addition to the various categories of strikes categorically banned by the City Charter, the language of section A8.346 is unreasonably overbroad in that it would also reasonably chill other protected conduct not involving any work stoppage, including strike preparations and strike threats, which our cases and controlling judicial authority also regard as protected conduct. (*Sweetwater Union High School District* (2014) PERB Order No. IR-58 (*Sweetwater),* pp. 11-13; *Santee, supra,* PERB Decision No. 1822, pp. 10-12; *County of Los Angeles, supra,* 160 Cal.App.3d 905, 908-910.) Section A8.346's prohibition against "instigat[ing]" or "afford[ing] leadership to a strike" presents some of the same issues addressed by the Court of Appeals in *County of Los Angeles,* the authority relied on by Local 1021 both in its briefing before the ALJ and in its response to the City's exceptions before the Board.

Following federal and California judicial precedent, our cases also hold that, even in the absence of any formal organizational activity, employees are guaranteed the right to discuss their wages, hours and working conditions, which logically includes whether to instigate, afford leadership to, or participate in a work stoppage and whether to threaten to do so. (*LACCD, supra,* PERB Decision No. 2404, pp. 6-7 [and federal cases discussed therein]; *County of Los Angeles, supra,* 160 Cal.App.3d 905, 910.) While the majority opinion focuses exclusively on language in the second sentence of subdivision (b) of section A8.346 prohibiting City employees from honoring a picket line by other City employees, it ignores the first sentence of subdivision (b), which was also quoted in the complaint, and which prohibits, among other things, "any municipal employee" from "caus[ing], instigat[ing], or afford[ing]

leadership to a strike against the City and County of San Francisco." This provision is no less unreasonable, as it conflicts with the language and purpose of MMBA section 3502.1,[10] which was designed to protect employee representatives and union officers from, among other things, punitive action for the exercise of lawful action on behalf of bargaining unit employees. (MMBA, § 3502.1; *Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, pp. 25-27.) Because an employee's good-faith threat to engage in protected conduct is likewise protected (*Hartnell Community College District* (2015) PERB Decision No. 2452, p.39), I can discern no reason for the majority's failure to find that the Charter's prohibition against "instigat[ing]" or "afford[ing] leadership to a strike" is an unreasonable local rule, which interferes with protected employee and organizational rights.

Allegations included in a complaint are not only ones that the charging party wishes to pursue, but also ones that the agency has determined *should* be pursued. (*Fresno Co. IHSS Public Authority, supra,* PERB Decision No. 2418-M, p. 20; *County of Fresno* (2014) PERB Decision No. 2352-M, p. 4; see also *City of Inglewood* (2015) PERB Decision No. 2424-M, p. 12.) The purpose of a formal hearing is to "[i]nquire fully into all issues and obtain a complete record upon which [a] decision can be rendered" (PERB Reg. 32170, subd. (a); *City of Santa Clara* (2016) PERB Decision No. 2476-M, p. 10; see also *State of California (State Personnel Board)* (2002) PERB Decision No. 1491-S, pp. 9-10), and it does the parties to unfair practice proceedings a disservice for the Board to ignore allegations in the complaint and to leave unresolved important issues in dispute.

[10] MMBA section 3502.1 provides: "No public employee shall be subject to punitive action or denied promotion, or threatened with any such treatment, for the exercise of lawful action as an elected, appointed, or recognized representative of any employee bargaining unit."

The majority's failure to confront and decide the issues placed squarely in front of the Board by the complaint and the parties' briefs is particularly problematic here because the issue remains a live controversy that may erupt at any time. As the majority correctly notes, because the Charter's no strikes provisions are maintained under threat of discipline, they are subject to challenge *at any time* by Local 1021 or other employee organizations representing City employees, or, for that matter, by *every* City employee. (MMBA, §§ 3507, subd. (d), 3509, subd. (b); *City of Livermore* (2017) PERB Decision No. 2525-M, p. 14; see also *Long Beach Unified School District* (1987) PERB Decision No. 608, pp. 11-12 [reasonableness of employer rule maintained under threat of discipline may be litigated at any time, regardless of its enforcement]; *County of Orange* (2006) PERB Decision No. 1868-M, pp. 4-5 [same].) Indeed, to the extent Charter section A8.409 incorporates by reference and relies on the strike prohibitions included in section A8.346, presumably any City employee or employee organization may also file a timely charge, at any time and without regard to actual enforcement, to challenge the reasonableness of the City's mandatory interest arbitration procedure. Far from exhibiting restraint by not addressing issues before it, the majority's opinion is an evasion of PERB's mission to administer the statutes within our jurisdiction. (*State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2282-S, p. 15 ["[w]here the same employer conduct concurrently violates more than one unfair practice provision, it is the duty of the Board to find more than one violation"].)

Certainly, a hearing officer and the Board in its review of exceptions may appropriately dismiss an allegation that fails for lack of proof or that has been abandoned, but, just as certainly, that is not the case here. Take, for example, the City's personnel policy of requiring employees upon appointment or reappointment to acknowledge receipt of the Charter's no strikes

provisions. While subdivision (i) of section A8.346 (authorizing this policy) is not quoted in the complaint, Local 1021's brief before the ALJ argued that "because the Charter provision itself is unlawful, any document relying upon it or purporting to recite as a term and condition of employment is itself also unlawful." According to Local 1021, the acknowledgement of receipt forms which the City requires employees to sign are a type of yellow dog contract[11] and unenforceable as a matter of law. (Local 1021 Post-Hearing Brief, p. 9; see also Labor Code, § 921; *Petri Cleaners, supra,* 53 Cal.2d 455, 469-470; 29 U.S.C., §§ 102, 103.)[12] Although the ALJ found, and the majority agrees, that City employees "are and continue to be, restrained in their ability to participate in a sympathy strike based on the City's prohibition *and their personnel documents acknowledging that prohibition*" (proposed decision, p. 18, emphasis added), the majority does not declare subdivision (i) invalid nor explain why evidence of the City's personnel practices may be used to establish liability, while the Charter provisions authorizing those personnel practices are not addressed as part of the Board's remedy.

The appropriate remedy for an unreasonable rule is to identify the specific portions of the rule that are unlawful and declare them "void" (*City of Palo Alto v. Public Employment Relations Bd.* (2016) 5 Cal.App.5th 1271, review den. (Mar. 15, 2017); *City of Livermore*,

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[11] A yellow dog contract is an agreement between an employer and an employee, where the employee agrees as a condition of employment to forego union membership and/or protected conduct. (*Lincoln Federal Labor Union No. 19129, A.F. of L. v. Northwestern Iron & Metal Co.* (1949) 335 U.S. 525, 534; *Petri Cleaners, Inc. v. Automotive Emp., Laundry Drivers and Helpers Local No. 88* (1960) 53 Cal.2d 455, 469–471.)

[12] The Norris-LaGuardia Act, which is codified at 29 U.S.C. section 101 et seq, guarantees the rights of private-sector employees to "full freedom of association, self-organization, and designation of representatives of [their] own choosing," to "be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," and to be free from "any contract or agreement of hiring or employment" purporting to limit the right of employees to membership in a labor organization. (29 U.S.C., §§ 102, 103, 157.)

supra, PERB Decision No. 2525-M, pp. 17-19), or, if the unlawful portions of an employer's rule cannot be severed from what is lawful, then the appropriate remedy is to declare the entire rule "void." (*County of Los Angeles, supra*, 160 Cal.App.3d 905, 908-910.) Here, there is a legitimate question whether the language prohibiting City employees from honoring picket lines by other City employees, which the majority correctly concludes is unlawful, can be severed from the remainder of the Charter, or whether the *other* invalid provisions of the Charter are so numerous and so permeate section A8.346 that to excise them would leave the section unintelligible. (*County of Los Angeles, supra*, at p. 910.) Unfortunately, the majority does not attempt to answer this question. Instead, it declares "void and unenforceable the second sentence of section A8.346(b)" and orders the City "to cease and desist from enforcing or threatening to enforce A8.346(b) and (e) to interfere with or prohibit employees from exercising their protected right to engage in sympathy strikes that do not threaten public health and safety."[13] The majority offers no persuasive explanation why such conduct is only unlawful with respect to sympathy strikes, but not other forms of protected activity.

