*** * * JUDICIAL APPEAL PENDING * * ***

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1021, Charging Party, v. CITY & COUNTY OF SAN FRANCISCO, Respondent.	Case No. SF-CE-1154-M PERB Decision No. 2691-M January 17, 2020

Appearances: Weinberg, Roger & Rosenfeld, by Kerianne R. Steele, Attorney, for Service Employees International Union, Local 1021; Office of the City Attorney, by Erik A. Rapoport, Deputy City Attorney, for the City and County of San Francisco.

Before Banks, Krantz, and Paulson, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on cross-exceptions filed by the City and County of San Francisco (City) and by Service Employees International Union Local 1021 (SEIU) to a proposed decision of an administrative law judge (ALJ). The unfair practice complaint in this matter alleged that the City violated the Meyers-Milias-Brown Act (MMBA)[1] and PERB Regulations[2] by maintaining and enforcing sections A8.409-4(k) and 8A.104(n) of the

[1] The MMBA is codified at Government Code section 3500 et seq. Statutory references herein are to the Government Code, except where otherwise specified.

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

City Charter (Charter). These provisions set forth procedures for resolving a collective bargaining impasse via binding interest arbitration before a three-member mediation/arbitration board (arbitration board). The challenged sections also establish a "submission deadline" by which bargaining parties must submit a Memorandum of Understanding (MOU) containing terms that are mutually-bargained, ordered by the arbitration board, or a combination thereof.[3] If parties submit no MOU whatsoever by the deadline, the Charter imposes a penalty, viz., a delay in the implementation of new economic enhancements. The ALJ found that the Charter submission deadline and associated penalty are inconsistent with the MMBA, both facially and as applied in this case, because they tilt bargaining toward the employer's priorities and prevent the bargaining parties from devoting sufficient time to good faith negotiations and impasse resolution. The City filed 63 exceptions to the ALJ's findings, while SEIU excepted to several specific findings, as well as to alleged omissions from the ALJ's proposed remedy.

Having reviewed the record in this matter and considered the parties' arguments, we depart somewhat from the ALJ's analysis and conclusion. We uphold SEIU's as-applied challenge. We do not uphold SEIU's facial challenge, because the City can in the future lawfully interpret Charter sections A8.409-4(k) and 8A.104(n) to harmonize them with the MMBA, consistent with our explanation in today's decision.

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[3] The Charter provisions at issue use the term "agreement" interchangeably with the phrase "collective bargaining agreement." We mainly opt to use the more standard phrase in California public sector labor relations, which is "memorandum of understanding" (MOU). MOU has the same meaning as "agreement," "collective bargaining agreement," and "contract." Accordingly, when we use the term "mid-contract" throughout our decision, this means the same as "mid-MOU."

Thus, these sections are facially valid but susceptible to further as-applied challenges unless they are interpreted lawfully. These sections must be interpreted to require good faith negotiations by the parties over an adequate length of time. They must also be interpreted to allow the parties to agree upon, or an arbitration board to order, an MOU provision providing for mid-contract negotiations and associated mid-contract interest arbitration proceedings that may lead to a full range of mid-year or retroactive MOU adjustments.

PROCEDURAL HISTORY

SEIU initiated this action by filing an unfair practice charge against the City on January 8, 2014. PERB's Office of the General Counsel (General Counsel) issued a complaint against the City on September 26, 2014. The City filed its answer to the complaint on October 17, 2014, denying the material allegations and raising a number of affirmative defenses. The parties engaged in a formal hearing before the ALJ on May 6-7 and August 24-25, 2015. The parties submitted post-hearing briefs in January 2016, and the ALJ issued a proposed decision on January 27, 2017. The parties filed timely cross-exceptions, leading to this decision.[4]

