VACATED IN PART by City & County of San Francisco (2019) PERB Decision No. 2540a-M

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

TRANSPORT WORKERS UNION OF AMERICA LOCAL 250, SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1021, INTERNATIONAL ASSOCIATION OF MACHINISTS LOCAL 1414, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 6, TRANSPORT WORKERS UNION LOCAL 200, Charging Parties, v. CITY & COUNTY OF SAN FRANCISCO, Respondent.	Case No. SF-CE-827-M PERB Decision No. 2540-M October 20, 2017

Appearances: Law Office of Kenneth C. Absalom by Kenneth C. Absalom and James A. Achermann, Attorneys, for Transport Workers Union of America Local 250; Weinberg, Roger & Rosenfeld by Alan Crowley, Attorney, for Service Employees International Union Local 1021 and International Association of Machinists Local 1414; Leonard Carder by Peter Saltzman, Attorney, for International Brotherhood of Electrical Workers Local 6; Neyhart, Anderson, Flynn & Grosboll by Benjamin K. Lunch, Attorney, for Transport Workers Union Local 200; Meyers, Nave, Riback, Silver & Wilson by Arthur A. Hartinger, Attorney, for City & County of San Francisco.

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the City & County of San Francisco (City) to a proposed decision (attached) by a PERB administrative law judge (ALJ) that concluded that

the City violated the Meyers-Milias-Brown Act (MMBA)[1] by adopting unreasonable rules concerning impasse dispute resolution and the treatment of past practices and side letters.

The complaint alleged that the City adopted Charter section 8A.104, subdivisions (o) and (q), the substance of which were contrary to the MMBA and therefore in violation of MMBA section 3507 and PERB Regulation 32603, subdivision (f).[2] The City Charter provides for binding interest arbitration of bargaining impasses between the City's Metropolitan Transit Agency (MTA) and recognized employee organizations. Subdivision (o) of section 8A.104 requires the employee organization to prove to the arbitration panel by clear and convincing evidence that its proposals concerning scheduling, deployment, assignment, staffing, sign-ups, and the use and number of part-time transit personnel "outweighs the public's interest in effective, efficient, and reliable transit service and is consistent with best practices." Subdivision (q) of that section declares that past practices and side letters are not binding unless they are approved in writing by the Director of Transportation or the Board of Directors.

The Board has reviewed the entire record, the proposed decision, the City's exceptions and responses thereto filed by Transport Workers Union of America Local 250-A (TWU 250); Transport Workers Union Local 200; International Brotherhood of Electrical Workers, Local 6 (IBEW, Local 6); Service Employees International Union Local 1021; and International Association of Machinists and Aerospace Workers Local 1414 (collectively, Unions) in light of applicable law. Based on this review, we conclude that the ALJ's findings of fact are

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

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

supported by the record and his conclusions of law are well reasoned and in accordance with applicable law, except with respect to the remedial order. We hereby affirm the proposed decision as modified, subject to the following discussion of the City's exceptions.

FACTUAL BACKGROUND

The essential facts as described in the proposed decision are not in dispute, and are summarized here to provide relevant context to our discussion. In November 2010, the City's voters passed Proposition G. Proposition G removed transit operators (represented by TWU 250) from the City's Salary Stabilization Ordinance[3] and placed them, like all other employees of the MTA, under the City's collective bargaining/interest arbitration procedure.[4] Proposition G also changed the interest arbitration procedure that applies to MTA employees by adding subdivisions (o) and (q) to City Charter section 8A.104.

Subdivision (o) of Charter section 8A.104 provides:

> The voters find that for transit system employees whose wages, hours and terms and conditions of employment are set by the Agency, the Agency's discretion in establishing and adjusting scheduling, deployment, assignment, staffing, sign ups, and the use and number of part-time transit system personnel based[5] upon service needs is essential to the effective, efficient, and reliable operation of the transit system. *In any mediation/ arbitration proceeding under Section 8.409-4 with an employee organization representing transit system employees, the employee organization shall have the burden of proving that any restrictions proposed on the Agency's ability to exercise broad discretion with respect to these matters are justified. To meet this*

[3] The Salary Stabilization Ordinance set salaries by surveying salaries in comparable jurisdictions. The removal of transit operators from the Salary Stabilization Ordinance is not at issue in this case.

[4] Proposition G encompassed more topics than these subdivisions, but these are the only subdivisions at issue in this case. Hereafter, "Proposition G" will refer only to subdivisions (o) and (q).

[5] These subjects are referred to collectively as "Transit Effectiveness Subjects."

> *burden, the employee organizations must prove by clear and convincing evidence that the justification for such restrictions outweighs the public's interest in effective, efficient, and reliable transit service and is consistent with best practices.* The mediation/arbitration board shall not treat the provisions of MOUs for transit system employees adopted prior to the effective date of this provision as precedential in establishing the terms of a successor agreement. The mediation/arbitration board's jurisdiction shall be limited to matters within the mandatory scope of bargaining under state law.

(Emphasis added.)

Section 8A.104, subdivision (q), pertaining to side letters and unwritten past practices provides:

> In addition, the voters find that Agency service has been impaired by the existence of side-letters and reliance on "past practices" that have been treated as binding or precedential but have not been expressly authorized by the Board of Directors or the Director of Transportation, and have not been and are not subject to public scrutiny. Accordingly, for employees whose wages, hours and terms and conditions of employment are set by the Agency, *no side-letter or practice within the scope of bargaining may be deemed binding or precedential by the Agency or any arbitrator unless the side-letter or practice has been approved in writing by the Director of Transportation or, where appropriate, by the Board of Directors* upon the recommendation of the Director of Transportation and appended to the MOU of the affected employee organization or organizations subject to the procedures set out in this charter. No MOU or arbitration award approved or issued after the November 2010 general election shall provide or require that work rules or past practices remain unchanged during the life of the MOU, unless the specific work rules or past practices are explicitly set forth in the MOU. All side-letters shall expire no later than the expiration date of the MOU.

(Emphasis added.)

Following passage of Proposition G, the Unions, who represent MTA employees, filed the unfair practice charge challenging these Charter amendments on their face.

PROPOSED DECISION

As an initial matter, the ALJ determined that the appropriate standard or test for determining if a local rule is unreasonable under PERB Regulation 32603, subdivision (f), is whether the charging party has demonstrated that the local rule "abridges the exercise of a fundamental right, or frustrates the fulfillment of an affirmative duty, prescribed by the MMBA." (*County of Monterey* (2004) PERB Decision No. 1663-M; *International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, 199-200 (*City of Gridley*).) After reviewing some history of California's public sector labor law, and the need for the law to provide a clear incentive for resolving disputes, the ALJ concluded: ". . . a necessary function of the collective bargaining statute, whether enforcing mandatory interest arbitration or not, is to ensure fairness through the adoption of neutral rules of engagement, ones which are non-normative in outcome terms and grounded in a presumption that the parties engage each other on a relatively level playing field." (Proposed decision, p. 18.)

Based on that principle, the ALJ concluded that section 8A.104, subdivision (o), "unreasonably abridges the unions' right to represent their unit members and frustrates the parties' duty to meet and confer in good faith under the MMBA." (Proposed Decision, p. 27.) In support of his conclusion, the ALJ noted several flaws in subdivision (o), including the discriminatory application of the burden of proof as to the six Transit Effectiveness Subjects. It is only the Unions that need to convince the arbitrator by clear and convincing evidence that justification for union proposals outweighs the public's interest in efficient, reliable transit service and is consistent with best practices. This higher burden of proof "handicaps" the Unions by giving great weight to managerial discretion versus the Unions' interest in these six negotiable subjects, making it more likely that the City will prevail in arbitration when any of

these subjects are submitted to binding arbitration. This, too, would warp the pre-arbitration negotiations by sending the message to both union and management that there is little point in pressing a union proposal on these subjects because management is more likely than not to prevail in binding arbitration. In the words of the ALJ, where "one side maintains a clear advantage over the other throughout the process, the chilling effect is easily predicted." (Proposed Decision, p. 25, fn. 8.)

The ALJ noted an additional discriminatory effect of subdivision (o). Its requirement that a union proposal not only outweigh the public's interest in efficient and reliable transit service but be consistent with "best practices," placed all past practices regarding any of the six subjects in opposition to the new "best practice" standard. According to the ALJ, this means that any new proposals adding costs or restricting broad managerial discretion are likely not to prevail under the new guidelines prescribed by subdivision (o).

In sum, the ALJ determined that subdivision (o) did not implement neutral rules for interest arbitration, but instead "added significant weight to management's side of the scale in interest arbitration." (Proposed Decision, pp. 26-27.)

The ALJ then turned to subdivision (q)'s provisions retroactively voiding any side letters and past practices not expressly approved by the Director of Transportation or the MTA and appended to the memorandum of understanding (MOU). This conflicts with PERB precedent, according to the ALJ, because it prevents the Unions from enforcing past practices through PERB's processes. (*Omnitrans* (2009) PERB Decision No. 2030-M.) The rule also prevents the Unions from relying on or enforcing past practices in grievance arbitrations. Moreover, because side letters are directly enforceable, the ALJ concluded that any attempt to rescind them would be unlawful. (*Palomar Community College District* (2011) PERB

Decision No. 2213 (*Palomar*).) Although an employer may mandate which of its own representatives are authorized to execute a side letter, nothing on the face of subdivision (q) indicates this rule is to be applied only prospectively. Therefore the ALJ concluded: "Proposition G's voidance of all previous unexpired side letters and past practices not formally adopted repudiates terms and conditions of employment and deprives the unions of their right to shape the meaning of ambiguous terms in their agreements through the grievance procedure." (Proposed Decision, p. 29.)

The ALJ then considered subdivision (q)'s provision that no MOU or arbitration award approved or issued after November 2010 (when Proposition G was passed) shall provide or require that work rules or past practices remain unchanged during the life of the MOU, unless the specific work rules or past practices are explicitly set forth in the MOU. The ALJ found that this provision refers to past practice clauses in MOUs, i.e., provisions that require the recognition of past practices existing at the time of the agreement even though not expressly included in the MOU. Both these clauses and zipper clauses are within the scope of representation. (*Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375, p. 81.) According to the ALJ, this provision imposes on the Unions an obligation to list every possible past practice in a past practice clause or forfeit the right to challenge any subsequent repudiation of those practices. While it would be permissible for the City to propose such a requirement in bargaining, it cannot unilaterally impose it, since it abridges the Unions' right to represent its members. The provision also denies the Unions their ability to seek enforcement of a past practice through arbitration or PERB proceedings. The ALJ also noted that a local rule cannot unilaterally remove a subject from the scope of representation, citing *Huntington Beach Police*

Officers' Association v. City of Huntington Beach (1976) 58 Cal.App.3d 492, 499-503 (*Huntington Beach*). (Proposed Decision, p. 30.)

Finally, the ALJ found that the fourth sentence of subdivision (q), which requires the expiration of all side letters upon expiration of an MOU, conflicts with the well-established rule that the employer must maintain the status quo upon expiration of an MOU until good faith negotiations have been completed. (*Palomar, supra*, PERB Decision No. 2213 [holding that side letters bind the parties to the practices contained in them and do not expire automatically upon expiration of the MOU].) The ALJ concluded that this provision was "tantamount to a unilateral repudiation of all side letters not explicitly limited in time to the term of the . . . MOU, thereby frustrating the unions' right to represent [unit members]." (Proposed Decision, p. 30.)

The ALJ then considered and rejected the City's argument that voters may legitimately legislate to further the public's interest in an efficient transit system, an interest that supersedes the Unions' claims of undue burden on the arbitration process. In the ALJ's view, the proponents of Proposition G successfully leveraged their interests through the political process, and this case illustrates "the need to critically assess whether this factor [the public interest] is properly implemented in a manner consistent with the statutory premise of good faith negotiations. Anti-labor motivated legislation by the electorate has no legal consequences so long as the bargaining process remains neutral." (Proposed Decision, p. 32.) Because both subdivisions (o) and (q) are discriminatory on their face and impose undue burdens on the Unions according to the ALJ, they cease to be neutral. The ALJ observed:

> Rules for collective bargaining must be faithful to the premise of equal leverage in the process to fulfill the purposes of the statute; otherwise they amount to 'official compulsion' of a particular outcome. [Citation.] When local legislation crosses that line, it

> not only runs afoul of the statute as an unreasonable regulation but must also give way under the principles of preemption.

(Proposed Decision, p. 33.)