The majority attempts to justify its arbitrarily narrow focus on sympathy strikes by asserting in footnote 29 that, while "SEIU members also discussed supporting the Court employees in other ways that were undoubtedly protected such as joining the Court picket lines during their off hours, wearing SEIU t-shirts, and providing food to the striking employees," the record includes "no evidence that the City tried to stop or otherwise interfere with these protected activities." The majority's reasoning is clearly contrary to PERB precedent and the legislative directive that PERB follow judicial authority when interpreting the MMBA's unfair

[13] Curiously, section A8.346, subdivision (e), which is not mentioned in the complaint, is properly before the Board, while subdivision (a), which was not only mentioned in the complaint, but quoted in its entirety, is not properly before the Board in this case.

labor practice provisions. (MMBA, §§ 3509, subd. (b), 3510, subd. (a).) The allegations in the complaint include *both* a facial challenge to section A8.346 and an allegation that the Charter provisions quoted are unreasonable, *as applied* by the City on July 16, 2012. In analyzing a facial challenge to a similarly-worded strike prohibition adopted by Los Angeles County, the Court of Appeal did not ask whether the public agency had "tried to stop or otherwise interfere with … protected activities" involving no actual work stoppage. Instead, it considered whether disciplinary provisions applying to "any employee who instigates, participates in or affords leadership to a strike" were overly broad because they would reasonably chill employee conversations regarding their wages and working conditions or how to support the union's bargaining demands. (*County of Los Angeles, supra,* 160 Cal.App.3d at p. 908.)

The majority thus confuses a facial challenge, as analyzed under controlling judicial precedent and PERB's *Carlsbad, supra*, PERB Decision No. 89, line of cases, with an as-applied challenge, which requires some evidence of how an employer rule or policy was actually enforced. (*Ibid*.; see also *Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, pp. 42-50 [analyzing the language of employer directive, as it would reasonably be understood by employees, without regard to how or whether it was enforced].) To determine whether the Charter provisions at issue are facially inconsistent with the MMBA, as alleged in the complaint, the Board need do no more than examine the language of the Charter itself and determine whether it would reasonably discourage the exercise of protected rights or undermine the policies and purposes of the MMBA. (*County of Monterey* (2004) PERB Decision No. 1663-M, adopting proposed decision at pp. 28-29; *LACCD, supra*, PERB Decision No. 2404, pp. 6-7; *County of Sacramento* (2014) PERB Decision No. 2393-M, pp. 17, 25.) For the reasons discussed above, it undoubtedly would. However, whether, *under*

the circumstances of this case, the City has applied the Charter provisions in a manner inconsistent with the MMBA, as is *also* alleged in the complaint, is a separate issue and not determinative of the facial challenge, and the majority undermines our case law and does a great disservice to our constituency by holding otherwise.

Lawfulness of the City's Interest Arbitration Procedures and Prior Board Precedent

In *City & County of San Francisco* (2009) PERB Decision No. 2041-M (*San Francisco*), the Board upheld the lawfulness of the City's mandatory interest arbitration procedure, notwithstanding the contention of an employee organization representing City employees its codification in the City Charter operates as a permanent forfeiture of the statutory rights of employees and employee organizations to strike. (*Id*. adopting proposed decision, at pp. 27-28.) Although questionable even at the time, the reasoning of *San Francisco* has become even more suspect in light of subsequent PERB precedent expressly recognizing a qualified, but nonetheless *statutorily-protected* rights of employees and employee organizations to strike. (*Fresno Co. IHSS Public Authority, supra*, PERB Decision No. 2418-M, p. 33 [overruling plurality opinion in *Compton Unified School District* (1987) PERB Order No. IR-50 [to the extent it regarded all strikes by public-sector employees illegal]; *Sacramento Co. Superior Court, supra*, PERB Order No. IR-59-C, pp. 2-3 [following *County Sanitation* standard when considering requests for PERB to seek injunctive relief against allegedly unlawful strikes]; see also Zerger, ed., *California Public Sector Labor Relations* § 25.03 [expressing doubt as to the validity of Charter section A8.346 because it conflicts with presumptive, qualified right to strike and the case-by-case standard announced in *County Sanitation*, affirmed in *City of San Jose v. Operating Engineers, supra*, 49 Cal.4th 597, 606, and followed by PERB].)

Because the MMBA's purpose is to establish a uniform, *statewide* basis for recognizing the rights of public employees to join organizations of their own choice and to be represented by those organizations in their employment relations (MMBA, § 3500), and because the MMBA's right to participate in employee organizational activities embraces a corollary right to exert "various forms of economic pressure" whose threatened and actual use are necessary as a means of equalizing the parties' respective bargaining positions (*County Sanitation, supra,* at p. 583; *Sweetwater, supra,* PERB Order No. IR-58, pp. 11-13[14]), the City cannot use its local rulemaking authority to supersede the MMBA's right to engage in protected conduct by banning all strikes by City employees, without regard to protected and unprotected conduct. The majority boldly proclaims this principle, but then inexplicably refuses to apply it in this case with regard to any statutorily-protected conduct, except a non-existent sympathy strike.

Because, I do not believe the issues properly raised in this case, as set forth in the complaint and argued by the parties, are limited to sympathy strikes, I do not agree with the majority's attempt to distinguish *San Francisco, supra,* PERB Decision No. 2041-M, by asserting that it was concerned with the Charter's provision forfeiting the rights of City employees to engage in any *primary* strike. In short, if the City has unlawfully banned not only sympathy strikes but "any" strike by City employees, as the language of section A8.346 clearly does, it does no good for the majority to say that "interest arbitration is a quid [pro quo] for

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[14] *Sweetwater* did not consider the lawfulness of a strike but of a union's strike threats and preparations. Nevertheless, like the Supreme Court's opinion in *County Sanitation,* the Board in *Sweetwater* acknowledged that, unless there is some lawful basis for an actual strike, the effectiveness of a threat to use of economic force is diminished to the point of ineffectiveness. (*Sweetwater, supra,* at pp. 8-9; *County Sanitation, supra,* 38 Cal.3d at p. 583; see also *Fresno Co. IHSS Public Authority, supr*a, PERB Decision No. 2418-M, p. 35; *Mastro Plastics Corp. v. NLRB* (1956) 350 U.S. 270, 280; *Gary-Hobart Water Corp*. (1974) 210 NLRB 742, 744, enforced (7th Cir. 1975) 511 F.2d 284, cert. den. (1975) 423 U.S. 925; *Children's Hosp. Med. Ctr. v. California Nurses Assn.* (9th Cir. 2002) 283 F.3d 1188, 1192.)

forfeiture of the right to strike." For the reasons outlined above, the Charter's provisions prohibiting "any" strike by City employees are unlawful and so permeate the language and purpose of section A8.346, that I would grant Local 1021's exception and declare the entire section of the Charter void and unenforceable.