[4] The parties made three procedural requests as part of their exceptions briefs. First, SEIU requested oral argument. We typically deny such requests when the record before us is adequate, the parties availed themselves of the opportunity to brief all pertinent issues, and the briefs are sufficiently clear as to make oral argument unnecessary. (*County of Santa Clara* (2018) PERB Decision No. 2613-M, p. 6, fn. 3.) Applying this standard here, we deny SEIU's request for oral argument. Second, we grant the City's request to file a reply brief regarding its exceptions, as we find that SEIU raised new matters in its responsive briefing. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 2, fn. 1 (*San Ramon*).) Finally, we decline to resolve the parties' numerous disagreements regarding the City's request that we take administrative notice of certain records and documents, as none of our findings would

FACTUAL FINDINGS

I. The Parties

SEIU is an "employee organization" within the meaning of MMBA section 3501, subdivision (a), and an "exclusive representative" within the meaning of PERB Regulation 32016, subdivision (b). SEIU represents a unit of approximately 11,000 City employees who are classified under the Charter as "miscellaneous" employees. SEIU also represents a unit of over 500 employees at the City's Municipal Transportation Agency (SFMTA) who are classified under the Charter as "service-critical" employees. SEIU and the City bargain separate MOUs for the two units at partially separate bargaining tables, but the parties typically choose to merge certain elements of their negotiations, particularly on common issues such as wages, health insurance, and retirement benefits.

The City, which is both a charter city and a county under California law, is a public agency within the meaning of MMBA section 3501, subdivision (c). The City's highest governing body is its Board of Supervisors. At the time of trial, the City had over 28,000 employees.

City voters approved Proposition E in 1999, thereby adding Article VIIIA to the Charter and establishing SFMTA as a City agency governed by a Board of Directors. SFMTA replaced the former supervising authority, the Public Transportation Commission. SFMTA Directors are appointed by the City's Mayor and confirmed by the Board of Supervisors. In this decision, we follow the parties' practice in that we

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differ based on the outcome of the City's request. (*County of Santa Clara* (2019) PERB Decision No. 2629-M, p. 6, fn. 5.)

intend references to the City to include SFMTA, except where context dictates otherwise.

II. The Charter Provisions at Issue in This Case

Appendix 8 to the Charter, commonly referred to as "A8," governs City employment. Section A8.409-4 provides for binding interest arbitration when the City reaches an impasse in collective bargaining with a union that exclusively represents one or more established bargaining units. Subpart (k) of this section contains the primary Charter provision challenged in this case, as follows:

> "[A8.409-4(k)] An agreement reached between the designated representatives for the City and the representatives of a recognized employee organization that is submitted to the Board of Supervisors on or before May 15, or a decision of the Arbitration/Mediation Board that is submitted to the Board of Supervisors on or before May 10, or May 15 if the parties waive the 10-day period between the Board's decision and public disclosure of the decision, shall be effective on July 1 of the same calendar year upon adoption by the Board of Supervisors. An agreement submitted to the Board of Supervisors after May 15, or a decision of the Arbitration/Mediation Board that is submitted to the Board of Supervisors after May 10, or May 15 if the parties waive the 10-day period between the Board's decision and public disclosure of the decision, shall become effective no earlier than July 1 of the next calendar year upon approval of the Board of Supervisors. But an agreement reached during the term of an existing memorandum of understanding that results in a net reduction, or results in no net increase, in the cost to the City, during the current fiscal year, of existing economic provisions in the existing memorandum of understanding may become effective at any time upon approval by the Board of Supervisors. Economic provisions include, but are not limited to, wages, premium pay rates, overtime, any

> employer pickup of the employees' retirement contribution, paid time off, and other compensation."[5]

The second Charter provision at issue in this case, which pertains to SEIU's labor relations with SFMTA, arises under Charter Article VIIIA. The parties typically refer to Article VIIIA as "8A."[6] Section 8A.104 provides that the impasse resolution provisions set forth in section A8.409-4 apply to SFMTA and the unions representing its service-critical employees, with several SFMTA-specific adjustments. One of those adjustments, at issue here, is an SFMTA-specific timing provision appearing in section 8A.104(n), as follows:

> "[8A.104(n)] . . . Notwithstanding the timelines described in Section A8.409-4, to be effective the beginning of the next succeeding fiscal year, all collective bargaining agreements must be submitted to the Board of Directors no later than June 15 for final adoption on or before June 30."