To remedy these violations, the ALJ ordered the City to cease and desist from adopting and enforcing the provisions of subdivisions (o) and (q) of Charter section 8A.104 and to rescind these provisions.

THE CITY'S EXCEPTIONS

The City filed 32 exceptions, which can be summarized and grouped into the following ten contentions.

- The ALJ's factual summary is inaccurate and incomplete because he failed to note that the Unions' witness admitted that the City bargained in good faith after Proposition G passed and that at least one Union, IBEW, Local 6, was able to obtain agreement on numerous proposals that affected the six Transit Effectiveness Subjects without resorting to binding arbitration. Since Proposition G was passed, none of the charging parties have requested arbitration on any of the six Transit Effectiveness Subjects, so there can be no legitimate finding that their bargaining rights were chilled by Proposition G.
- The ALJ erroneously neglected to analyze the City's home rule authority.
- Proposition G is not an unreasonable regulation because it simply establishes standards to guide arbitrators' exercise of their judgment. The "clear and convincing" standard is reasonable given the public's determination that the transit system is integral to public health and quality of life, and it was an error for the ALJ to assume it is an insurmountable burden, especially given that none of the six Transit Effectiveness Subjects have been presented to binding arbitration. The ALJ

also erred in concluding that the "best practice" standard was discriminatory and anti-labor.

- The "as-applied" challenge to subdivision (o) must be rejected because the City bargained in good faith after the passage of Proposition G and the MTA agreed to several union proposals concerning the six Transit Effectiveness Subjects.
- With respect to subdivision (q), the ALJ erred in failing to harmonize or even address MMBA section 3505.1, which requires that an agency's governing body adopt a tentative agreement before it will be binding. Subdivision (q) merely places controls on who from the City has authority to bind the MTA, which does not violate the MMBA.
- The ALJ erroneously ruled on parts of subdivision (q) that were not challenged by the complaint.
- There is nothing unreasonable about the requirement in subdivision (q) that requires the parties to identify "binding contractual agreements."
- Contrary to the ALJ's finding, there is nothing in subdivision (q) that interferes with the use of evidence of a past practice as an aid in interpreting ambiguous provisions of an MOU. Moreover, it is not unreasonable to require parties to negotiate and obtain approval for a past practice that purportedly constitutes binding terms and conditions of employment
- The City's sunshine laws and policy favoring transparency in government supersede other local laws and it is not unreasonable for the voters to require greater transparency in negotiations, as subdivision (q) does.

- The proposed remedy is excessive and unenforceable because PERB has no authority to order any part of a municipal charter rescinded. Moreover, striking the entire subdivision (o) is overbroad in light of the ALJ's focus on the standard of proof and the definition of "best practices," while striking subdivision (q) exceeds the scope of the complaint and what was actually litigated.

DISCUSSION

We are presented in this case with the tension between management's claim that it has a right and a duty to enforce legislation that furthers an asserted public interest in efficient transit practices, and labor's assertion that such regulation is not reasonable because it conflicts with the purposes of the MMBA.

One of the central purposes of the MMBA is 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. (§ 3500, subd. (a).) MMBA section 3507, subdivision (a)(5), explicitly permits a public agency to adopt reasonable rules and regulations after consultation in good faith with employee organizations concerning additional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment. However, such rules and regulations must be "reasonable," meaning in conformance with the provisions, polices and purposes of the MMBA. (MMBA, §§ 3507, subds. (a)(5) and (d), 3509, subd. (b); PERB Reg. 32603, subd. (f).) For reasons explained below, we agree with the ALJ that the provisions of Proposition G at issue here do not constitute a reasonable method for resolving disputes.

The Appropriate Test For Assessing a Facial Challenge to a Local Rule

The City asserts that in order to succeed in a facial challenge to a local rule, the challenger must establish that no set of circumstances exists under which the rule would be valid and that the rule inevitably poses a total and fatal conflict with applicable law, citing *Arcadia Unified School Dist.* v. *State Department of Education* (1992) 2 Cal.4th 251, 267. The City's reliance on *Arcadia* is misplaced. That case involved a facial *constitutional* challenge to a statute that permitted school districts to charge students for transportation. The Court rejected the challenge, noting that in order to successfully challenge a statute on its face based on constitutional infirmities, the challenger must show that the act's provisions "inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." (*Ibid*.)

PERB and the courts have applied a different standard when presented with an asserted conflict between a public agency's local rules and the MMBA. In *City of Gridley*, *supra*, 34 Cal.3d 191, the Court looked only to whether the local rule (allowing the employer to withdraw recognition of an employee organization if it engaged in a strike) was inconsistent with the principles of the MMBA, acknowledging:

> [I]t is now well settled that the Legislature intended that the MMBA "set forth reasonable, proper and necessary principles which public agencies must follow in their rules and regulations for administering their employer-employee relations . . ." and that "if the rules and regulations of a public agency do not meet the standard established by the Legislature, the deficiencies of those rules and regulations as to rights, duties and obligations of the employer, the employee, and the employee organization, are supplied by the appropriate provisions of the act." [Citations.]

(*Id*. at pp. 197-198. See also *Los Angeles County Federation of Labor v. County of Los Angeles* (1984) 160 Cal.App.3d 905, 908 (*County of Los Angeles*); *Voters For Responsible Retirement v. Board of Supervisors*, 8 Cal.4th 765, 781 [MMBA preempts the right of the

electorate to subject to referendum an MOU adopted by local agency's governing body]; *Service Employees International Union, AFL-CIO v. Superior Court* (2001) 89 Cal.App.4th 1390, 1395 [local rule must be reasonable in light of the intent of the MMBA].)

The Board applied this test of reasonableness in *County of Monterey*, *supra*, PERB Decision No. 1663-M, the first case in which PERB determined that a local rule was unreasonable in violation of MMBA section 3507 and PERB Regulation 32603, subdivision (f). The Board stated:

> A local rule that infringes on employee organization rights . . . or employee rights . . . would constitute an unreasonable regulation. . . . Accordingly, a violation based on the adoption or enforcement of an unreasonable regulation requires, as a threshold matter, a showing that the local rule or regulation abridges the exercise of a fundamental right, or frustrates the fulfillment of an affirmative duty, prescribed by the MMBA.

(*County of Monterey*, adopting proposed decision at pp. 28-29. See also *City of Madera* (2016) PERB Decision No. 2506-M, pp. 5-6.) The ALJ correctly applied this same test to determine the reasonableness of Proposition G.

The Home Rule Doctrine

The City avers that the ALJ erred by not considering the home rule doctrine in analyzing Proposition G. As the City notes, the home rule doctrine "reserves to charter cities the right to adopt and enforce ordinances, provided the subject of the regulation is a municipal affair rather than a subject of statewide concern." (City's Statement of Exceptions to Proposed Decision and Brief in Support (City's Exceptions), p. 18.)[6] Although the City correctly states

[6] In the absence of a citation to the precise part of the California Constitution to which the City refers, we presume it intends by "the home rule doctrine" to refer to California Constitution, article XI, sections 3 and 5, which respectively permit cities and counties to adopt a charter which has the force and effect of legislative enactments and that a charter city may make and enforce all ordinances and regulations with respect to municipal affairs.

the law on this point, the home rule doctrine does not assist the City in this case. The process of collective bargaining and the rights of employees and their organizations secured by the MMBA and the uniform application of that statute are matters of statewide concern. (*People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 600 (*Seal Beach*).) Courts have recognized this for decades and have thus, for example, upheld the right of firefighters to organize, despite charter provisions to the contrary (*Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276 (*City of Los Angeles*)); invalidated charter provisions prohibiting granting improvements in wages or working conditions to employees who engaged in a strike (*County of Los Angeles*, *supra*, 160 Cal.App.3d 905); and struck down a charter city's attempt to exclude working hours from the scope of bargaining (*Huntington Beach*, *supra*, 58 Cal.App.3d at p. 500). In *Huntington Beach*, 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, fn. omitted.)

Quoting then-Professor Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719, 725, the *Huntington Beach* 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.) [7]

Thus, the home rule doctrine does not permit a charter city to enact or enforce a local ordinance that conflicts or is inconsistent with the intent or purpose of the MMBA. We turn next to consider that predicate issue, i.e. whether subdivisions (o) and (q) conflict with the MMBA.

The Merits of Section 8A.104, Subdivision (o)

We agree with the ALJ that ". . . a necessary function of the collective bargaining statute, whether enforcing mandatory interest arbitration or not, is to ensure fairness through the adoption of neutral rules of engagement, ones which are non-normative in outcome terms and grounded in a presumption that the parties engage each other on a relatively level playing field." (Proposed Decision, p. 18.)

[7] The City makes a related argument that Proposition G must be harmonized with the MMBA. The courts have generally harmonized the MMBA's procedural provisions with public agencies' authority to regulate their municipal affairs. For instance, in *Seal Beach* (*Seal Beach*, *supra*, 36 Cal.3d 591, 601), the Supreme Court held that the MMBA's meet and confer requirement did not conflict with a charter city's authority to submit a proposed charter amendment to the voters, because the governing body "may still propose a charter amendment if the meet-and-confer process does not persuade it otherwise." For similar reasons, the Supreme Court in *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 665, a case involving the City, found no conflict between the MMBA's meet-and-confer requirement and a charter provision reserving certain authority to a civil service commission.

City of Los Angeles, *supra*, 60 Cal.2d 276, *County of Los Angeles*, *supra*, 160 Cal.App.3d 905, and *Huntington Beach*, *supra*, 58 Cal.App.3d at p. 502 make clear, however, that when there is a conflict, the local authority must yield to the MMBA. In this case, the City has not advanced any plausible interpretation of Proposition G's provisions that does not conflict with the MMBA. In fact, the City's argument does not rely on Proposition G at all, but instead rests on other provisions of the Charter—sections 8A.104, subdivision (k), and A8.409-3—that merely reiterate the duty to meet and confer in good faith. Therefore, there is no basis for harmonizing Proposition G with the MMBA.

We disagree with the City's characterization of subdivision (o) as simply an articulation of standards or criteria to guide the arbitrator. While the establishment of criteria or factors to be considered by an arbitrator is commonplace and unobjectionable,[8] subdivision (o) goes beyond merely establishing neutral criteria that guide arbitrators in making their decision. The heightened standard of proof as to the six Transit Effectiveness Subjects functions as a one-way ratchet. Only the Unions must establish by clear and convincing evidence that their proposals on any of these six subjects outweigh the public's interest in efficient transit service and are consistent with "best practices." Employer proposals are not subject to these standards. This difference makes it much more likely a union proposal on these subjects will be rejected in arbitration. Because subdivision (o) thus places a "thumb on the scale" in favor of the City's proposals, its provisions are not mere neutral criteria or standards to guide the arbitrator.

We also reject the City's exception that the ALJ erred in describing the "best practice" requirement as discriminatory. We read the proposed decision on this point as saying that this requirement is inseparable from the requirement that Unions must prove by clear and convincing evidence that the justification for proposals that restrict management's discretion outweighs the public's interest in effective and reliable transit service. We agree with the ALJ's analysis that the "best practice" standard automatically juxtaposes past practice with "best practice," and operates with the heightened burden of proof and higher level of scrutiny

[8] The City's Charter already prescribes factors that arbitrators must weigh in making their awards including economic comparators, the financial resources of the City, revenue projections, the interests and welfare of transit riders, residents and other members of the public, and the MTA's ability to efficiently tailor work hours and schedules for transit system employees to the public demand for service.

to make it far less likely that an arbitrator will choose a Union's proposal over the City's proposal on any of the Transit Effectiveness Subjects. (See Proposed Decision, p. 26.)

The City also claims that its interest arbitration process must include safeguards to prevent an unconstitutional delegation of legislative authority. However, the issue in this case is not whether the process may or must include standards to guide the arbitrator's decisionmaking. As explained above, the issue is whether the process may be constructed to clearly favor one party over the other. We hold that it may not, and neither of the cases cited by the City on this point—*County of Riverside v. Superior Court* (2003) 30 Cal.4th 278 (*County of Riverside*) and *Kugler v. Yocum* (1968) 69 Cal.2d 371—are to the contrary.[9]

The City also asserts that subdivision (o)'s "clear and convincing" evidentiary standard for assessing the merits of union proposals on the six Transit Effectiveness Subjects is a legitimate public policy enacted in response to the public outcry over the deterioration of MTA services. In the absence of a statewide collective bargaining law, these arguments would have some weight. And in the context of bargaining, they may well justify proposals by the City at the bargaining table to improve services. Nothing in the MMBA prevents a public agency from relying on public policy and public demands to justify its bargaining positions, and the Charter already provided, prior to Proposition G, that the public's interest be considered by the arbitration panel when determining an award.