APPENDIX

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

After a hearing in Unfair Practice Case No. SF-CE-981-M, *Service Employees International Union Local 1021 v. City and County of San Francisco*, in which all parties had the right to participate, it has been found that the City and County of San Francisco (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3507 and Public Employment Relations Board (PERB) Regulation 32603, subdivision (f) (Cal. Code of Regs., tit. 8, § 31001, et seq.) by maintaining and enforcing an unreasonable regulation that interferes with the right to engage in sympathy strikes. This conduct also violated Government Code section 3506 and PERB Regulation 32603, subdivision (a) by interfering with the right of bargaining unit members to participate in an employee organization of their own choosing, and Government Code section 3503 and PERB Regulation 32603, subdivision (b) by denying Service Employees International Union Local 1021 (SEIU) its right to represent employees in their employment relations with the City.

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

A. CEASE AND DESIST FROM:

1. Adopting and enforcing City Charter section A8.346 to the extent it prohibits sympathy strikes.

2. Interfering with bargaining unit members' right to participate in the activities of an employee organization of their own choosing.

3. Denying SEIU its right to represent employees in their employment relations with the City.

4. Requiring employees to sign an acknowledgment document that includes any reference to a prohibition of sympathy strikes.

Dated: _____ City & County of San Francisco

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

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1021, Charging Party, v. CITY AND COUNTY OF SAN FRANCISCO, Respondent.	UNFAIR PRACTICE CASE NO. SF-CE-981-M PROPOSED DECISION (12/31/2013)

Appearances: Weinberg, Roger & Rosenfeld, by Kerianne R. Steele, Attorney, for Service Employees International Union, Local 1021; Office of the City Attorney, by Elizabeth Salveson, Chief Labor Attorney, for City and County of San Francisco.

Before Donn Ginoza, Administrative Law Judge.

PROCEDURAL HISTORY

Service Employees International Union, Local 1021 (SEIU or Local 1021) filed an unfair practice charge against the City and County of San Francisco (City) under the Meyers-Milias-Brown Act (MMBA or Act)[1] on July 18, 2012. On January 2, 2013, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging that the City enforced a provision of the City Charter prohibiting strikes that was not in conformance with the MMBA. This conduct is alleged to violate sections 3503, 3506, 3507, and 3509(b) of the Act and PERB Regulation 32603(a), (b) and (f).[2]

On January 25, 2013, the City filed its answer to the complaint denying the material allegations and raising a number of affirmative defenses.

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

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

On February 7, 2013, an informal settlement conference was held, but the matter was not resolved.

On August 8, 2013, a formal hearing was conducted in Oakland.

On November 6, 2013, the matter was submitted for decision with the filing of post-hearing briefs.

FINDINGS OF FACT

SEIU 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). The City is a public agency within the meaning of section 3501(c). The City is a charter city under California law.

Local 1021 was created in 2007 out of the amalgamation of nine locals, including Locals 250, 535, and 790. These locals represented employees of the City, San Francisco Unified School District, and San Francisco Community College District. For some period of time the three locals have been parties to a single collective bargaining agreement.

Covered by these agreements were employees of the San Francisco County Superior Court (Court), such as court clerks, window clerks and process servers. With the enactment of the Trial Court Employment Protection and Governance Act, court employees came under the control of the Court as a separate employer for collective bargaining purposes. Local 1021 continues to represent these employees. A number of the court employees are assigned to the Hall of Justice and the Youth Guidance Center. SEIU represented employees in the miscellaneous unit are also assigned to work at these two locations. The Youth Guidance Center houses detention facilities for juvenile wards, known as Juvenile Hall, as well as courtrooms of the Superior Court constituting the Juvenile Court. Juvenile Hall is a secured facility requiring 24/7 staffing.

The July 16, 2012 Strike

In 2012, SEIU was engaged in contract negotiations with the Court. The bargaining was contentious. Problems in the negotiations were reported to SEIU's membership at meetings of the local. SEIU believed that the Court had engaged in bad faith bargaining. SEIU filed unfair practice charges and also voted to undertake a one-day unfair practice strike on July 16, 2012. The union sought and obtained the San Francisco Labor Council's sanction for the strike.

In the period preceding the strike, SEIU leadership fielded a number of questions from City employees as to how they might support their fellow Court employees, including joining the picket line during their off-hours, withholding services to the City by not crossing picket lines, and providing food to the picketers. SEIU Vice President Larry Bradshaw and Henrietta Lee, an SEIU chief job steward in the Probation Department, both testified that a number of employees had expressed interest in supporting the Court employees' strike. Some employees were concerned about their job security if they were to honor the picket line. Those questions were prompted by the fact that new hires and employees transferring to new positions are required to sign a form acknowledging notice that under provisions of the City Charter willful withholding of services for purposes of concerted action by labor is grounds for termination. SEIU leadership did not believe employees could be terminated for honoring the picket line and advised the members that they could follow their conscience and withhold services out of respect for the Court employees' job action.

Early on the morning of July 16, SEIU delivered written notice to the Court of its intention to engage in a one-day unfair practice strike that day. Louise Brooks Houston was the director of the human resources department at the City's Juvenile Probation Department. She responded by seeking guidance from the Employee Relations Division of the City's Human Resources Department regarding the roles and responsibilities of the staff. The guidance was requested in part so that the department could respond to any questions raised by

affected employees regarding the strike. Employee Relations Director Martin Gran answered by drafting a memorandum intended for distribution to employees represented by SEIU working at locations affected by the strike.

Gran's memorandum began by reminding employees of their appointment documents acknowledging the City Charter's prohibition on strikes, quoting the language of section A8.346(a). That section defines a strike as:

> [T]he willful failure to report for duty, the willful absence from one's position, any concerted stoppage or slowdown of work, any concerted interruption of operations or services by employees, or the willful abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment.

Next, Gran cited language of SEIU's memorandum of understanding (MOU) article I.D, paragraph 14 ("No Work Stoppage"), which states:

> It is mutually agreed and understood that during the period this Agreement is in force and effect the Union will not authorize or engage in any strike, slowdown, or work stoppage. Represented employees are also bound by the above. . . .

Lastly, Gran reminded employees that sick leave is subject to departmental approval and medical verification of any absence may be required. He e-mailed the document to Juvenile Probation Department Deputy Director Allison Magee.

Magee in turn forwarded Gran's document as an attachment to an e-mail of her own to management and supervisor staff at 11:16 a.m. Houston testified initially that the memorandum was not circulated to other employees, but she quickly acknowledged that Magee's cover message asked the management and supervisor staff to distribute it to all staff represented by SEIU. Houston directed the Juvenile Hall director to disseminate the information to members who work at the site including those without e-mail, and she personally forwarded Gran's memorandum to her payroll staff members who are represented by SEIU.

Lakisha Benjamin, a Probation Department clerical employee, happened to be listed on Magee's message, though she was only a secretary to one of the supervisors. Benjamin called Lee who was on leave that day. Benjamin had previously informed Lee that she intended to support the Court employees' job action, but she was now abandoning that plan. Lee went to the Youth Guidance Center and joined the picket line. After arriving she, too, received a copy of Gran's memorandum, although she did not identify who gave it to her. Benjamin had also informed Julio Corral, an SEIU organizer, that she wanted to show her support for the strike. When Corral arrived to join the picket line, Benjamin, who was already working, came out and showed him Gran's memorandum. Benjamin informed Corral that because of the memorandum she could not participate in the strike, and she did not.

The City imposed no discipline for employees who may have refused to work in support of the Superior Court strike.