Notably, although the submission deadline applicable to unions representing SFMTA employees is later than the deadline for unions representing other City employees, it is functionally analogous. In this decision, we refer to the submission deadline in the singular, while recognizing that in reality it includes more than a single date.

Under these Charter provisions, the arbitration board consists of one member appointed by the City, a second member appointed by the union, and a neutral third member. The neutral third member is typically a labor arbitrator, and it is almost

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[5] Impasse resolution procedures for public safety employees are governed by a comparable submission deadline set forth in Charter section A8.509-5(h). SEIU did not challenge that provision.

[6] Charter nomenclature can be confusing, particularly in this case, where the two provisions at issue arise under parts of the Charter commonly referred to as A8 (also known as Appendix 8) and 8A (also known as Article VIIIA).

invariably his or her vote that matters on any disputed topic, since the arbitration board members appointed by the parties are not neutral and generally vote in favor of the party that appointed them. For this reason, the parties often refer to "the arbitrator" as an accurate shorthand for what is technically a three-member arbitration board. We largely follow suit in this decision by referring to the arbitrator and the arbitration board interchangeably, except where context dictates otherwise.

The arbitrator has discretion to resolve disputes by mediation and/or arbitration, and the arbitrator may hold hearings and receive evidence from the parties. (Charter, § A8.409-4(c).) The arbitrator "may also adopt other procedures designed to encourage an agreement between the parties, expedite the arbitration hearing process, or reduce the cost of the arbitration process." (*Ibid*.) "If no agreement is reached prior to the conclusion of the arbitration hearings," the arbitrator "shall direct each of the parties to submit, within such time limit as the Board may establish, a last offer of settlement on each of the remaining issues in dispute." (*Id*., § A8.409-4(d).) Each disputed issue shall be resolved by majority vote of the arbitration board members, based on a lengthy list of factors set forth in the Charter. (*Ibid*.) The Charter thereby permits parties to submit an MOU in which some provisions have been agreed-upon and others have been directed by the neutral arbitrator.

After the arbitrator issues a decision, the parties may not disclose it publicly for ten days, unless the parties waive the ten-day cooling off period. (Charter, § A8.409-(e).) As noted above, if the parties choose to waive the cooling off period, then the Charter relaxes the submission deadline by five days. (*Id*., § A8.409-(k).)

III. Chronology of Ballot Measures Impacting the City's Impasse Resolution Provisions

The City first adopted interest arbitration as a dispute resolution method in 1991, when City voters approved Proposition B. The City had placed Proposition B on the ballot after negotiating with affected unions pursuant to the requirements of *People ex rel. Seal Beach Police Offices Association v. City of Seal Beach* (1984) 36 Cal.3d 591 (*Seal Beach*).[7] After completing those negotiations, SEIU's predecessor, Local 790, publicly supported the eventual Proposition B ballot measure.

Proposition B established optional collective bargaining, ending in interest arbitration, for most unions interested in permanently opting into these mechanisms as a replacement for the City's traditional salary survey methodology. City Negotiator Jonathan Holtzman (Holtzman) testified the City was concerned that in other jurisdictions with interest arbitration, the process often took two or three years, and moreover, the City had many bargaining units and unions. Holtzman testified that in *Seal Beach* negotiations, the City therefore insisted on drafting Proposition B to establish a deadline for submitting MOUs involving most bargaining units.

Proposition B initially codified the submission deadline in Charter section A8.409-4(e), a predecessor to the later-adopted Charter provisions challenged in the instant case. At that time, the Charter's submission deadline read as follows:

> "To be effective the beginning of the next succeeding fiscal year, an agreement shall be reached or the board shall

[7] As the Supreme Court recently reaffirmed, *Seal Beach* requires such negotiations whenever a local agency or one of its agents proposes a ballot measure impacting terms or conditions of employment. (*Boling v. PERB* (2018) 5 Cal.5th 898, 914-919 (*Boling*).) There is no allegation in this case that the City at any point violated its duties with respect to *Seal Beach* negotiations.