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[9] *County of Riverside*, *supra*, 30 Cal.4th 278, held unconstitutional a statute requiring municipalities to submit certain bargaining disputes to binding arbitration, as it interfered with the municipality's authority to set employee compensation. (Cal. Const., art. XI, § 1, subd. (b)) and delegated the authority of the municipality's governing body to a private person (Cal. Const., art XI, § 11, subd. (b).)

Kugler v. Yocum, *supra*, 69 Cal.2d 371, held that an ordinance establishing firefighter salaries by comparison to surrounding jurisdictions included adequate guidance, and thus was not an unconstitutional delegation of legislative authority.

But that is not what was accomplished by subdivision (o). Rather, this provision was designed to tilt the bargaining table in favor of management proposals and priorities. We agree with the ALJ for the reasons he explained that subdivision (o) was not an expression of neutral rules for resolving bargaining disputes, and for that reason conflicts with the MMBA.

In further defense of subdivision (o), the City argues that by requiring interest arbitrators to "place great emphasis on the public's interest," Proposition G merely establishes priorities and applies those priorities to collective bargaining. The City claims that this does not run afoul of the MMBA because the City could, in the absence of binding interest arbitration, emphasize those priorities by withholding agreement and implementing its own proposals after reaching impasse. (City's Post-hearing Opening Brief, p. 17.) This argument ignores that under the binding interest arbitration procedure at issue here, the City's bargaining rights are tempered by the arbitration procedure. Although it may reject proposals at the bargaining table, it may not impose its last best and final offer at the point of impasse. By decreeing in the charter that binding interest arbitration shall be the bargaining dispute resolution mechanism, the City has ceded to an arbitrator the right to impose terms and conditions of employment.[10] Having done so, it cannot subsequently attempt to "buy" the referee by requiring that referee to apply one standard to the Unions and another to the City.

The City also contends that the Unions' "as-applied" challenge to subdivision (o) must be rejected because the Unions admitted the City bargained in good faith after Proposition G passed, and that they successfully negotiated over a variety of Transit Effectiveness Subjects

[10] The City correctly points out that it could eliminate interest arbitration and simply refuse to agree to anything that would negatively impact the Transit Effectiveness Subjects. Yet it has not done so. We are presented here only with the question of the reasonableness of the regulation the City has imposed on its interest arbitration process, and not with any hypothetical impact of a decision to jettison its interest arbitration procedure.

without resort to arbitration. Related to this contention is the City's exception that the ALJ appears to have conflated the Unions' facial challenge to Proposition G with their "as-applied" challenge. We reject these exceptions.

This case does not involve an "as-applied" challenge to Proposition G. The complaint alleged that Charter section 8A.104, subdivisions (o) and (q), described as "Respondent's policies" (Complaint, par. 4) are contrary to the MMBA. The complaint does not allege that the policies were applied in a way that violates the MMBA, or that the City engaged in any conduct other than adopting these policies. As pled, this case presents a facial challenge to these policies. The ALJ did not conflate a facial challenge with an "as-applied" challenge, but properly analyzed whether Proposition G was facially unreasonable. Although the ALJ cited testimony of a Union witness, Kevin Hughes (Hughes), assistant business manager for IBEW, Local 6, as an example of the chilling effect subdivision (o) could have on negotiations, this does not render his analysis or conclusions erroneous.[11] The proposed decision did not hinge on this testimony.

We also reject the City's exception that the ALJ erroneously relied on Hughes' testimony because it was hearsay. PERB Regulation 32176 provides in pertinent part: "Hearsay evidence is admissible but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." The City asserts that the ALJ relied on Hughes' testimony for his finding that Proposition G had a chilling effect on good faith negotiations. We do not read the proposed decision as the City does. In the paragraphs

[11] Hughes testified that the chief negotiator for the MTA, Michelle Modena, explained during negotiations the MTA's resistance to a Union proposal concerning one of the Transit Effectiveness Subjects. According to Hughes, Modena pointed out that Proposition G raises the bar significantly and puts the burden on the Union to establish its proposal was consistent with the transit-first policy. She also said the Union would have a difficult time prevailing in interest arbitration with the additional criteria in Proposition G.

preceding the ALJ's reference to Hughes' testimony, he analyzed the language of subdivision (o) and observed:

> . . . the Charter requires that the unions' justification address a particular burden. . . . This burden handicaps the unions by giving especially great weight to MTA's managerial discretion in opposition to the unions' interest in negotiable subjects. Section 8A.104(o) also imports a subjective standard that invites circular reasoning by MTA because managements' discretion is deemed essential to achieving MTA's goals as a transit system. . . .
>
> Moreover, like the burden of proof, the gloss placed on the new factor inhibits negotiations prior to impasse by encouraging the assertion of scope of representation arguments by the City at the interest arbitration stage, . . .

(Proposed Decision, pp. 24-25.)

In short, the ALJ based his findings of a chilling effect on his reading of subdivision (o). Hughes' testimony merely confirmed his legal analysis.[12]

The City also excepts to what it characterizes as an inaccurate factual conclusion that "employees gave up a right to strike as a 'quid pro quo' for interest arbitration," asserting that such a finding is not supported by the "undisputed chronology of relevant charter provisions."[13] (City's Exceptions, pp. 10 and 12.)

The City is correct that the City Charter banned strikes in San Francisco before charter amendments were passed that provided for interest arbitration. (See *City & County of San Francisco, supra,* PERB Decision No. 2536-M, p. 26, fn. 24.) This chronology

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[12] To the extent the ALJ made a "finding" based on Hughes' testimony regarding statements by MTA representatives, those statements were properly considered as an admission by a party, an exception to the hearsay rule (Evid. Code, § 1220; PERB Reg. 32176.)

[13] Curiously, the City argued just the opposite in a recent case concerning sympathy strikes, claiming in that case that it is permitted to ban strikes generally because binding interest arbitration is the quid pro quo for such a ban. (*City and County of San Francisco, supra,* PERB Decision No. 2536-M, p. 25.)

undermines the contention that interest arbitration was predicated on a "forfeiture" of the right to strike, since the City banned strikes long before it implemented interest arbitration. It is also inaccurate to characterize as a quid pro quo a situation in which strikes are purportedly prohibited by local rule, rather than by mutual agreement after a meet and confer process. We also question whether this particular interest arbitration procedure is "predicated on forfeiture of the right to economic weapons." (Proposed Decision, p. 27.) As the Board noted in *City and County of San Francisco* (2009) PERB Decision No. 2041-M (*San Francisco*), Charter section 8A.409-4, subdivision (a), requires that unresolved disputes over wages, hours and terms and conditions of employment be submitted to arbitration upon declaration of impasse (*id.,* adopting proposed decision at p. 33), a conclusion we re-affirm—the interest arbitration procedure in *San Francisco* is mandatory. However, that same Charter section also provides in pertinent part:

> ". . . the arbitration procedures set forth in this part shall not be available to any employee organization that engages in a strike. . . . Should any employee organization engage in a strike either during or after the completion of negotiations and impasse procedures, the arbitration procedure shall cease immediately and no further impasse resolution procedures shall be required."

(*San Francisco, supra,* adopting proposed decision at pp. 7, 30.) As we held in *San Francisco*, adopting proposed decision at p. 31, and the penalty imposed by section 8A.409-4, subdivision (a), for engaging in a primary strike is forfeiture of the benefits of binding interest arbitration. This is the clause that arguably creates a quid pro quo for a particular dispute, not a blanket ban on strikes. (See *City & County of San Francisco, supra*, PERB Decision No. 2536-M, p. 26, fn. 24, questioning whether the charter's ban on strikes and penalties for striking employees is the quid pro quo for binding interest arbitration.) An employer may not impose terms that waive or forfeit the statutory rights of employees or their organizations to

engage in concerted activity, including the right to strike. (*Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, p. 24). Public employees have a qualified right to strike. (*Ibid.*; *City and County of San Francisco*, *supra*, PERB Decision No. 2536-M. Relying on these principles and those favoring peaceful resolution of bargaining disputes, *San Francisco*, *supra*, PERB Decision No. 2041-M, correctly concluded that the Charter "provides that interest arbitration is forfeited by any union engaging in a strike. Stated differently, the penalty for striking is the union's inability to proceed to interest arbitration, unless the City chooses to ignore the strike." (*Id.*, adopting proposed decision at p. 31.) If a union wants the bargaining dispute resolved through arbitration, it cannot strike during or after the completion of negotiations and impasse procedures.

The proposed decision offers numerous reasons why Proposition G in general and subdivision (o) in particular violate the MMBA. We do not read the decision to turn on whether binding arbitration is a quid pro quo for banning the right to strike. But to the extent the observation in the proposed decision that ". . . an interest arbitration process predicated on forfeiture of the right to economic weapons must maintain a level playing field" can be interpreted to heighten the scrutiny applied to Proposition G because of an alleged quid pro quo, we disavow such interpretation. There can be no unilateral forfeiture of the right to strike. The infirmities identified with subdivision (o) render its provisions incompatible with the MMBA regardless of whether the City has disarmed both sides of their respective economic weapons.

The City, in exercising its right under MMBA section 3507, subdivision (a)(5), to adopt *reasonable* regulations for procedures "for the resolution of disputes involving wages, hours and other terms and conditions of employment," determined that binding interest arbitration

would be that procedure. However, such regulations must be "reasonable." As the ALJ found and as we affirm, subdivision (o) is not reasonable under the MMBA because it turns what should be a level table into a warped surface that favors the employer's proposals by making it more difficult for the Unions to persuade an arbitrator that their proposals concerning the Transit Effectiveness Subjects should be adopted. It is not difficult to imagine that this "thumb on the scale" would also alter the dynamic at the bargaining table long before the parties reach impasse and arbitration. Placing the additional burdens of persuasion on the Unions removes or reduces incentives by management to reach agreement short of impasse on these subjects, knowing that an arbitrator is likely to find for the management proposal. Such a situation interferes with the presumed good faith of both parties when they commence negotiations. It also conflicts with the purpose of the MMBA, which is to provide a reasonable method of resolving disputes regarding wages, hours and working conditions.

Finally, the City argues that the reasonableness of subdivision (o) is proven by the fact that none of the Unions alleged that the City bargained in bad faith after Proposition G passed. Once again, this case is a facial challenge to the reasonableness of Proposition G. It is of no consequence that the employer bargained in good faith after the rule was enacted. Surface bargaining occurs when one party's intent is to avoid reaching agreement. (*Muroc Unified School District* (1978) PERB Decision No. 80; *City of San Jose* (2013) PERB Decision No. 2341-M.) By contrast, there is no requirement of intent when assessing the reasonableness of a rule. (*County of Monterey*, *supra*, PERB Decision No. 1663-M.)[14]

[14] Because intent is irrelevant here, we do not rely, as the ALJ did, on the conclusion that Proposition G was intended to be "anti-labor," based on the comments of the County Supervisor who sponsored the initiative. Moreover, as the City correctly points out, voter intent cannot be determined based on those comments, which were not communicated to

Similarly unpersuasive is the City's assertion that no Union has taken a Transit Effectiveness Subject to arbitration since the passage of Proposition G. It can just as easily be argued that the Unions settled on proposals they would not have otherwise agreed to, knowing that they could not prevail in arbitration, given the tilted playing field brought about by Proposition G.

Therefore, we affirm the ALJ's conclusion that subdivision (o) is an unreasonable local rule.

The Merits of Subdivision (q)

Subdivision (q) (which is not limited to the six Transit Effectiveness Subjects), declares that no side letter or past practice may be deemed precedential or binding by the MTA or any arbitrator unless the side letter or practice has been approved in writing either by the Director of Transportation or the Board of Directors and appended to the applicable MOU. As the ALJ correctly noted, this has a three-fold effect. First, it immediately and retroactively invalidates all previously negotiated side letters and past practices. This retroactive invalidation constitutes a unilateral change in working conditions, a clear violation of the MMBA. Second, subdivision (q) on its face prevents PERB from enforcing any past practice because it is purportedly not binding on the MTA. Third, it also removes from arbitrators and PERB an evidentiary tool utilized to ascertain whether a unilateral change has occurred, thereby preventing the Unions from enforcing MOUs in any arbitrations, including grievance

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voters. (*County of Contra Costa* (2014) PERB Order Ad-410-M, p. 34; *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 931.)

arbitrations.[15] (*Omnitrans* (2009) PERB Decision No. 2030-M, p. 26; *Marysville Joint Unified School District* (1983) PERB Decision No. 314 [evidence of past practice used to ascertain meaning of ambiguous contract language].)