History of the City's Prohibition on Strikes

In 1975, strikes occurred that involved most of the City's employees. The following year, the Board of Supervisors responded by proposing an amendment to the City Charter to include the language of section 8.346, as well as language providing for dismissal from employment for violation of the prohibition. The pertinent language was as follows:

> 8.346 Disciplinary Action Against Striking Employees Other Than Members of Police and Fire Departments.
>
> The people of the city and county of San Francisco hereby find that the instigation of or participation in, strikes against said city and county by any officer or employee of said city and county constitutes a serious threat to the lives, property, and welfare of the citizens of said city and county and hereby declare as follows:
>
> (1) As used in this section the word "strike" shall mean the willful failure to report for duty, the willful absence from one's position, any concerted stoppage or slowdown of work, any concerted interruption of operations or services by employees, or the willful abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment, for the

> purpose of inducing, influencing, or coercing a change in the conditions of employment; provided, however, that nothing contained in this section shall be construed to limit, impair, or affect the right of municipal employee to express or communicate a view, grievance, complaint, or opinion on any matter related to the conditions or compensation of municipal employment or their betterment, so long as the same is not designed to and does not interfere with the full, faithful, and proper performance of the duties of employment.
>
> (2) No person holding a position by appointment or employment under the civil service provisions of this charter, exclusive of uniformed members of the police and fire departments as provided under section 8.345 of this charter, which persons are hereinafter referred to as municipal employees, shall strike, nor shall any municipal employee cause, instigate, or afford leadership to a strike against the city and county of San Francisco. *For the purposes of this section, any municipal employee who willfully fails to report for duty, is willfully absent from his or her position, willfully engages in a work stoppage or slowdown, willfully interrupts city operations or services, or in any way willfully abstains in whole or in part from the full, faithful, and proper performance of the duties of his or her employment because such municipal employee is "honoring" a strike by other municipal employees, shall be deemed to be on strike.*
>
> [¶ . . . ¶]
>
> (5) In the event of a strike, or if the mayor with the concurrence of a majority of the board of supervisors determines that a strike is imminent, a special committee shall convene forthwith . . . . Notwithstanding any other provision of law, it shall be the duty of the special committee to dismiss in accordance with the provisions of this section any municipal employee found to be in violation of any provision of this section. . . .

(Italics added.) The language was adopted as a result of the passage of an initiative measure known as Proposition B.

During the early years of collective bargaining under the MMBA, wages were determined by a comparative salary setting formula, based on a survey process undertaken by the Civil Service Commission followed by a recommendation to the Board of Supervisors. The process was known as salary stabilization.

In 1991, the City sought a wage freeze from all of its unions. In response the unions demanded interest arbitration for future disputes. The parties eventually agreed to work toward a City sponsored initiative that would provide for interest arbitration as an impasse resolution procedure. Unions would have the option to elect the impasse procedure or remain with the salary stabilization process. Jonathan Holtzman, then head of the City Attorney's Labor and Employment Section, undertook *Seal Beach*[3] negotiations with all of the unions for what would also become known as Proposition B. The measure provided for "all or nothing" interest arbitration (also known as "baseball" arbitration) where the interest arbitrator is limited to picking the entire last, best and final offer of one the parties, rather than particular proposals on a subject-by-subject basis. In its declaration of policy section, Proposition B declared strikes to be against the public interest and restated that section 8.346 "remained in full force and effect and shall not be subject to the provisions of this part." Holtzman testified that despite some question whether the Charter's original strike prohibition was lawful in the wake of the California Supreme Court's decision in *County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn.* (1985) 38 Cal.3d 564 (*County Sanitation*) the City felt absolutely confident that the no-strike provision would withstand challenge after the addition of interest arbitration under the widely accepted view that such a procedure is a quid pro quo for a waiver of the right to strike. The San Francisco Labor Council officially supported the proposition. Proposition B was passed by the voters.

SEIU opted into the full collective bargaining mode. The first set of negotiations with the City's unions occurred in 1993. The process resulted in Arbitrator John Kagel adopting SEIU's package proposal. The City predicted bankruptcy as a result of the award issued and filed a challenge to it in the courts that resulted in a compromise settlement. Mayor Frank

[3] *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591.

Jordan vowed to place a measure on the ballot to repeal interest arbitration. Supervisor Kaufman prevailed upon the City employee relations staff to work with the unions on a jointly sponsored measure that would become Proposition F.

Proposition F replaced whole package interest arbitration with issue-by-issue arbitration. Holtzman again represented the City in *Seal Beach* negotiations, which resulted in a compromise on the language of the measure and the unions' support for it on the ballot. Under the declaration of policy section, Proposition F clarified that an employee engaging in a strike as defined in section 8.346(a) would be subject to dismissal under the terms of that section, by removing the "not subject to" clause. Proposition F prevailed at the ballot and the provisions of this measure constitute the impasse resolution procedures operative today.

In 1995, Proposition E passed, which moved the interest arbitration procedures, strike prohibition, and other labor relations provisions to the appendix of the Charter, without any substantive changes affecting this dispute. The same numbering of provisions was retained but preceded with the letter "A" (thus, section 8.436 became A8.436). The provisions in the appendix retain the same force and effect as Charter law.

The Contract's No-Strike Clause

For a number of years SEIU's collective bargaining agreement with the City has contained a no-strike clause. The language is that which Gran quoted from article I.D(14) in his memorandum. This language predated the second Proposition B.

Bargaining notes from the City indicate that as early as 1989, SEIU attempted without success to add language stating that sympathy strikes are exempted from the no-strike provision. SEIU made the same proposal in the 1993 negotiations and withdrew it, and did so again in the 2012 negotiations. Vincent Harrington, attorney for SEIU, testified that the proposal in 2012 was withdrawn in part because SEIU did not believe it was necessary to express the right to engage in a sympathy strike in light of the fact that current legal precedent

interpreted the existing no-strike clause as failing to include sympathy strikes. Bradshaw testified that one purpose for the amendment was to provide clear notice to employees that they could not be terminated for participating in a sympathy strike. In contrast to SEIU Local 1021's contract, the contract of SEIU Local 21 representing the City's registered nurses, contains language specifically prohibiting sympathy strikes. Gran testified without contradiction that SEIU's legal position that sympathy strikes were not covered by the no-strike clause was never expressed at the table in 2012.

ISSUE

Did the City violate the MMBA by adopting and enforcing the provisions in the City Charter prohibiting sympathy strikes?

CONCLUSIONS OF LAW

The complaint alleges that section A8.346 of the City Charter is an unreasonable local rule in violation of section 3507 and PERB Regulation 32603(f), that the City's enforcement of the rule interfered with employee rights in violation of section 3503 and PERB Regulation 32603(a), and that it denied SEIU its rights in violation of section 3506 and PERB Regulation 32603(b).

SEIU contends that the City's policy of prohibiting sympathy strikes conflicts with the MMBA's right to engage in strikes and that the MMBA's guarantee supersedes the City Charter's prohibition. By enforcing the prohibition, the City violated the Act.

The City offers a series of arguments: (1) that the MMBA does not provide for a right to strike; (2) that the City Charter prohibition is valid because strikes are a matter of local concern and the Charter supersedes the MMBA under the home rule doctrine; (3) that SEIU's MOU waives the right to engage in a sympathy strike, assuming a right exists; (4) that because SEIU never urged support for a sympathy strike and the City merely issued a facially accurate guidance to its staff without imposing any disciplinary action against employees, there was no

enforcement of the prohibition upon which to base an unfair practice; and (5) the charge is untimely because the Charter prohibition was enacted more than six months prior to the filing of the charge.