> reach a final decision no later than sixty days before the date the Mayor is required to submit a budget to the board of supervisors, except by mutual agreement of the parties."

In 1994, City voters approved Proposition F, which eliminated, for most City unions, any option to continue using the City's legacy salary survey methodology in lieu of collective bargaining.

As noted above, in 1999 City voters approved Proposition E, a measure principally aimed at reforming service delivery within the municipal transportation system. Proposition E provided that the impasse resolution provisions in section A8.409 applied to SFMTA and the unions representing its service-critical employees, with certain SFMTA-specific adjustments.

In 2007, City voters approved a ballot measure known as Proposition A. Among other changes, the 2007 ballot measure amended section 8A.104(n) to add the above-noted language providing that absent agreement to the contrary, an MOU covering SFMTA service-critical employees must be submitted to the SFMTA Board of Directors by June 15 in order to take effect at the beginning of the following fiscal year.[8] Following *Seal Beach* negotiations, SEIU publicly endorsed the 2007 ballot measure.

Prior to 2009, the Charter contained no submission deadline for bargaining units comprised of public safety employees. However, in March 2009, City Controller

[8] Section 8A.104(n) thereby extends the submission deadline for SFMTA units by one month. Although section 8A.104(n) does not repeat the full penalty provision found in section A8.409-4(k), it appears to incorporate that penalty provision by reference, in that section A8.409-4(k) generally applies to SFMTA units except in those respects that the Charter explicitly includes distinct SFMTA-specific provisions.

Ben Rosenfeld (Rosenfeld) worked with the Board of Supervisors on possible changes to the then-existing impasse resolution procedures. Rosenfeld and others at the City hoped, among other goals, to establish a deadline for public safety employee negotiations. Rosenfeld believed that having a submission deadline helped the City avoid "exceptional and unsustainable fiscal methods, such as mid-year spending cuts, hiring freezes, voluntary labor concessions, delays in capital improvements, and other one-time stopgap measures."[9]

In June 2009, the City notified SEIU and other unions that the Mayor and several supervisors intended to propose an initiative measure to amend the Charter. The eventual 2009 ballot measure was coincidentally also labeled as Proposition A, like the 2007 ballot measure. The 2009 ballot measure replaced the Charter's primary submission deadline with the reworded provision at issue here, in section A8.409-4(k). Another part of the 2009 ballot measure created an identical submission deadline for public safety MOUs, within Charter section A8.509-5(h). SEIU declined to support the 2009 measure, although an SEIU representative present during the *Seal Beach* negotiations over the 2009 measure did not specifically object to the proposed language in Charter section A8.409-4(k). City voters approved the measure.

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[9] The City's fiscal year runs from July 1 through June 30. At any time in the midst of a fiscal year, the City can approve a supplemental budget request adding to the items initially approved. If such a supplemental budget request seeks monies that the Mayor previously rejected when the budget was first adopted, then the Board of Supervisors must approve the request by a two-thirds margin. If a fiscal year ends with a surplus, the Controller transfers unused funds to the general fund. If during the fiscal year funds are insufficient to meet authorized expenditures, the Controller is authorized to transfer monies to the general fund, from funds available for such purposes.

In 2010, City voters approved Proposition G, which made additional SFMTA-specific changes to the City's dispute resolution procedures. Those changes are not at issue in this case. A coalition of unions (including SEIU) filed unfair practice charges alleging that selected provisions added by Proposition G conflict with the MMBA, leading to a PERB decision that we discuss *post* at pages 32-34.