As PERB has held, a side letter is "[a]t its most basic, . . . a contract between the parties." (*Palomar, supra,* PERB Decision No. 2213, p. 9.) A side letter typically modifies, clarifies or interprets either existing MOU provisions, or addresses issues that are not covered in an MOU. (*Ibid*. See also *City of Riverside* (2009) PERB Decision No. 2027-M [side letter did not automatically expire at the end of term of the MOU] and *Regents of the University of California* (2014) PERB Decision No. 2398-H, pp. 3, 26 [repudiation of a side letter found to be unfair practice].) By declaring that no side letter may be deemed binding or precedential unless approved in writing by the Director of Transportation or the Board of Directors, subdivision (q) retroactively and automatically voids all side letters that have not been approved in writing by these particular individuals. This is contrary to PERB caselaw and the MMBA because it unilaterally abrogates the results of the meet and confer process that produced the side letter. A local rule that dictates this result is therefore unreasonable.

[15] In its brief in support of exceptions, the City attempts to put a gloss on the plain language of subdivision (q): ". . . the City understands and accepts that past practices can be used to help interpret a contract provision. There is nothing in section 8A.104(q) that changes this usage." (City's Exceptions, p. 31.) On the contrary, there is nothing in subdivision (q) that qualifies or insulates the use of past practices to interpret the meaning of a contract. Especially since we are dealing with a ballot initiative, the City's post hoc explanation of what subdivision (q) actually means carries scant weight.

The Board may consider allegations not included in the complaint when: (1) the respondent has had adequate notice and an opportunity to defend against the unalleged matter; (2) the unalleged conduct is intimately related to the subject matter of the complaint and is part of the same course of conduct; (3) the matter has been fully litigated; (4) the parties have had an opportunity to examine and be cross-examined on the issue; and (5) the unalleged conduct occurred within the same limitations period as those matters alleged in the complaint. (*City of Roseville* (2016) PERB Decision No. 2505-M, p. 25; *Tahoe-Truckee Unified School District* (1988) PERB Decision No. 668.) Here it is easily determined that the second and fifth factor have been met. The third and fourth sentences of subdivision (q) are closely related to the sentence at issue in this case because they are directed at eliminating unapproved past practices or side letters by requiring that all side letters expire at the end of the term of an MOU and prohibiting the negotiation of provisions in an MOU that enshrine past practices or work rules in the MOU unless they are explicitly included in the MOU. This conduct occurred at the same time as the matters alleged, as it was part of the same Proposition G.

It is a closer question whether the other notice and due process factors were met. In their opening statements at the administrative hearing, the Unions (except for TWU 250) did assert that they were facially challenging subdivision (q) and claimed that subdivision (q) "effectively severely hampers an arbiter [*sic*] tool of interpretation by not allowing an arbitrator to consider past practices." The statement then highlights two aspects of subdivision (q): (1) the impact on existing side letters and beneficial practices; and (2) the impact of subdivision (q) on "the mandatory subject of grievance procedure and the parties' ability to eventually argue to an arbitrator this bidding procedure or this section here is interpreted this way." (Reporter's Transcript, pp. 19-20.) We believe reference to the

"mandatory subject of grievance procedure" reasonably put the City on notice that the Unions contended that the third sentence of subdivision (q) violated the MMBA. Only one witness was called to testify at the hearing, and he was called by the Unions. The City had an opportunity to examine him on this subject, but did not do so. The City also declined to call any witnesses of its own.

At the conclusion of the hearing, a briefing schedule provided for two rounds of briefs, opening and reply briefs. In its opening brief the Unions argued that subdivision (q) was unreasonable because it expressly eliminates the use of side letters not expressly approved by the Director and the "inclusion in MOUs of past practice clauses — that is, clauses requiring that work rules or past practices remain unchanged during the life of the MOU even if they are not explicitly set forth in the MOU, . . ." (Unions' Post-Hearing Brief, p. 21.)

The City's reply brief met this argument: "The Unions claim that 'Proposition G prohibits collective bargaining over past practice clauses and rescinds existing contractual agreements.' . . . The Unions are wrong." (City's Reply Brief to ALJ, p. 14.) Tellingly, the City did not assert that this issue concerning the past practice clauses was not alleged in the complaint and should therefore not be considered. That argument is first raised by the City in its exceptions to the proposed decision. (*Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C, pp. 11-12.)

In the Unions' post-hearing reply brief to the ALJ, they reiterated their objections to subdivision (q), namely that it prevents any arbitrator from relying on past practices and unlawfully restricts negotiations on a mandatory subject of bargaining, grievance procedures. Their brief also asserts that subdivision (q)'s prohibition against arbitrators relying on past practices "prevents the parties from negotiating over the mandatory subject of 'past practice'

clauses. Clauses designed to ensure continuance of some or all of the established practices or local working conditions are the counterpart to 'zipper clauses'" and subdivision (q) prevents negotiation of such clauses, thereby unlawfully removing a mandatory subject from the bargaining table. (Unions' Post-Hearing Reply brief, pp. 19-20.)

For these reasons, and because the last two sentences of subdivision (q) are inextricably entwined with the second sentence, which was paraphrased in the complaint, we conclude that the unalleged violation doctrine applies here. It was appropriate for the ALJ to address the entirety of subdivision (q). Having concluded that it is an unreasonable rule, we declare it void. (*County of Los Angeles*, *supra*, 160 Cal.App.3d 905, 910.)

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 & County of San Francisco (City) violated the Meyers-Milias-Brown Act (MMBA). The City adopted unreasonable regulations as a result of the passage of Proposition G and the provisions added to the City Charter at section 8A.104, subdivisions (o) and (q), in violation of the MMBA, Government Code section 3507, and Public Employment Relations Board (PERB) Regulation 32603, subdivision (f). (Cal. Code Regs., tit. 8, sec. 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 MMBA section 3506 and PERB Regulation 32603, subdivision (a), and denied the Transport Workers Union of America Local 250-A, Transport Workers Union Local 200, International Brotherhood of Electrical Workers, Local 6, Service Employees International Union Local 1021 and International Association of Machinists and Aerospace Workers Local 1414 (collectively, Unions) their 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 the MMBA, Government Code section 3509, subdivision (a), it hereby is ORDERED that Charter section 8A.104, subdivision (o), is void and unenforceable, except for the last sentence of that subdivision that reads: "The mediation/arbitration board's jurisdiction shall be limited to matters within the mandatory scope of the bargaining under state law."

It is further ORDERED that Charter section 8A.104, subdivision (q), is void and unenforceable in its entirety. Accordingly, the City is further ORDERED to:

A. CEASE AND DESIST FROM:

1. Enforcing unreasonable regulations in the form of City Charter section 8A.104, subdivisions (o) and (q), as adopted through Proposition G.

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

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

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

1. 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 physical posting of paper notices, the Notice shall be

posted by electronic message, intranet, internet site, and other electronic means customarily used by the City to communicate with its employees.

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 the Unions.

Chair Gregersen and Member Banks joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

TRANSPORT WORKERS UNION OF AMERICA LOCAL 250-A, TRANSPORT WORKERS UNION LOCAL 200, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 6, SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1021, AND INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, LOCAL 1414, Charging Party, v. CITY & COUNTY OF SAN FRANCISCO, Respondent.	UNFAIR PRACTICE CASE NO. SF-CE-827-M PROPOSED DECISION (April 30, 2013)

Appearances: Law Office of Kenneth C. Absalom by Kenneth C. Absalom and James J. Achermann, Attorneys, for Transport Workers Union of America Local 250-A; Neyhart, Anderson, Flynn & Grosboll by Benjamin K. Lunch, Attorney, for Transport Workers Union Local 200; Leonard Carder by Peter Saltzman, Attorney, for International Brotherhood of Electrical Workers, Local 6; Weinberg, Roger & Rosenfeld by Alan Crowley, Attorney, for Service Employees International Union Local 1021, and International Association of Machinists & Aerospace Workers, AFL-CIO, Local 1414; Meyers, Nave, Riback, Silver & Wilson by Arthur A. Hartinger and Scott N. Kivel, Attorneys, for City and County of San Francisco.

Before Donn Ginoza, Administrative Law Judge.

PROCEDURAL HISTORY

Transport Workers Union of America Local 250-A (TWU Local 250-A), Transport Workers Union Local 200 (TWU Local 200), International Brotherhood of Electrical Workers, Local 6 (IBEW), Service Employees International Union Local 1021 (SEIU), and International Association of Machinists and Aerospace Workers, AFL-CIO, Local 1414 (IAMAW), joined in filing an unfair practice charge against the City and County of San Francisco (City) under

the Meyers-Milias-Brown Act (MMBA or Act)[1] on May 2, 2011. On September 6, 2011, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint, alleging that the City adopted unreasonable rules for impasse dispute resolution and the effect of past practices and side letters through a voter initiative known as Proposition G. This conduct is alleged to violate section 3507 and PERB Regulation 32603(f).[2]

On September 27, 2011, the City filed its answer to the complaint, denying the material allegations and raising affirmative defenses.

On October 19, 2011, an informal settlement conference was held, but the matter was not resolved.

On June 18, 2012, a formal hearing was conducted in Oakland.

On November 19, 2012, the matter was submitted for decision with the filing of post-hearing briefs.

FINDINGS OF FACT

Each of the charging parties 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).

TWU Local 250-A represents transit operators, transit fare inspectors, and automotive service workers. Transit operators operate the passenger-carrying vehicles of the City's public transit system known as the San Francisco Municipal Railway (MUNI). TWU Local 200

[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.

represents supervisors and other specialist positions. SEIU represents station agents, signal operators, fare collectors, parking control officers, and related classifications. IBEW represents skilled workers in the electrical trade. IAMAW represents automotive mechanics, machinists, and other skilled metal workers.

City Charter Provisions Preceding Proposition G

The City's Charter has adopted a "Transit-First Policy." The policy declares that the City favors its public transportation system over reliance on private automobiles. It requires the City's officers, commissions, and departments to follow this principle in conducting the City's affairs, including the administration of the City's general plan. It commits the City to new investments in public transit, dedicating portions of City streets to transit vehicles, parking policies that encourage public transit, and promoting pedestrian and bicycle movement.

The City's Charter also contains provisions concerning labor relations for the City's represented employees. Beginning in the 1970s provisions in the Charter known as the Salary Stabilization Ordinance established wage levels for City employees based on a survey of comparable public agencies. Other subjects were determined through collective bargaining.

In 1991, the voters approved a ballot initiative known as Proposition B. Proposition B amended the Charter to allow unions the option to engage in collective bargaining on wages, hours, benefits and other terms and conditions of employment. This was coupled with an impasse dispute resolution procedure culminating in interest arbitration and a prohibition on the right to strike. Charter section A8.409-4(d) provided that the three-person arbitration board (consisting of one neutral) would choose by majority vote the package last offer that most nearly conforms to a list of factors, such as changes in the consumer price index, wages of other City employees, other demands on City resources, revenue projections, and the City's power to raise revenue.

In 1994, the voters approved Proposition F. Proposition F repealed the salary survey process for all employees except safety employees, nurses, and transit operators; in effect, defaulting all remaining represented units into the collective-bargaining/interest-arbitration procedure of Proposition B. The wages of transit operators and safety employees were frozen for one year. The interest arbitration board was required to rule on an issue-by-issue basis rather than choosing one side's package last offer. The board was to select whichever "last offer of settlement on that issue it finds by a preponderance of the evidence presented during the arbitration most nearly conforms to the factors listed." To the previous factors were added consideration of the City's three-year budget forecast, limitations on the amount and use of revenues and expenditures, and the City's ability to meet the costs of the arbitration award. In arriving at the award, the arbitration board was required to issue written findings on the listed factors as applicable to the issues determined.