Timeliness of the Charge

PERB unfair practice charges are subject to a six-month statute of limitations. (*Coachella Valley Mosquito & Vector Control Dist. v. Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1092.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.) A charging party bears the burden of demonstrating that the charge was timely filed. (*Long Beach Community College District* (2009) PERB Decision No. 2002.)

The City contends that SEIU has been on notice for more than six months of the enactment of the City's 1976 City Charter prohibition on the right to strike, and that this is confirmed by the City's practice of obtaining signed acknowledgment forms from its employees. SEIU counters that the charge is timely because it was filed within six months of the City's enforcement of the prohibition; that enforcement being reflected in the City's announced intent to rely upon the Charter provisions banning strikes and the personnel-related documents, both of which included the threat of discipline to any employee who engages in a sympathy strike.

SEIU relies on *Long Beach Unified School District* (1987) PERB Decision No. 608 (*Long Beach*). In that case, an employer's purportedly unreasonable access regulation adopted outside the statute of limitations period could be challenged even though no enforcement of the rule had occurred within the limitations period. (*Id.* at p. 12.) PERB stated it is not the "act" of adopting the policy, but its "existence" continuing to the time of the hearing that constitutes the offending conduct. (*Ibid*.) This rule is not always applied in cases of facial challenges to

policies or regulations of the employer however. Subsequent to *Long Beach,* PERB held that a challenge to a public agency's rule based on unreasonableness will not be timely unless some "new wrongful act" occurs within the limitations period to revive the original unlawful conduct of adopting the rule. (*County of Orange* (2006) PERB Decision No 1868-M; citing *San Dieguito Union High School District* (1982) PERB Decision No. 194; *Regents of the University of California* (1983) PERB Decision No. 353-H.) *County of Orange* found the charge to be untimely where the signature requirement of a local representation rule was challenged but the union failed to file a representation petition to test the rule within the limitations period. PERB rejected the dissent's argument that the mere existence of an unreasonable rule constituted ongoing harm that could be challenged regardless whether a representation petition had been rejected within the limitations period. PERB did not disturb the validity of *Long Beach* but merely distinguished it on the ground that no new unlawful act is required where seeking to test the rule would risk disciplinary consequences, and the filing of a representation petition carries no such risk. In this case, the rule can be challenged regardless of whether SEIU attempted to challenge the rule by encouraging employees to participate in the strike or whether any employees participated in the strike. Gran's memorandum reminds staff of potential termination for participation, while the personnel documents constitute an ongoing threat of discipline as well. Therefore, *Long Beach*, not *County of Orange,* applies, and actual enforcement need not be shown. The charge was timely filed.

The Legality of Sympathy Strikes

SEIU relies on *County Sanitation, supra,* 38 Cal.3d 564 and other PERB cases which have held that the collective bargaining statutes do not prohibit public employee strikes. SEIU reads these cases as confirming a right to strike under the MMBA.

The City maintains that striking "is not a right protected under the MMBA, and cannot be enforced under the facts of this case." Further, the City asserts that *County Sanitation* only stands for the proposition that California common law does not generally prohibit strikes by public employees, emphasizing the court's statement that the "MMBA neither denies nor grants local employees the right to strike." (*Id.* at p. 572.) The City further asserts that *County Sanitation* "explicitly did not reach the issue of whether public employees have a constitutional right to strike." In regard to the latter point, the City notes the court's statement that it was "not persuaded that the personal freedoms guaranteed by the United States and California Constitutions confer an *absolute right* to strike." (*Id.* at p. 590, original italics, fn. omitted.)

In *County Sanitation* the trial court ordered damages against two unions in an MMBA jurisdiction whose employees had engaged in a strike. The unions appealed and the matter reached the Supreme Court, where the court stated the issue as: whether all strikes by public employees are illegal and, if so, whether the striking union is liable in tort for compensatory damages. (*Id.* at p. 567.) The court began by noting that the legality of such strikes was an open question, but the case presented an opportunity for California to adopt a prohibition against such strikes as recognized in other states. (*Id.* at pp. 569-571.) Next, the court concluded that the Legislature had also reserved judgment on the legality of strikes "generally" or under the MMBA. (*Id.* at pp. 571-572.)[4] Immediately thereafter, the court states:

> In sum, the MMBA establishes a system of rights and protections for public employees which closely mirrors those enjoyed by workers in the private sector. The Legislature, however, intentionally avoided the inclusion of any provision which could be construed as either a blanket grant or prohibition of a right to strike, thus leaving the issue shrouded in ambiguity. In the absence of clear legislative directive on this crucial matter, it becomes the task of the judiciary to determine whether, under the law, strikes by public employees should be viewed as a prohibited tort.

[4] The court noted the prohibition against firefighter strikes. (*Ibid.*, citing Lab. Code, sec. 1962.)

(*Id.* at p. 573.)

The court then proceeded to assess three policy justifications traditionally invoked in support of the common law rule against public employee strikes, and rejected each of them. (*County Sanitation, supra*, 38 Cal.3d at pp. 573-584.) In the course of this discussion, the following point was made:

> It is universally recognized that in the private sector, the bilateral determination of wages and working conditions through a collective bargaining process, in which both sides possess relatively equal strength, facilitates understanding and more harmonious relations between employers and their employees. In the absence of some means of equalizing the parties' respective bargaining positions, such as a credible strike threat, both sides are less likely to bargain in good faith; this in turn leads to unsatisfactory and acrimonious labor relations and ironically to more and longer strikes. Equally as important, the possibility of a strike often provides the best impetus for parties to reach an agreement at the bargaining table, because *both* parties lose if a strike actually comes to pass. Thus by providing a clear incentive for resolving disputes, a credible strike threat may serve to avert, rather than to encourage, work stoppages.

(*Id.* at p. 583, fn. omitted.) Immediately prior to stating its holding, the court rejected the argument that only the Legislature can reject the common law prohibition. (*Id.* at p. 584.) The court's holding is then stated as follows:

> For the reasons stated above, we conclude that the common law prohibition against public sector strikes should not be recognized in this state. Consequently, strikes by public sector employees in this state as such are neither illegal nor tortious under California common law. We must immediately caution, however, that the right of public employees to strike is by no means unlimited. Prudence and concern for the general public welfare require certain restrictions.
>
> The Legislature has already prohibited strikes by firefighters under any circumstance. It may conclude that other categories of public employees perform such essential services that a strike would invariably result in imminent danger to public health and safety, and must therefore be prohibited.

(*Id.* at p. 585, fn. omitted.)

Despite the posture of the case defined by the question whether a tort action lies for strike activity, there can be little doubt that by holding that strikes by public employees are not prohibited by common law, *County Sanitation* also found that such employees have a right to strike, albeit a qualified one. This is confirmed by the language of the court immediately following its pronouncement that public employee strikes are neither illegal nor tortious: "We must immediately caution, however, that *the right of public employees to strike* is by no means unlimited." (38 Cal.3d at p. 585, italics added.) The City's reliance on the court's observation of the MMBA's silence regarding strikes has no import because that point simply prefaced the court's announcement that the case before it presented the "proper circumstances for direct consideration of [the] fundamental issue" of the "broader question of the right of public employees to strike." (*Id.* at p. 571.) Later, the court returned to the point to state: "Legislative silence is not the equivalent of positive legislation and does not preclude judicial reevaluation of common law doctrine. If the courts have created a bad rule or an outmoded one, the courts can change it." (*Id.* at p. 584; see *City of San Jose* (2010) PERB Decision No. 2141-M, p. 7 ["Notwithstanding the absence of any specific statutory language in the MMBA addressing the right to strike, it is now well established that certain public sector strikes are lawful."].)

The City's citation to the court's decision not to find a right to strike under the United States or California Constitutions is also unavailing because it loses sight of the context of that discussion. That discussion occurs in five pages of discussion after the holding in which the court explains its reasoning for not reaching the union's request that the case also be decided on constitutional grounds. Nevertheless, in that discussion is confirmation that the court embraced a non-constitutionally-based right to strike within the MMBA. First, the court recognized that the right to form and be represented by unions is a fundamental right and that the right embraces the corollary right to exert "various forms of economic pressure" on the

employer. (*County Sanitation, supra,* 38 Cal.3d at pp. 587-588.) The court then stated it was not persuaded that the state and federal constitutions "confer an *absolute right* to strike, but the arguments above may merit consideration at some future date." (*Id.* at p. 590, original italics, fn. omitted.) Finally, the court concluded: "Although we are not inclined to hold that the right to strike rises to the magnitude of a fundamental right, it does appear that associational rights are implicated to a substantial degree." (*Id.* at p. 591.) The court's finding of a qualified right to strike—one that does not present an imminent danger to health and safety—would have been problematic if it had found an absolute constitutional right to strike.

Reading *County Sanitation* as upholding a qualified right to strike is consistent with PERB's decision in *Oxnard Harbor District* (2004) PERB Decision No. 1580-M (*Oxnard*). There the employer charged the union with engaging in a sympathy strike under a theory of unilateral repudiation of the no-strike clause of the parties' MOU. After noting *County Sanitation*'s holding as the premise for its analysis, PERB concluded that the employer could only prevail if it showed the no-strike clause covered sympathy strikes as opposed to primary strikes. The language was found not to cover sympathy strikes, and the union was found not to have interfered with employee rights by disciplining members who refused to participate. (*Oxnard, supra,* at pp. 6-7.) If *Oxnard* did not read *County Sanitation* as granting a right to engage in a sympathy strike, its analysis of the contractual waiver would have been unnecessary. In other words, the right was assumed to exist under the authority of *County Sanitation*.[5] In *Regents of University of California* (2004) PERB Decision No. 1638-H, PERB read *Oxnard* as holding that a sympathy strike is only an unfair practice if it violates the no-strike clause, because there is no common law prohibition against strikes under *County*

[5] In *Children's Hospital Medical Center v. California Nurses Association* (9th Cir. 2002) 283 F.3d 1188, 1191-1192 (*Children's Hospital*), the court explained that sympathy strikes in the private sector have long been held to fall within the general right to strike. PERB cited the case with approval in *Oxnard, supra,* PERB Decision No. 1580-M, pp. 7-8.

Sanitation. Like *County Sanitation*, PERB interprets the absence of any lawful prohibition on striking as an implied recognition of the right to strike.

If *County Sanitation* were subject to any doubt on the right to strike in general, that doubt was removed by the recent case of *City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, a case finding that PERB has exclusive initial jurisdiction to adjudicate MMBA employer requests for injunctive relief against strikes. In a restatement of *County Sanitation*, the court recast the language of that opinion's holding into its logically compelled reading, when it stated that: "[p]ublic employees *have a right to strike* unless it is clearly shown that there is a substantial and imminent threat to public health and safety. (*Id.* at p. 606, citing *County Sanitation*, italics added.) Under *County Sanitation, supra*, 38 Cal.3d 564 and *Oxnard, supra*, PERB Decision No. 1580-M, a right to engage in a sympathy strike exists under the MMBA.

Supersession and Home Rule Powers

The City contends that even if a right to engage in sympathy strikes exists, it has the authority under its home rule powers to enact local legislation that overrides the MMBA. Under the California Constitution charter cities like the City have the right to make and enforce laws with respect to their "municipal affairs." (Cal. Const. art XI, sec. 5.) Charter cities have exclusive authority when legislating on matters of local concern. (*Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, 291-292; *Baggett v. Gates* (1982) 32 Cal.3d 128.) However, when a charter enacts legislation pertaining to its municipal affairs that conflicts with state law, it must be determined whether the state law addresses a matter of statewide concern. It if does, state law will control so long as it is "reasonably related" and "narrowly tailored" to addressing the statewide concern. (*California Federal Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 16-17, 24.)

In declaring its intent in enacting the MMBA, the Legislature has declared in section 3500:

> It is the purpose of this chapter to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations. It is also the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the various public agencies in the State of California by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by those organizations in their employment relationships with public agencies.

By this language section 3500 expresses the Legislature's view that the rules and guidelines for labor relations are a matter of statewide concern, particularly the statement of intent to establish a uniform basis for the conduct of labor relations and collective bargaining. (See *Professional Fire Fighters, Inc. v. City of Los Angeles, supra*, 60 Cal.2d 276, 294-295; *Baggett v. Gates, supra*, 32 Cal.3d 128, 139-140.) Further, as explained in *County Sanitation*, the right to strike is essential to a viable and fair system of labor relations because bilateral determination of terms and conditions of employment must rest on a real and perceived equality of bargaining power. (38 Cal.3d at p. 583.) The City offers no authority or argument establishing that the MMBA's right to strike as announced in *County Sanitation*, fails to be "reasonably related" and "narrowly tailored" to addressing a statewide concern. The local rule does not supersede the MMBA's right to engage in a sympathy strike.

The City contends in the alternative that there is no conflict between the MMBA and its right to enact legislation prohibiting sympathy strikes because the "circumstances of this case don't present an actual conflict." This argument rests on the fact that SEIU did not authorize a sympathy strike and the City did not pursue any discipline against any of its employees as a result of the court employees strike. The City's argument is without merit because employees

are, and continue to be, restrained in their ability to participate in a sympathy strike based on the City's prohibition and their personnel documents acknowledging that prohibition. The City Charter specifically prohibits sympathy strikes by defining strikes to include ones based on "'honoring' a strike by other municipal employees." But SEIU advised its members they could follow their conscience and honor the picket lines. The City's argument here does not depend on any claim that a general right to strike fails to encompass sympathy strikes but rests on the authority of the City Charter, whose language is incompatible with the MMBA's right to strike. (See *NLRB v. Southern Cal. Edison* (9th Cir. 1981) 646 F.2d 1352, 1363.) The no-strike provisions of the Charter and the MMBA's right to strike are incompatible. No authority is cited supporting the City's theory that a case or controversy involving a law determining rights of employees is limited to cases where the challenged local rule has actually resulted in termination or other discipline. (See *Long Beach, supra,* PERB Decision No. 608.)

Adoption and Enforcement of an Unreasonable Regulation

The MMBA authorizes public agencies to "adopt reasonable rules and regulations for the administration of employer-employee relations." (Sec. 3507(a).) *International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Ca1.3d 191, 196-206, held that 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. The public agency's 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.) In the cited case, a rule sanctioning an unlawful strike by decertifying the recognized union and another denying terminated employees participating in the strike pre-termination hearing rights were 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; *Santa Clara County Counsel Attnys. Assn. v. Woodside* (1994) 7 Ca1.4th 525, 538-542.) PERB has held that the adoption or enforcement of an

unreasonable regulation constitutes an unfair practice when it is established that the local rule or regulation abridges the exercise of employee or employee organizational rights under the MMBA. (*County of Monterey* (2004) PERB Decision No. 1663-M, adopting administrative law judge's proposed decision at pp. 28-29; see also *County of Imperial* (2007) PERB Decision No. 1916-M [enforcement of an unreasonable rule violates PERB Reg. 32603(f)].) The burden of proving unreasonableness is on the party challenging the rule. (*City & County of San Francisco* (2007) PERB Decision No. 1890-M, p. 7.)