In 1999, Proposition E was adopted, creating the Municipal Transportation Agency (MTA or Agency) to replace the former supervising authority, the Public Transportation Commission. Proponents of the measure asserted that the MUNI had suffered declines in service due to under-funding and a lack of accountability, and that an independent agency free from political interference was needed to manage the system and make it "comparable to the best urban transit systems in the world's major cities." Proposition E mandated levels of service and on-time performance and established standards for measuring the system's performance. The City was committed to a minimum contribution from its general fund. The Board of Supervisors was to approve MTA annual budgets; it could reject the budget (with a two-thirds vote) but not modify it. The MTA was given exclusive authority to set fares, and any changes were to be submitted to the Board of Supervisors with its proposed budget. The MTA assumed responsibility for its own labor relations. At the hearing, the current

memoranda of understanding (MOU) between the unions and the MTA were entered in the record indicating the product of their negotiations.[3]

Proposition E added to the list of interest arbitration factors found in Charter section A8.409-4 factors pertinent to MTA interest arbitrations only.[4] At section 8A.104(n) the following factors were established: (1) "the interests and welfare of transit riders, residents, and other members of the public;" and (2) "the Agency's ability to meet the costs of the decision of the arbitration board without materially reducing service." Section 8A.104(o) was added, containing a finding of the voters that "unscheduled employee absences adversely affected customer service," mandating, as a consequence, that the Agency create a comprehensive plan for the reduction of such absences. The Agency was prohibited from approving any written agreement restricting MTA's authority to administer appropriate discipline for unexcused absences.

Proposition G

In 2010, a citizens' coalition known as "Fix Muni Coalition," spearheaded by City Supervisor Sean Elsbernd, mounted a signature gathering campaign to qualify Proposition G. Due to the economic difficulties of the time, the City had reopened negotiations with those unions having contracts and achieved considerable savings needed to close its budget deficit. No such prospect of relief was available as to the Agency's transit operators who remained

[3] The most recent TWU Local 250-A MOU affirms the parties' mutual recognition of the "substantial problems" facing the MUNI, in light of Proposition E's "service and accountability requirements," and pledges the parties' intention to meet and confer over new programs involving or affecting transit operators, as required by the MMBA. Among the issues identified are industrial injuries, worker's compensation costs, unscheduled absenteeism, the safety of passengers and operators, driver-passenger relations, and the delivery of transportation services.

[4] Proposition E added sections 8A.100 through 8A.113. Section 8A.104 deals with the labor relations authority of MTA's personnel/labor relations office.

under the Salary Stabilization Ordinance. Under those provisions, transit operators were awarded wages equal to the average salary of transit operators at the two highest paying similar transit systems in the country. Proposition G proposed to remove transit operators from the Salary Stabilization Ordinance and place them under the Charter's mediation/interest arbitration procedure. As a result, TWU Local 250-A would be treated the same as the other four unions in this case for purposes of collective bargaining and impasse resolution.

Proposition G qualified for the ballot and was given the subject title "Transit Operator Wages." The initiative's proponents argued in the voter pamphlet that as a result of the Salary Stabilization Ordinance "MUNI drivers received a $9 million raise while the MTA balanced a $50 million deficit on the backs of riders." Meanwhile, "[a]ll other city workers offered concessions to help balance the City budget, but MUNI drivers refused." Another argument from a group named Rescue Muni Board of Directors stated that "Proposition G is about simple math: if Muni's costs keep growing faster than its revenues, we'll be trapped in a downward spiral of service cuts and higher fares." Opponents asserted that the proposition "would do nothing to restore the $62 million in MUNI funds siphoned by other City departments this year on top of $60 million in state cuts to MUNI in each of the last three years" that resulted in a 10 percent cut to service. Opponents pointed to a "bloated bureaucracy" and decried the scapegoating of drivers, while noting that the existing system made the City one of the few in the country not to experience a transit strike.

Proponents also described MUNI operators as being an undisciplined work force. They described Proposition G as a "targeted reform of the labor-management culture at MUNI" which was necessary to "make changes in the work rules so MUNI can provide better service at reduced cost." They cited riders' frustration with a transit agency that does not "know who will show up to work each day," allows MUNI operators to "be absent without notice, missing

runs and contributing to poor service," and is prevented from hiring extra drivers to cover the busiest shifts. Although the subject of wage setting for transit operators may have been the main impetus for Proposition G, the provisions of the measure engendering the dispute here have their genesis in the proponents' dim view of labor discipline. To address this concern, Proposition G proposed changes to the factors used in determining the outcome in interest arbitration and to the enforceability of side letters and unwritten past practices.

Proposition G prevailed at the November 10, 2010 election. It added a third special factor to Charter section 8A.104(n): "the Agency's ability to efficiently and effectively tailor work hours and schedules for transit system employees to the public demand for transit services."

Pertinent to the dispute here, Proposition G added to the MTA interest arbitration procedure language identifying six subjects of bargaining to be afforded special treatment in terms of the burden of proof. Charter section 8A.104(o) states:

> The voters find that for transit system employees whose wages, hours and terms and conditions of employment are set by the Agency, the Agency's discretion in establishing and adjusting scheduling, deployment, assignment, staffing, sign ups, and the use and number of part-time-transit system personnel based upon service needs is essential to the effective, efficient, and reliable operation of the transit system. In any mediation/arbitration proceeding under Section 8.409-4 with an employee organization representing transit system employees the employee organization shall have the burden of proving that any restrictions proposed on the Agency's ability to exercise broad discretion with respect to these matters are justified. To meet this burden, the employee organization must prove by clear and convincing evidence that the justification for such restrictions outweighs the public's interest in effective, efficient, and reliable transit service and is consistent with best practices. The mediation/arbitration board shall not treat the provisions of MOUs for transit system employees adopted prior to the effective date of this provision as precedential in establishing the terms of a successor agreement. The mediation/arbitration board's jurisdiction shall be limited to matters within the mandatory scope of bargaining under state law.

The following language was also added to section 8A.104(q) pertaining to side letters and unwritten past practices:

> In addition, the voters find that Agency service has been impaired by the existence of side-letters and reliance on "past practices" that have been treated as binding or precedential but have not been expressly authorized by the Board of Directors or the Director of Transportation, and have not been and are not subject to public scrutiny. Accordingly, for employees whose wages, hours and terms and conditions of employment are set by the Agency, no side-letter or practice within the scope of bargaining may be deemed binding or precedential by the Agency or any arbitrator unless the side-letter or practice has been approved in writing by the Director of Transportation or, where appropriate, by the Board of Directors upon the recommendation of the Director of Transportation and appended to the MOU of the affected employee organization or organizations subject to the procedures set out in this charter. No MOU or arbitration award approved or issued after the November 2010 general election shall provide or require that work rules or past practices remain unchanged during the life of the MOU, unless the specific work rules or past practices are explicitly set forth in the MOU. All side letters shall expire no later than the expiration date of the MOU.

A number of the proposition's legislative findings, listed in the voter pamphlet, reveal the intent of these provisions: (1) for public transit service to be effective, efficient, and reliable, labor agreements must be supportive of that goal; (2) labor costs are the most significant portion of MTA's budget; (3) higher labor cost inevitably undercuts MTA's ability to preserve and enhance services; (4) some provisions of existing labor agreements restrict the ability of the MTA to schedule, deploy, and assign employees in a manner that reflects services and ridership needs, and are therefore an impediment to effective, efficient, and reliable transit operations; (5) antiquated and inflexible rules contained in labor agreements undercut the City's Transit First Policy by failing to ensure that employees have their primary work hours scheduled at the times when their services are most needed; (6) past practices and side-letters

that are not spelled out in an MOU preserve antiquated and inflexible practices that impair transit operations; (7) some past practices and side letters have not been subjected to public scrutiny because they have not been approved by MTA; (8) the MTA should operate based on best practices, not past practices; (9) to achieve the Transit First policy, labor relations at MTA must be guided by the principle of "Service First," giving first priority to the needs of the people of San Francisco who rely on the Agency; and (10) a broad overhaul of the compensation structure and labor rules and practices is necessary to preserve and expand transit services to the public.[5]

Bargaining History Regarding the Six Special Subjects

At the time of the hearing there was no history of interest arbitration determining the outcome of the six special subjects identified in section 8A.104(o). However the parties' bargaining history regarding the six subjects as reflected in the parties' negotiated contractual provisions is offered to assist in the analysis of the issues. Because the initiative principally targeted transit operators, the contractual provisions of TWU Local 250-A's last MOU (2004-2011) prior to the effective date of the Charter amendment have been selected for purposes of illustration.

The MOU distinguishes between regular operators and part-time operators. (Art. 12.) To stay in regular status an operator must be available for his regularly scheduled run. "Extra operators" (regular operators working as extras and assigned to the "extra board") must report on time daily and be available for runs assigned to them. The MTA commits to maintaining 700 "weekend off" runs, which are regular runs and extra board assignments for Saturday and

[5] Supervisor Elsbernd was not a participant in any labor negotiations. However he communicated to IBEW in 2011 that the measure would provide the City leverage to ensure that economic concessions were obtained through the reopener negotiations with the union that year.

Sunday. The parties have agreed to an "Available Operator Force" equal to the number of scheduled runs and "blocks" plus an extra board equal to 27.5 percent of the number of scheduled runs and blocks. The parties identified 1468 scheduled runs and blocks, all of which are to be staffed. If the parties' agreed-upon Available Operator Force (1,872 as of 2001) falls below that number, the MTA will convert part-time operators to full-time status. Part-time operators bid separately for part-time runs and the part-time extra board. Open runs may result from lack of operators as well as a shortage of equipment. TWU Local 250-A has pledged to work with MTA to reduce operator absenteeism.

Scheduling and assignment are specifically referenced within one article of the MOU. (Art. 14.) While recognizing that the MTA has the sole right to "schedule service in the most cost effective manner consistent with the needs of the public," the parties agree that the standards and criteria for setting schedules is of vital importance to the operation of MUNI and TWU members' acceptance of the schedule-setting process. To that end, the MTA agrees to provide TWU information regarding schedule changes and agrees to discuss them. MTA's decision to make a schedule change may be grieved if it is a hazard to the operators' health and safety. The MTA has agreed to provide adequate running, recovery and lay-over time in each run to address the operators' interest in health and safety. An operator may be ordered to work a maximum of 1.5 hours past his or her scheduled time of relief if the operator's relief fails to report or because of an unanticipated disruption in service. Other provisions in Article 14 address reassignments of runs. Separately, Article 18 ("Work on Regular Day Off (RDO)") authorizes the MTA to render an operator ineligible to work on a regular day off, in a number of circumstances, and minimally when the operator has an unexcused absence or fails to report with less than eight hours of accrued sick leave.

Sign-ups involve the operators' selection of runs and work locations. (Art. 15.) There are one general sign-up and three division sign-ups each calendar year. Seniority governs sign-ups and work assignments. Conducting the sign-up process during regular work hours has been recognized to cause disruptions in service.

The use and number of part-time operators, who are represented by TWU, is addressed in a separate article of the MOU. (Art. 11.) The parties' last MOU limits the number of part-time operators to 220, or 12 percent of the regular operator pool. Layoffs must occur within the part-time pool, before resorting to the regular pool. Part-time operators are guaranteed 3.4 hours per day and the pool is guaranteed 100 part-time runs.

Deployment and staffing are subjects not readily ascertained as having been the subjects of completed bargaining, except to the extent they may be addressed in the provisions cited above. The management rights provision reserves the managerial prerogative over, inter alia, operating and personnel schedules, determining work loads, arranging transfers, and assigning personnel.

Interest Arbitration Experience as to Other Transit Issues Under the Charter

The City offered into evidence an interest arbitration opinion and award issued by the panel in June 2012 involving MTA and IBEW. The neutral third panel member was Arbitrator/Mediator Christopher Burdick. As reflected in the opinion, prior to the taking of evidence, the parties were free to discuss their differences on disputed issues, reach tentative agreements, and narrow the issues to be submitted for decision. The party whose proposal sought a change in the status quo bore the burden of proof in persuading the panel to accept the proposal. The burden of proof was met by a preponderance of the evidence. Only one issue was submitted to the panel for determination: whether the City could begin charging employees for parking their cars on MTA controlled property. The MTA had a longstanding

past practice of providing such parking gratis, a practice which was at some point incorporated in the parties' agreement pursuant to a 1999 arbitrator's award.