The City believes this case is governed by *City & County of San Francisco* (2009) PERB Decision No. 2041-M. That case involved a challenge to the City's impasse resolution process, in which the union argued that it was entitled to refuse interest arbitration because to compel arbitration was to cause a forfeiture of the right to strike. The City filed a charge to compel participation in the process. The validity of the strike prohibition was limited to the claim that a union engaged in a primary bargaining dispute with the City could be prevented from striking because interest arbitration was a fair process for achieving the union's contract objectives. (*Id.,* adopting administrative law judge's proposed decision at pp. 28-29.) The issue of the legality of the City Charter as a prohibition on sympathy strikes was not presented. "Cases are not authority for propositions not therein considered." (*Alameida v. State Personnel Bd.* (2004) 120 Cal.App.4th 46, 58.)

The City also argues from *City & County of San Francisco*, *supra*, PERB Decision No. 2041-M that reasonable rules restricting the right to strike may be adopted, and that PERB can and should find that the Charter's prohibition of sympathy strikes is such a rule. The City believes that to find otherwise would "remove a key tenet of the City's impasse resolution procedure from the balance of those procedures" which "were adopted as a whole by the electorate." Thus the question is whether the no-strike rule "re-enacted" pursuant to

Proposition F together with the adoption of interest arbitration means that all strikes are lawfully barred by the Charter, and if so, whether this conflicts with the MMBA.

As Holtzman himself acknowledged, a key rationale for upholding the Charter's compelled waiver of the right to strike is that interest arbitration has been viewed as a quid pro quo for the right to strike. (See *City & County of San Francisco, supra,* PERB Decision No. 2041-M, adopting proposed decision of the administrative law judge at p. 32; see also *Fraternal Order of Police, Lodge No. 165 v. City of Choctaw* (Okla. 1996) 933 P.2d 261, 267; *Medford Firefighters Assn. v. City of Medford* (Or. 1979) 595 P.2d 1268, 1271.) Even assuming that sympathy strikes may be lawfully prohibited when in support of an economic strike by a union covered by interest arbitration, the language of the Charter barring sympathy strikes fails to make that distinction. As applied in this case, the prohibition bars a sympathy strike in support of another union's unfair practice strike. Unfair practice strikes are undertaken for reasons other than to achieve economic objectives. (*Regents of the University of California* (2010) PERB Decision No. 2094-H, p. 33-34.) They are not only lawful, they are protected. (*San Ramon Valley Unified School District* (1984) PERB Order No. IR-46, p. 10; *Regents of the University of California, supra,* PERB Decision No. 2094-H, p. 30.) In addition, the potential strike would have been in sympathy for employees at a common worksite but not ones whose union was subject to the City's interest arbitration procedures. The City has made no argument explaining how unfair practice strikes, and hence all sympathy strikes, are reasonably merged into the impasse resolution provisions of the Charter. When statutory rights are involved, the labor boards strictly construe any infringement on those rights. (*Oxnard, supra*, PERB Decision No. 1580-M; *Regents of the University of California* (2004) PERB Decision No. 1638-H; *Indianapolis Power and Light Co. v. NLRB* (7th Cir. 1990) 898 F.2d 524 (*Indianapolis Power*).) In the private sector, it is well settled that employees honoring a protected unfair practice strike are entitled to protection as well. (*In re GPS*

Terminal Services (2001) 333 NLRB 968, 983; *Limpert Bros.* (1985) 276 NLRB 364, 379, enfmt. granted (3d Cir. 1986) 800 F.2d 1135, cert. den. (1987) 479 U.S. 1087; compare with *Chevron U.S.A. Inc*. (1979) 244 NLRB 1081, 1086 [if primary strike is unprotected so, too, is the sympathy strike, irrespective of whether the sympathy strikers knew that the primary strike was unprotected].) Accordingly, the local rule here prohibiting all sympathy strikes is overbroad. The Charter prohibition abridges the employees' right to engage in a sympathy strike. Since the rule denies employees a right under the MMBA without proper justification, SEIU has met its burden of proving that the ban on sympathy strikes is unreasonable.

Waiver By Contract

The City contends as between SEIU and the City the parties have contracted to bar strikes; that is, that SEIU has waived any right to participate in a strike. The right of employees to engage in a strike is one that need not be personally waived; it may be waived by the union through a collective bargaining agreement. (*Mastro Plastics Corp. v. NLRB* (1956) 350 U.S. 270, 280; see also *Oxnard, supra*, PERB Decision No. 1580-M.)

In *Oxnard,* the language of the no-strike clause stated that "no employee, organization, its representatives, or members shall engage in, cause, instigate, encourage, or condone a strike, work stoppage, or work slowdown *of any kind*." (Italics added.) Later in the same provision a strike or work stoppage was defined as a job action undertaken "for the purpose of inducing, influencing, or coercing a change in the conditions of compensation, or the rights, privileges or obligations of employment." PERB relied on the latter language to distinguish a sympathy strike from the type of strike described in the contractual waiver, since a sympathy strike is not one for the purpose of changing one's own terms of employment. (*Oxnard, supra*, PERB Decision No. 1580, pp. 9-10.)

The City attempts to distinguish *Oxnard* based on the absence of language in SEIU's MOU defining a prohibited job action as one intended to change terms of employment. SEIU's

MOU simply provides: "It is mutually agreed and understood that during the period this Agreement is in force and effect the Union will not authorize or engage in any strike, slowdown, or work stoppage." Whether this distinction is material depends on whether the language here is nevertheless susceptible to interpretation based on a latent ambiguity. Although SEIU's no-strike clause is categorical in its use of the word "any," the language is indistinguishable from the clause found to be insufficiently clear to constitute a waiver in *Indianapolis Power, supra,* 898 F.2d 524, cited by PERB in *Oxnard.* The language considered there was:

> During the term of this agreement, and any extension or renewal thereof, the Union and each employee covered by the agreement agree not to cause, encourage, permit, or take part in *any strike*, picketing, sit-down, stay-in, slow-down, or other curtailment of work or interference with the operation of the Company's business, and the Company agrees not to engage in a lockout.

(898 F.2d at p. 526, fn. 1, italics added.) This language was not found to demonstrate a "clear and unmistakable" waiver by itself, and extrinsic evidence established that at best that the parties "agreed to disagree" as to the scope of the language. (*Id.* at p. 530.) Here, the language of the MOU is similarly broad but without specifically including sympathy strikes. Thus there can be no waiver based on the language alone.

As explained in *Children's Hospital, supra*, 898 F.3d 1188, 1194, the NLRB in the original *Indianapolis Power* cases had employed a presumption that a broad no strike clause normally constitutes a waiver of sympathy strikes but that the presumption can be overcome with extrinsic evidence demonstrating the parties' mutual intent *not* to include sympathy strikes. The Court of Appeals for the Seventh Circuit in *Indianapolis Power* noted the "substantial tension" between placing the burden of proof as to mutual intent on the union and the requirement that a waiver be clear and unmistakable. (*Children's Hospital, supra,* at p. 1195.) Although the court did not formally reject the NLRB's use of the presumption, it

concluded that as a practical matter when extrinsic evidence of the parties' intent exists, "the burden is on the employer to show that the parties intended to include sympathy strikes within the purview of the no-strike clause." (*Indianapolis Power, supra,* 898 F.2d at p. 528.) The court stated:

> Since the Union's waiver of the employees' statutory rights must be clear and unmistakable, the extrinsic evidence must manifest a clear *mutual* intent to include sympathy strikes within the scope of the no-strike clause or else the clause will not be read to waive sympathy strike rights. . . . A broad no-strike provision by itself is not sufficient to waive the right to engage in sympathy strikes if extrinsic evidence of the parties' intent does not demonstrate that the parties' [sic] *mutually* agreed to include such rights within the breadth of the no-strike clause.

(*Ibid.*) *Children's Hospital, supra,* adopted this approach. (898 F.3d at p. 1195.)

The City proffers extrinsic evidence in the form of SEIU's previous attempts to amend the MOU to include affirmation of the right to engage in a sympathy strike, claiming this demonstrates that the no-strike clause prohibited such strikes. While this would have clarified the existing no-strike language, under the cited authorities, it does not demonstrate intent on SEIU's part to have acquiesced in the inclusion of sympathy strikes. (See *Long Beach Community College District* (2003) PERB Decision No. 1568.) The crucial evidence of mutual intent would have been from the negotiations that first adopted the no-strike language. But no bargaining history was presented indicating that at that time the City communicated its belief that the prohibition extended to sympathy strikes without objection by SEIU, or that by some other conduct SEIU agreed that a waiver of sympathy strikes was included. The first evidence of an SEIU proposal to include sympathy strikes in 1989 was an attempt to revise existing language. SEIU's failed attempts to obtain an express exclusion cannot be construed as a waiver of the employees' right to engage in a sympathy strike. (*Los Angeles Community College District* (1982) PERB Decision No. 252, pp. 13-14.) That bargaining history would tend to prove at

best that the parties continued to agree to disagree. (Cf. *Regents of the University of California, supra,* PERB Decision No. 1638-H [union's agreement to include "other concerted activities" in response to employer's demand for "sympathy strikes" was sufficient to warrant a hearing on the parties' mutual intent].) Under the *Children's Hospital* test as adopted by *Oxnard, supra,* PERB Decision No. 1580-M, the City has not met its burden of demonstrating mutual agreement to include sympathy strikes.

The City also advances the rule of contract interpretation that a party's unsuccessful attempt to obtain agreement on specific contract language will bar that party from prevailing on a claim that the existing language can be interpreted to include the rejected language. (*Fairweather's Practice and Procedure in Arbitration* (4th ed. 1999) p. 252.) The rule has no applicability because *Oxnard* provides the applicable rule of interpretation, and under that rule the absence of language specifically excluding sympathy strikes from the prohibition does not render the language any less ambiguous.

The City has adopted and enforced an unreasonable regulation in violation of PERB Regulation 32603(f) and MMBA section 3507.

Interference

In order for the employer to interfere with rights guaranteed by the statute, the charging party must establish that some action on the employer's part was the cause of at least slight harm to the exercise of those rights. (*Carlsbad Unified School District* (1979) PERB Decision No. 89.) The City's distribution of Gran's July 16 memorandum meets that test. (*Regents of the University of California* (1983) PERB Decision No. 366-H [test is whether the employer's communications "would tend to coerce or interfere with a reasonable employee in the exercise of protected rights"]; see also *Rio Hondo Community College District* (1980) PERB Decision No. 128 [free speech right does not extend to coercive statements].)

The City's distribution of the Gran memorandum did cause at least slight harm because bargaining unit employees became aware of it. Magee's cover e-mail was addressed to at least one non-management employee. Benjamin was a departmental employee who had previously intended to participate in actions to support the striking employees, but abandoned that plan after seeing the memorandum. Management staff in the Probation Department also distributed Gran's memorandum to employees other than Benjamin. The lack of any disciplinary action against employees cannot be said to have avoided a legal controversy because the Department's position was disclosed to employees thereby by chilling their right to engage in the sympathy strike.

The City's action also denied SEIU its organizational rights because it had counseled its members that they can engage in a sympathy strike while the City's policy restrains employees from participating in such strikes.

By such conduct, the City interfered with employee rights in violation of section 3506 and denied SEIU its organizational rights in violation section 3503.

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.

The City has violated the MMBA by adopting and enforcing the City Charter's prohibition on sympathy strikes. It is appropriate to order that the County cease and desist from adopting and enforcing this regulation. SEIU requests an order "striking down" the challenged regulation, while the City argues that it is not within PERB's remedial power to strike down provisions of the City Charter as that would amount to "rewriting" the Charter. It is appropriate to order that the language of the City Charter in conflict with the MMBA be stricken out, specifically the second sentence of A8.346(b) that defines a strike as including a

work stoppage engaged in by employees because they are "'honoring' a strike by other municipal employees." (See *Brown v. City of Berkeley* (1976) 57 Cal.App.3d 223, 235-236 [striking only those portions of a city ordinance in conflict with the charter]; *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 693-698, 709 [invalid provision severable from the remainder of the ordinance]; *Younger v. Board of Supervisors* (1979) 93 Cal.App.3d 864, 870 [preventing entry of charter amendments passed by initiative measure where in conflict with superior state law]; *Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, 291-292 [general laws of the state may supersede charter authority].) The City relies on Civil Code section 3423(g) which prohibits injunctive relief "to prevent a legislative act by a municipal corporation." The legislative act has already occurred. PERB is merely enjoining enforcement of the challenged regulation. (*Los Angeles County Federation of Labor v. County of Los Angeles* (1984) 160 Cal.App.3d 905; sec. 3510(a).)

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

Finally, it is the ordinary remedy in PERB cases that the party found to have committed an unfair practice is ordered to post a notice incorporating the terms of the order. Such an order is granted to provide 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 the City to post a notice incorporating the terms of the order herein at its buildings, offices, and other facilities where notices to bargaining unit employees are customarily posted. Posting of such notice

effectuates the purposes of the MMBA that employees are informed of the resolution of this matter and the City's readiness to comply with the ordered remedy. The City contends that notice need only be given to "a limited group of SEIU-represented employees working for the Juvenile Probation Department." Such posting is too limited because of the City's general practice of requiring employees to sign an acknowledgment of the prohibition on strikes which they could read as including sympathy strikes.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it has been found that the City and County of San Francisco (City) violated the Meyers-Milias-Brown Act (MMBA). The City maintained and enforced an unreasonable regulation in violation of Government Code section 3507 and Public Employment Relations Board (PERB or Board) Regulation 32603(f) (Cal. Code of Regs., tit. 8, § 31001 et seq.) By this conduct, the City also interfered with the right of City employees to participate in the activities of an employee organization of their own choosing, in violation of Government Code section 3506 and PERB Regulation 32603(a), and denied Service Employees International Union, Local 1021 (SEIU) its right to represent employees in their employment relations with a public agency, in violation of Government Code section 3503 and PERB Regulation 32603(b).

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

A. CEASE AND DESIST FROM:

1 Adopting and enforcing City Charter section A8.346 to the extent it prohibits sympathy strikes.

2. Interfering with bargaining unit members' right to participate in the activities of an employee organization of their own choosing.

3. Denying SEIU its right to represent employees in their employment relations with the City.

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

1. Remove the second sentence of section A8.346, subdivision (b) from the City Charter.

2. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations in the City, where notices to employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the City, indicating that the City will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

2. Within thirty (30) workdays of service of a final decision in this matter, notify the General Counsel of PERB, or his or her designee, in writing of the steps taken to comply with the terms of this Order. Continue to report in writing to the General Counsel, or his or her designee, periodically thereafter as directed. All reports regarding compliance with this Order shall be served concurrently on SEIU.

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 95811-4124
(916) 322-8231
FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

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

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 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 Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

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