The decision is instructive in terms of how the panel applies the factors listed in the Charter, including those that apply solely to MTA by virtue of section 8A.104(n). When asked to consider and apply the interests and welfare of transit riders, residents, and other members of the public and MTA's ability to meet the costs of the decision without materially reducing service, the arbitrator declined, citing his lack of competence to pass judgment on the "social, environmental, ecological and political values underlying the City's Transit First Policy." Turning last to the cardinal factor listed in A8.409-4(d)—which last offer "most nearly conforms to those factors traditionally taken into consideration in the determination of wages, hours, benefits and term and condition of public and private employment"—the arbitrator began with a detailed analysis of the factors generally accepted in determining public sector interest arbitration disputes, citing the authoritative text *How Arbitration Works*. (Elkouri & Elkouri, *How Arbitration Works* (7th ed. 2012) (Elkouri & Elkouri).) The Elkouris' were cited for acknowledging that the "public interest is an important consideration" in such disputes as recognized in statutes around the country. Specifically in reference to paid parking as a disincentive to use of private automobiles weighed against the expense of parking in the City and its impact on wages, the arbitrator rejected the City's argument that the panel was required by Proposition G to apply factors that go "beyond the city's financial resources and health and the relative comparability of employee wages and other employment terms" to consider "'laudable' goals and motives not necessarily involving the specific interests of the employee and employer in the employment context." The arbitrator disclaimed any expertise in transit policy matters but left open future presentations by opposing "arm[ies] of policy and transportation experts" on such matters.

Kevin Hughes is IBEW's Assistant Business Manager. Hughes testified not to the actual conduct or outcome of an interest arbitration under Proposition G's rules but to the chilling effect they had on IBEW's ability to have proposals on the specified subjects taken seriously in bargaining preceding the impasse procedures. MTA's representatives resisted the union's proposals, warning him that the union would have a difficult time prevailing in interest arbitration because of the new rules.

ISSUE

Do the provisions of Proposition G constitute an unreasonable rule within the meaning of the MMBA?

CONCLUSIONS OF LAW

The unions contend that the City committed an unfair practice by adopting sections 8A.104(o) and 8A.104(q) because they limit and frustrate the meet-and-confer requirement of the MMBA and therefore constitute an unreasonable rule or regulation. The complaint alleges that the City's adoption of these provisions constituted an unfair practice under PERB Regulation 32603(f), which makes it an unfair practice for the employer to "[a]dopt or enforce a local rule that is not in conformance with MMBA."

Regulation 32603(f) defines an unfair practice developed specifically for the MMBA, one that acts as a control on the special authority the MMBA grants to public agencies to adopt procedural rules for the administration of their labor relations. (Sec. 3507; see *International Federation of Prof. & Technical Engineers v. City and County of San Francisco* (2000) 79 Cal.App.4th 1300, 1305-1306.) Where legislative action by a local governmental agency is attacked as unreasonable, the burden of proof is on the attacking party. Adopted regulations are presumed to be reasonable in the absence of proof to the contrary. (*Organization of Deputy Sheriffs of San Mateo County, Inc. v. County of San Mateo* (1975) 48 Cal.App.3d 331, 338.)

In *County of Monterey* (2004) PERB Decision No. 1663-M, PERB held that a violation of Regulation 32603(f) requires the charging party to demonstrate that the "local rule or regulation abridges the exercise of a fundamental right, or frustrates the fulfillment of an affirmative duty, prescribed by the MMBA." (*Id.*, adopting administrative law judge's proposed decision at pp. 28-29; see also *International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, 199-200 [MMBA permits the employer to adopt reasonable procedural rules but not ones that have the substantive effect of denying statutory rights].)

The MMBA specifically authorizes public agencies to adopt reasonable procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment. (Sec. 3507(a)(5).) In this context, PERB has considered the reasonableness of the City's interest arbitration provisions on two occasions, rejecting the union's challenge both times. (*City & County of San Francisco* (2007) PERB Decision No. 1890-M [provisions do not lack sufficient guidance as to when parties reach impasse]; *City & County of San Francisco* (2009) PERB Decision No. 2041-M [interest arbitration does not violate the MMBA by denying the union its right to strike].)

The Statutory Context of Public Sector Interest Arbitration

Interest arbitration is well established as a mechanism for resolving deadlocked collective negotiations in both the private and public sector. By submitting the resolution of conflicts between the parties' last offers leading to the bargaining impasse, the traditional economic weapons potentially in play are removed as outcome determinants. Although interest arbitration exists in the private sector, statutorily mandated interest arbitration in the public sector constitutes a significant adaptation of the basic framework of collective

bargaining.[6] (See *NLRB v. Columbus Printing Pressmen and Assistants' Union* (5th Cir. 1976) 543 F.2d 1161.)

In *NLRB v. Insurance Agents' International Union* (1960) 361 U.S. 477, the U.S. Supreme Court held that a union's work-slowdown tactics designed to achieve goals at the bargaining table while its representatives negotiated at the table in good faith were not unlawful and that the intervention by the National Labor Relations Board (NLRB) in a bargaining dispute to ban those tactics conflicted with the legislative mandate for board neutrality. The court noted past criticisms of the NLRB's application of the test of good faith bargaining as to some degree judging employers by their willingness to grant concessions. (*Id.* at p. 486.) The court emphasized that Congress had no concern with the substantive outcome of negotiations but intended only to establish procedural rules governing the sometimes visceral engagement that characterizes collective bargaining. (*Id.* at pp. 485-486.) The substance of the parties' agreement in the private sector is the product not only of the negotiations but the threat and/or exercise of economic weapons:

> It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one. The parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is

[6] Following strikes in 1966 and 1980, the Transport Workers Union and the City of New York agreed to emergency legislation providing for interest arbitration in lieu of the union's right to strike. This led ultimately to the passage of an amendment to the Taylor Law in 1986, making the procedure applicable to all transit employees. (Anderson & Krause, *Interest Arbitration: the Alternative to the Strike* (1987) 56 Fordham Law Rev. 153, 153-154.)

> part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.

(*Id.* at pp. 488-489; see also *H. K. Porter, Co., Inc. v. NLRB* (1970) 397 U.S. 99, 108 [bargaining occurs under governmental supervision of the procedure alone without any official compulsion over the actual terms of the contract].)[7]

This country's relatively more recent public sector collective bargaining statutes have been grounded in this fundamental construct. The private and public sector statutes are quite similar in concept and differ mainly in terms of the scope of representation and procedures for impasse resolution. In regard to impasse resolution procedures, the public sector statutes seek to protect the interests of the public while preserving the principle that labor and management must constructively engage each other in bargaining as they find each other throughout the process. In *County Sanitation District No. 2 v. Los Angeles County Employees' Assn.* (1985) 38 Cal.3d 564 (*County Sanitation District*), the California Supreme Court concluded that the MMBA does not prohibit the right to strike, stating: "[T]the MMBA establishes a system of rights and protections for public employees which closely mirrors those enjoyed by workers in the private sector." (*Id.* at p. 573.) In concluding that as a matter of tort law, public employee strikes were not prohibited (except to the extent they constitute an "imminent threat to health and safety"), the court rejected arguments that public employee unions would wield unreasonable leverage if allowed to strike, including one based on inelasticity in the supply of public services. The court noted a number of factors tempering the fear that the bargaining process would become distorted, including the public's concern over the possibility of increasing tax rates resulting from exorbitant concessions in bargaining and the fact that some

[7] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act where the provisions are similar. (*Firefighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

public services involve user fees that if increased would be "clearly visible to the public." (*Id.* at pp. 576-578.) The court assumed that public employers are capable of bargaining with economic rather than political objectives in the forefront and rejecting union demands deemed unacceptable notwithstanding the right to strike. (*Id.* at pp. 578-579.)

In *City & County of San Francisco, supra*, PERB Decision No. 2041-M, PERB concluded that the voters' approval of interest arbitration resulting in the compulsion to use that process was not an unreasonable rule because interest arbitration has been recognized as an appropriate means of resolving bargaining impasses. (*Id.*, adopting proposed decision of the administrative law judge at pp. 27-29.) The decision also cites the legislative history of the Charter provision as establishing a quid pro quo for the forfeiture of the right to strike by substituting a fair and equitable means for the parties to achieve their contract objectives. (*City & County of San Francisco, supra*, PERB Decision No. 2041-M, adopting proposed decision of the administrative law judge at p. 32; *Firefighters Union v. City of Vallejo, supra*, 12 Cal.3d 608, 622-623 [interest arbitration must allow arbitration of the full range of negotiable issues].) Other state courts have relied specifically on the quid pro quo concept to uphold interest arbitration against legal challenge. (*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.)

Our systems of collective bargaining assume that the parties engage each other in relative equipoise. This principle is essential to the MMBA's goal of good faith bargaining:

> 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.

(*County Sanitation District, supra,* 38 Cal.3d at p. 583.) Thus a necessary function of the collective bargaining statute, whether enforcing mandatory interest arbitration or not, is to ensure fairness through the adoption of neutral rules of engagement, ones which are non-normative in outcome terms and grounded in a presumption that the parties engage each other on a relatively level playing field. (See Anderson & Krause, *Interest Arbitration: the Alternative to the Strike*, *supra*, 56 Fordham Law Rev. 153, 155, 179 [interest arbitration enables the labor participants to retain the leverage necessary to bargain effectively; either the right to strike or interest arbitration is needed to make collective bargaining equitable].)

Public sector interest arbitration has fulfilled this aspiration and maintained fidelity to the essential principles of collective bargaining. The most commonly voiced criticism of interest arbitration arises from the perception that the arbitrator's task is "more nearly legislative than judicial." (Elkouri & Elkouri, *supra*, at p. 22-12 [citation omitted]; see *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278.) To avoid this tendency for arbitrary and/or subjective outcomes, a number of standards have come into use. (*City of Rocky River v. State Employment Relations Bd.* (Ohio 1989) 539 N.E.2d 103, 112-113 [unlawful delegation challenge rejected because standards were adequate].) In the public sector these standards are typically embodied in legislation. (Elkouri & Elkouri, *supra*, at p. 22-5.) By one survey the criteria most often employed in one set of public sector arbitrations were wage comparability, ability to pay, and inflation/cost of living, in that order.

(*Id.* at p. 22-64.) It has been suggested that the dangers of legislating can most easily be avoided if the arbitrator's primary role is to discover what the parties would have agreed to had they completed bargaining. (See Elkouri & Elkouri, *supra*, at p. 22-12 [citation omitted].) One author has stated that reliance on the wage comparability factor is consistent with this principle of outcome prediction because "[a]greements reached in comparable communities provide powerful evidence of the agreement the parties before the arbitrator would have reached had their negotiations been successful." (Grodin, Weisberger & Malin, *Public Sector Employment* (2004) p. 339; Elkouri & Elkouri, *supra*, at p. 22-5 [interest arbitration is a continuation of collective bargaining more than an adjudication].)

Stated differently, "[o]ne of the most compelling considerations must be what has happened in free and successful collective bargaining." (Elkouri & Elkouri, *supra*, at p. 22-69 [citation omitted].) These outcomes indicate what experienced bargainers "consider to be 'just'." (*Ibid.*) The Elkouris explain how the comparability factor is applied in practice:

> Most arbitrators will critically examine financial data presented to them and raise questions about such matters as available funds and alternative priorities. An ability-to-pay argument is likely to carry the most weight when an employer can demonstrate that it has done everything in its power to overcome an adverse financial position, both absolutely and in relation to what comparable public employers have done. However, an arbitrator is more likely to rule in favor of a union if the employer has not made sufficient taxing efforts as measured against comparable communities.

(Elkouri & Elkouri, *supra*, at p. 22-64.)

Over time the "interest of the public" has also gained acceptance as a factor in public sector interest arbitrations. (Elkouri & Elkouri, *supra*, at p. 22-110.) The Elkouris submit that the public, although not a direct party, has a vital interest in the settlement of some disputes, yet despite it being a "ubiquitous" factor, they concede it is an "ill-defined" one. (*Ibid.*) Other

authors maintain that such phrases as "interest and welfare of the public" and its kin typically and specifically relate to "ability to pay," "bargaining patterns," "historic parity relationships," and "overall allocation of the employer's resources." (Anderson & Krause, *Interest Arbitration: the Alternative to the Strike, supra*, 56 Fordham L.Rev. at pp. 161-162.) As currently articulated the interest of the public factor is closely related to the other broad factors. For example, overall allocation of the employer's resources is related to parity of one bargaining unit to another of the same employer, ability to pay, and the competing interests of the public for the various types of services the municipality is obligated to provide. On the other hand, the Burdick opinion reveals one neutral's rejection of the Transit First policy arguments as being too remote to the bargaining relationship.

The Six Special Subjects

The unions argue that section 8A.104(o) is unreasonable both on its face and as applied. (See *County of Monterey, supra*, PERB Decision No. 1663-M.) The unions' facial challenge is the more direct argument and springs from the language of the statute itself. TWU Local 250-A argues that Proposition G's unreasonableness arises from its imposition of a heavy burden of proof on only one party to the arbitration as to matters that are indisputably mandatory subjects of bargaining. It notes that PERB's prior acceptance of the City's mandated interest arbitration assumed the existence of an even-handed procedure in which the panel determines which offer "most nearly conforms to the factors traditionally taken into consideration in the determination of wages, hours, benefits and terms and conditions of public and private employment" based on the simple preponderance of evidence standard. (*City & County of San Francisco, supra*, PERB Decision No. 2041-M; Charter, sec. A8.409-4(d).) The heavier burden of proof imposed not only reduces the union's chance of prevailing in the interest arbitration but undermines the City's incentive to bargain in good faith in the

negotiations leading up to impasse. In short, TWU Local 250-A argues that the clear and convincing standard of proof is irreconcilable with the preponderance of the evidence standard for all other subjects—which, by implication, is a fair and evenly applied standard.

IBEW takes this argument a step further, asserting that section 8A.104(o) creates a presumption that any union bargaining proposal related to the six subjects is contrary to the public's interest in effective, efficient and reliable transit service. That is so because any union proposal would necessarily operate as a "restriction" of some kind on MTA's ability to "exercise broad discretion" and because that discretion is deemed "essential" to the public's interest in effective, efficient and reliable transit service.

The City maintains that the new criteria regarding the six subjects of bargaining merely add to the Charter's existing language requiring that the arbitration panel consider the transit riding public's interest in an efficient system, except now those factors require the panel to place "great emphasis" on that interest. The City does not dispute that the higher standard of proof may disadvantage the unions because it only applies to bargaining proposals made by the unions. But it asserts that Proposition G cannot conflict with the MMBA because the electorate's legislative findings are unassailable unless demonstrated to be unreasonable or arbitrary. (See *Amwest Surety Insurance Co. v. Wilson* (1995) 11 Cal.4th 1243, 1253.) The City emphasizes that the voters of San Francisco have determined that the preponderance of the evidence standard is not sufficient to protect and promote their stated policy priority for transit service. In addition, the City contends that the MMBA "expressly permits local agencies to retain final authority to adopt, or to reject, bargaining proposals." Thus, if without interest arbitration a public agency can lawfully implement employment terms after good faith bargaining, and because interest arbitration is an added benefit for labor, a fortiori, a procedure that only guides the decisionmaker cannot conflict with the statute.

TWU Local 250-A identifies the concern with section 8A.104(o) most readily apparent from its language, namely, its discriminatory application of the burden of proof. This conflicts with the notion that the parties begin negotiations on a level playing field, and remain there upon reaching impasse and entering the impasse resolution phase. Presently the MTA can make any number of proposals against the unions' interest on the six subjects without facing the heightened scrutiny of this regulation. For example, the MTA, in furtherance of its interest in scheduling and assignments, could propose to eliminate recovery and lay-over time during runs or grant itself the discretion to hold an operator for four hours rather than the current 1.5 hours, when the operator assigned to relieve the operator fails to report. Such proposals logically advance the public's expressed interest greater efficiency. Although the arbitration panel might place the burden on MTA to justify the proposal because it constitutes a change in the status quo, it would not require MTA to demonstrate that its interest in efficiency outweighed the operators' interest in health and safety by clear and convincing proof. Nor would MTA face an opposing interest deemed to be "essential" to the operators or its union.

Section 8A.104(o) encounters an additional problem as a result of the Charter's elevated burden. The unions rightly maintain that the requirement's principal constraint arises from the conflict with the free reign interest arbitrators are traditionally afforded because consideration is limited to a single standard directed at the public's interest in a more efficient transit system. No other factors listed in the Charter require the unions to meet the clear and convincing proof standard. If the unions cannot meet this standard the other factors do not come into play. Thus the new standards reject the holistic analysis essential to the equitable nature of interest arbitration. The arbitration panel must have the "freedom to weigh the standards, to 'mix the porridge,' so to speak," because the result depends on the way all of the

standards are applied together. (Elkouri & Elkouri, *How Arbitration Works* (6th ed. 2003) pp. 1101-1102.)

Taking the point further, Benjamin Aaron, a principal architect of California's public sector collective bargaining statutes, claims that burdens of proof have no place in arbitrations, except in disciplinary cases in general and discharge cases in particular. (Aaron, *Some Procedural Problems in Arbitration* (1957) 10 Vanderbilt L.Rev. 733, 742.) In a grievance arbitration contract issue, he submits, neither side has a burden of proof or disproof, but both have an obligation to cooperate in an effort to bring out the facts and arguments relevant to the dispute and give the arbitrator as much guidance as possible. (*Id.* at pp. 739, 742.) Aaron believes such mechanisms designed to provide a tactical advantage to one party, as in court trials, permanently impair the collective bargaining process because they undermine the parties' ongoing cooperative relationship. (*Id.* at p. 739.) Even more so than contract dispute arbitration, interest arbitration is a direct extension of the bargaining process that aims to promote the parties' cooperative relationship by providing them a means to craft a solution to their negotiations impasse. (Anderson & Krause, *Interest Arbitration: the Alternative to the Strike*, *supra*, 56 Fordham L.Rev. at p. 179 [the task is to legislate the terms of employment, not to prove or disprove a particular set of facts].) While some have claimed that interest arbitration has a chilling effect on successful bargaining even without the type of evidentiary advantage created by Proposition G (by encouraging parties to gamble on the outcome of arbitration), that effect is undoubtedly more pronounced here in the City's favor due to the imposition of the clear and convincing standard.

Contrary to the unions' assertion that such the clear and convincing standard only arises as a result of contractual agreement, this burden of proof also arises from notions of workplace justice and the inherent authority of the arbitrator. (Aaron, *Some Procedural Problems in*

Arbitration, *supra*, 10 Vanderbilt L.Rev. at pp. 740-742.) However the unions are correct that the standard is a strictly limited exception that only applies in disciplinary grievance arbitration (absent agreement otherwise of course). (Elkouri & Eklouri, *supra*, at p. 8-104.) The rationale is that a finding of misconduct has a highly stigmatizing effect that can severely diminish the employee's future employability, including an effective ban from particular lines of work. (*Id.* at p. 15-26, fn. 119, citing *City of Kankakee, Ill.* (Wolff, 1991) 97 Lab.Arb.Rpts. 564, 569.) No such special considerations are advanced by the City here to justify the heightened standard for interest arbitration.

IBEW's objection to the language of section 8A.104(o)'s characterization of MTA's discretion with respect to the six subjects because it provides the City with the prospect of near certain victory in every instance is close to the mark. Setting aside the higher burden of proof and its selective application, if section 8A.104(o) read simply that the "employee organization must prove . . . that the justification for such restrictions outweighs the public's interest in effective, efficient, and reliable transit service," the requirement would be at least consistent with, and perhaps merely redundant to, other factors that already take the public's interest in efficient transit into account. (Charter, sec. 8A.104(n).) But here the Charter requires that the unions' justification address a particular burden. This burden refers to the antecedent legislative finding of the voters that MTA's discretion with respect to the six subjects is "essential" to an efficient system, together with the requirement that any union proposal overcome MTA's interest in its "ability to exercise *broad* discretion" as to these subjects. (Emphasis added.) This burden handicaps the unions by giving especially great weight to MTA's managerial discretion in opposition to the unions' interest in negotiable subjects. Section 8A.104(o) also imports a subjective standard that invites circular reasoning by MTA because management's discretion is deemed essential to achieving MTA's goals as a transit

system. In contrast, an objective standard might require that MTA demonstrate that other means to achieve the same level of efficiency had been considered and rejected as more costly.

Moreover, like the burden of proof, the gloss placed on the new factor inhibits negotiations prior to impasse by encouraging the assertion of scope of representation arguments by the City at the interest arbitration stage, long after those issues would have been decided at the bargaining table. (See *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375 [where an employer believes a matter to be outside the scope of mandatory meeting and conferring, it is obliged to explore the matter at the bargaining table].) As reflected in the parties' negotiating history, there is nothing about the six subjects that suggests they are non-negotiable based on managerial prerogative. (See *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 635 [rejection of overbroad assertion of managerial prerogative in favor of weighing test]; *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 660, 664 [rejection of the city's assertion that its action was exempted as a fundamental policy decision because it concerned the effective operation of local government].) At the same time, as Hughes testified, MTA bargaining representatives openly articulated doubt about the prospects of IBEW prevailing in interest arbitration on proposals dealing with the six subjects without asserting their non-negotiability.[8]

[8] The City cites the fact that agreements were reached on these subjects in the recent negotiations. This does not deny the chilling effect. (See Hoh, *Interest Arbitration: Its Effects on Collective Bargaining in Montana's Protective Services* (2007) 32 Montana Lawyer 8, 10.) Hoh notes that the chilling effect is greater in issue-by-issue arbitration than final-offer arbitration, but cites research indicating that even in the former the number of issues reaching arbitration lessens over time as the process becomes less of a judicial procedure particularly in tripartite arbitration systems. But where as here one side maintains a clear advantage over the other throughout the process, the chilling effect is easily predicted: the more distant the parties are on the issue or the weightier its value, the greater the effect.

By requiring that the unions prove their proposals are consistent with best practices, section 8A.104(o) is discriminatory in yet another respect. Proposition G does not define best practices except to say they are *not* past practices. If the panel is to effectuate the intent of the legislation, those findings place all of the unions' historically achieved bargaining objectives in opposition to the hortatory new standard. (Proposition G, sec. 1 (Findings) ["MTA should operate on based on best practices, not past practices"; "past practices' . . . not spelled out in an MOU preserve antiquated and inflexible practices that impair transit operations"].) Best practices are commonly understood to be ones aspiring toward achievement of the employer's mission; to be read here as efficient transit and greater levels of service at lower cost.[9] Taking the Proposition G proponents at their word, prior successes won by labor are contrary to the interests of riders because those gains have come at the expense of increased fares and/or reduced service. Hence any new proposals adding costs or administrative burdens on management, or restricting its broad discretion, are likely not to prevail under the new guidelines.

California law is consistent with federal labor precedent in confining legislation on collective bargaining to the procedural aspects of the process, rather than dictating the substantive terms of the parties' agreement. (*People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 600, fn. 11; *Huntington Beach Police Officers' Assn. v. City of Huntington Beach* (1976) 58 Cal.App.3d 492, 499-503.) Proposition G did not implement neutral rules for interest arbitration that promote harmonious labor relations. Instead Proposition G's added significant weight to management's side of the scale in interest

[9] The City cites definitions of "best practices" that include "a method or technique that has consistently shown results superior to those achieved with other means" (from "wikipedia.com") and "guidelines which are used to obtain the most efficient and effective way of completing a task using repeatable and proven procedures" (from "webopedia.com").

arbitration, while openly announcing through its legislative findings the intention for a "broad overhaul of the compensation structure and labor rules and practices" deemed "necessary to preserve and expand transit services to the public." While it is true, as the City maintains, that the collective bargaining process envisioned by the MMBA permits an employer to oppose and reject any proposals made by the unions in the absence of interest arbitration, an interest arbitration process predicated on forfeiture of the right to economic weapons must maintain a level playing field. That is not the case with section 8A.104(o).

It is concluded that Proposition G's evidentiary standard unreasonably abridges the unions' right to represent their unit members and frustrates the parties' duty to meet and confer in good faith under the MMBA.

Side Letters and Past Practices

The unions contend that section 8A.104(q) conflicts with the MMBA because it retroactively voids side letters and past practices not expressly approved by the Director of Transportation or the MTA governing board and appended to the MOU, infringes on their right to preserve past practices through language in the MOUs, and prematurely terminates existing side letters.

Side letters and unwritten past practices exist parallel to the negotiated terms of the parties' MOU and as such are enforceable rights. Side letters are the product of the meet-and-confer process itself and are no less binding than collective bargaining agreements. (*Palomar Community College District* (2011) PERB Decision No. 2213.) Past practices acquire the status of terms and conditions of employment if they are sufficiently regular, understood, and accepted by the parties. (Elkouri & Elkouri, *supra*, at pp. 12-2-12-4, citing *Metal Specialty Company* (Volz, 1962) 39 Lab.Arb.Rpts. 1265, 1269; *Alpena General Hospital* (Jones, 1967) 50 Lab.Arb.Rpts. 48, 51.) Past practices are enforceable through PERB's processes to the

extent a repudiation of such a practice violates the duty to bargain. (*Omnitrans* (2009) PERB Decision No. 2030-M, p. 27 [a past practice "must be (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice"].)

Citing Elkouri and Elkouri, *supra*, the unions also maintain that past practices (1) provide a basis for rules governing matters included in the written contract; (2) indicate the proper interpretation of contract language; and (3) support allegations that "clear language" in a contract has been amended by the parties' mutual agreement. (*Id.* at p. 12-1.) As explained in *Steelworkers v. Warrior & Gulf Navigation Co.* (1960) 363 U.S. 574, 582: "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it."[10] (See also *City & County of San Francisco, supra*, PERB Decision No. 2041-M, adopting administrative law judge's proposed decision at p. 29 [grievance arbitration is a form of "continuous bargaining"].) The free parking in the Burdick opinion illustrates an example where an arbitrator relied on a past practice, resulting in an amendment of the MOU to expressly recognize the benefit.

Under section 8A.104(q) only if a side letter or past practice is memorialized in a document approved by the MTA director or governing board can it be recognized as binding and precedential. This rule is set forth in the second sentence. Unlike past practices, side letters are directly enforceable. Thus any attempt to rescind them, assuming the City's

[10] Indeed the Elkouris note that the most widely accepted use of past practices arises out of the need to interpret ambiguous and unclear contract language and that its rationale is self-evident: "the parties' intent is most often manifested in their actions." (Elkouri and Elkouri, *supra*, at p. 12-20 [use is "so common that no citation of arbitral authority is necessary"].) They also state that even a zipper clause does not negate practices invoked for this purpose. (*Id.* at p. 12-18.)

signatories were authorized agents, would be unlawful. (*Palomar Community College District*, *supra*, PERB Decision No. 2213.) As a matter of labor relations protocol, an employer may require that side letters be executed by only certain representatives, but the second sentence has no language limiting its effect to prospectively adopted side letters. On the other hand, while past practices achieve enforceability through adequate proof either in a grievance arbitration or in a PERB unfair practice proceeding, they are equally binding on the City under the principles cited above. (*Omnitrans*, *supra*, PERB Decision No. 2030-M.) They are also an important tool for the union in enforcing the terms of the existing agreements through grievance arbitration. Proposition G's voidance of all previous unexpired side letters and past practices not formally adopted repudiates terms and conditions of employment and deprives the unions of their right to shape the meaning of ambiguous terms in their agreements through the grievance procedure.

The third sentence of section 8A.104(q) states in full: "No MOU or arbitration award approved or issued after the November 2010 general election shall provide or require that work rules or past practices remain unchanged during the life of the MOU, unless the specific work rules or past practices are explicitly set forth in the MOU." This sentence, as the unions correctly assert, refers to past practice clauses. These clauses are the union's antidote to the employer's zipper clause: they require recognition of practices existing at the time of the agreement even though not expressly included within the MOU. (See Elkouri & Elkouri, *supra*, at p. 12-19.) Such clauses are within the scope of representation. (*Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375, p. 81.) The third sentence imposes on the unions an obligation to successfully obtain a listing of every possible past practice in the past practices clause or forfeit the right to challenge any subsequent repudiation of those practices. While it

is permissible for the City to propose that past practices clauses operate within this limitation of specific inclusion in the MOU, it cannot unilaterally impose that requirement since that abridges the union's right to represent. (Sec. 3503; *Omnitrans*, *supra*, PERB Decision No. 2030-M; see also *South Bay Union High School District* (1991) PERB Decision No. 791.) The language also denies the union its ability to seek enforcement of a past practice through grievance arbitration or PERB. A local rule cannot unilaterally remove a subject from the scope of representation. (*Huntington Beach Police Officers' Assn. v. City of Huntington Beach*, *supra*, 58 Cal.App.3d 492, 499-503.)

The fourth sentence of section 8A.104(q) provides for the forced expiration of all side letters at the expiration of the MOU (whether existing or ones to be adopted). The unions argue that this provision conflicts with the MTA's duty to maintain the status quo until good faith negotiations have been completed. They are correct. In *Palomar Community College District*, *supra*, PERB Decision No. 2213, PERB held that side letters bind parties to the practices contained therein and do not expire automatically at the expiration of the parties' MOU. Under this rule, Proposition G's directive is tantamount to a unilateral repudiation of all side letters not explicitly limited in time to the term of the parties' contemporaneous MOU, thereby frustrating the unions' right to represent employees. (See *San Joaquin County Employees Assn. v. City of Stockton* (1984) 161 Cal.App.3d 813, 819.)

The City's position is that section 8A.104(q) has only prospective effect and is simply a guide for more transparent negotiations. For the reasons explained above, this argument is rejected.

Like the heightened evidentiary standard, the provisions invalidating side letters and past practices unreasonably abridge the unions' right to represent their unit members and frustrate the parties' duty to meet and confer in good faith under the MMBA.

Local Legislation Based on the Public's Interest in Efficient Transit

The City relies on the legislative findings of Proposition G to rebut the unions' claims that the Charter amendments impose an undue burden on their prospects for prevailing in interest arbitration and unilaterally eliminate side letters and past practices, contending that the voters may legitimately legislate to further the public's interest in efficient transit.

In a series of published articles, noted labor scholar Clyde Summers offered an original analysis of the unique aspects of public sector collective bargaining.[11] He claimed that the critical difference between the private and public sectors is not the nature of the industry or the work performed, but the character of the employer. Economic decisions in the labor arena are in fact political decisions around budget. More so than the elected officials who supervise the negotiations, the voters to whom those officials are responsible constitute the real party opposing the interests of labor. Voters are purchasers and users of public services, and because they want to maximize services and minimize costs their economic interests are inherently in conflict with public employees. (Summers, *Public Employee Bargaining: A Political Perspective*, *supra*, 83 Yale L.J. at p. 1159.) Thus collective bargaining is a special procedure by which unions are able to effectively influence elected officials; one that is an appropriate modification of the political process, necessary to neutralize the disadvantage unions have because they are outnumbered in the budgetary process and their interests are contrary to every other interest group vying for a greater allocation of public funds. (*Id.* at pp. 1162-1165, 1168.) Summers was primarily concerned with how this conflict of interests can be better mediated through greater accountability on the part of elected officials. In California,

[11] Summers, *Public Employee Bargaining: A Political Perspective* (1974) 83 Yale L.J. 1156; Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking* (1975) 44 U. Cin. L.Rev. 669; Summers, *Bargaining in the Government's Business: Principles and Politics* (1987) 18 U. Toledo L.Rev. 265; Summers, *Public Sector Bargaining, a Different Animal* (2002-2003) U. Pa. J. Lab. & Emp. L. 441.

however, voters are able to directly assert their interests through the initiative/referendum process and legislate on both negotiable subjects and the process by which negotiations take place. On these occasions, negotiations with labor cease to be a "closed two-sided" process. (Summers, *Public Employee Bargaining: A Political Perspective*, *supra*, 83 Yale L.J. at pp. 1164-1165; *Voters for Responsible Retirement v. Trinity County Board of Supervisors* (1994) 8 Cal.4th 765, 782-783.) The Fix Muni Coalition and Transit First proponents with their finely honed opposition to the transit worker unions in this case have successfully leveraged their interests through the political process based on the popular sentiment identified by Summers.[12]

It is true that the "interest of the public" has gained currency as a statutory factor in public sector interest arbitrations. However this case illustrates the need to critically assess whether this factor is properly implemented in a manner consistent with the statutory premise of good faith negotiations. Anti-labor motivated legislation by the electorate has no legal consequences so long as the bargaining process remains neutral. Proposition G's substitution of interest arbitration for the salary survey process for determining transit operators' wages, despite the intent suppress the wages of transit operators, is an example. (*City & County of San Francisco*, *supra*, PERB Decision No. 2041-M.) But for the reasons explained above, sections 8A.104(o) and 8A.104(q) are discriminatory on their face and impose undue burdens on the unions. Proposition G's legislative findings adopted by the citizens confirm the intent

[12] The unanimity of public opposition to labor based on cost of services may depend on the jurisdiction or be subject to particular anomalies, but its potentiality is well confirmed historically over the past several decades. (Kapoor, *Pubic Sector Labor Relations: Why it Should Matter to the Public and to Academia* (2003) 5 U. Pa. J. Lab. & Emp. 401, 404-405.) Summers accepts that unions have the ability to form coalitions in support of their economic interests and have a right to be engaged in the political process, but maintains they are nevertheless greatly disadvantaged vis-à-vis voters who have a common interest in either wanting more services or opposing more taxes. (Summers, *Public Employee Bargaining: A Political Perspective*, *supra*, 83 Yale L.J. at pp. 1159-1160, 1167.) Regardless, under the analysis applied here, pro-union legislation would be scrutinized in the same fashion.

to affect the outcome of interest arbitrations in favor of the City and to deny the unions the benefit of rights accrued over time through side letters and past practices because they are viewed as costly and inefficient. Hence Proposition G imposes not merely the various competing interests of the public in general, but the interest of a particular advocacy group directly opposed to the negotiable interests of the unions, which interests the statute is intended to protect. Its success at the ballot box invites activation of similar organized interests opposed to labor in regard to other City services, and without protection leads to the erosion of the unions' standing in the process of collective bargaining generally. The unions have overcome the presumption of reasonableness as to Proposition G.

Rules for collective bargaining must be faithful to the premise of equal leverage in the process to fulfill the purposes of the statute; otherwise they amount to "official compulsion" of a particular outcome. (*H. K. Porter, Co., Inc. v. NLRB*, *supra,* 397 U.S. 99, 108.) When local legislation crosses that line, it not only runs afoul of the statute as an unreasonable regulation but must also give way under the principles of preemption. Here the traditional judicial deference afforded local legislation must be set aside because the amendment conflicts with the fundamental purposes of the MMBA. (*City & County of San Francisco*, *supra*, PERB Decision No. 2041-M, adopting proposed decision of the administrative law judge at p. 22; *International Brotherhood of Electrical Workers v. City of Gridley*, *supra,* 34 Cal.3d 191, 202; *Voters for Responsible Retirement v. Trinity County Board of Supervisors*, *supra*, 8 Cal.4th 765.) Proposition G exceeded the City's lawful rulemaking authority under the MMBA by adopting an unreasonable regulation, causing the City to violate PERB Regulation 32603(f).

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 been found to have violated PERB Regulation 32603(f) by adopting an unreasonable regulation in the form of sections 8A.104(o) and 8A.8104(q) of the City Charter. Therefore it is appropriate to order that the City cease and desist from adopting and enforcing these provisions. (*Los Angeles County Federation of Labor v. County of Los Angeles* (1984) 160 Cal.App.3d 905.) It is also appropriate to order that the City rescind these provisions of the City Charter. (*Tehama County Superior Court*, *supra*, PERB Decision No. 1957-C.)

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 the charging parties their 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.

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 (Act). The City adopted unreasonable regulations as a result of the passage of Proposition G and the provisions added to the City Charter at sections 8A.104(o) and 8A.104(q), in violation of Public Employment Relations Board (PERB or Board) Regulation 32603(f) (Cal. Code of Regs., tit. 8, sec. 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 the Charging Parties their 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 unreasonable regulations in the form of City Charter sections 8A.104(o) and 8A.104(q), as adopted through Proposition G.

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

3. Denying Charging Parties their right to represent employees in their employment relations with the City.

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

1. Rescind sections 8A.104(o) and 8A.104(q) of the City Charter, as amended by Proposition G.

2. Within 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 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.

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

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
FAX: (916) 327-7960

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

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Cal. Code of Regs., tit. 8, secs. 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code of Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code of Regs., tit. 8, secs. 32090 and 32130.)

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

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-827-M, *Transport Workers Union of America Local 250-A, Transport Workers Union Local 200, International Brotherhood of Electrical Workers, Local 6, Service Employees International Union Local 102, and International Association of Machinists & Aerospace Workers, AFL-CIO, Local 1414 v. City & County of San Francisco*, in which the parties had the right to participate, it has been found that the City and County and San Francisco (City) violated the Meyers-Milias-Brown Act (Act), Government Code section 3507, and PERB Regulation 32603(f) (Cal. Code of Regs., tit. 8, sec. 31001, et seq.), when it adopted an unreasonable regulation in the form of City Charter sections 8A.104(o) and 8A.104(q), as contained in Proposition G. This conduct also violated Government Code section 3506 and PERB Regulation 32603(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(b) by denying the Charging Parties 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 unreasonable regulations in the form of City Charter sections 8A.104(o) and 8A.104(q), as adopted through Proposition G.

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

3. Denying Charging Parties their right to represent employees in their employment relations with the City.

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

1. Rescind sections 8A.104(o) and 8A.104(q) of the City Charter, as amended by Proposition G.

Dated: _____ CITY AND 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.