IV. The Parties' 2014 Negotiations

At the time of trial, the City was party to approximately 30 MOUs covering 59 bargaining units. This is an unusually high number, though not necessarily the most of any California public entity.[10] The City created this unit structure, pursuant to its authority under the Charter, even though the Charter directed the City to consider unit proliferation when making unit decisions, and despite advice from experts to reduce such proliferation.[11]

The parties' MOUs covering the miscellaneous and service-critical units were due to expire on June 30, 2014, necessitating the 2014 negotiations between SEIU and the City. In total, the City needed to negotiate successor MOUs covering 38 of its 59 bargaining units during approximately the same timeframe. At least eight of these units had fewer than fifteen full-time equivalent employees. To handle these simultaneous negotiations, the City used a mix of in-house and contracted negotiators.

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[10] Neither party excepted to the ALJ's finding that the County of Los Angeles has 61 bargaining units, the City of Los Angeles has 42 bargaining units, and the State of California has 21 bargaining units. We therefore accept those findings as true for purposes of this case, while recognizing them as approximations that may be subject to change from time to time.

[11] Holtzman testified that the City had permitted such unit proliferation because, under the pre-1991 salary survey methodology, the City did not bargain wages.

On November 21, 2013, less than six months prior to the May 2014 submission deadline, City Employee Relations Director Martin Gran (Gran) wrote to SEIU Field Director David Canham (Canham) regarding the upcoming negotiations. Based on the parties' prior experience of needing as much time as possible to conclude negotiations, Gran proposed that the parties could slightly extend the Charter deadline (from May 10 to May 15) by agreeing, pursuant to section A8.409-4(k), to waive the Charter's ten-day cooling off period. SEIU eventually agreed to the City's proposed waiver and the associated five-day extension, although SEIU did not agree to the extension when the City first proposed it.

The parties appointed their respective arbitration board members and mutually selected Arbitrator Robert Hirsch (Hirsch) as the third, neutral arbitration board member for both bargaining units.

The parties' miscellaneous unit MOU is lengthy, in part because it covers 370 job classifications. The 2012-2014 version of the miscellaneous unit MOU consisted of 196 pages. Covered employees perform a mix of manual, technical, and skilled work. The miscellaneous unit has the largest total employee compensation of any City bargaining unit. Because of the diversity of the workforce SEIU represents, its 2014 bargaining team had approximately 50 members.

Carol Isen (Isen) was the City's chief negotiator. She reported to Gran and Human Resources Director Micki Callahan. Josie Mooney (Mooney) and John Stead-Mendez were co-chief negotiators for SEIU's miscellaneous unit.

Based on previous experience bargaining with the City, in which there was not enough time to have full negotiations before the Charter's submission deadline, SEIU

asked to begin bargaining earlier and schedule more dates than in the past. The City agreed to start somewhat earlier, but initially only agreed to about the same number of bargaining dates as the previous cycle, which was 21 or 22. The parties began negotiations on February 4, 2014.[12] Negotiations continued, over the course of more than 20 sessions, before mediation began on April 9.[13] Between April 9 and the beginning of interest arbitration on April 25, the parties engaged in several days of mediation with Hirsch.

SEIU considered the 2014 negotiations as an opportunity to achieve gains after several rounds of concessionary bargaining resulting from the 2008 recession and its significant negative impact on the City's budget. SEIU surveyed its chapters regarding their goals for negotiations, generated 130 proposed improvements based on the survey results, and later winnowed that total down to 70 proposals. SEIU identified numerous significant issues in need of adjustment, including wages, avoiding healthcare premium cost-sharing for employees without dependents, alternative work schedules, equitable distribution of overtime, just cause for discipline, workload, safety, upward mobility paths, reducing the City's use of short-term

[12] Unless otherwise specified, all further dates refer to 2014.

[13] The parties dispute the number of times that they met. Their differing counts may turn, at least in part, on whether one should count sessions that solely involved SFMTA issues. The number of pre-mediation sessions covering either or both units totals at least 21, and possibly as many as 25. We find no need to establish the number of sessions more precisely, as the exact number does not impact the outcome of this case.

employees, and alleged workforce "de-skilling."[14]

The City, for its part, began with 34 proposals relating to the miscellaneous unit and 32 proposals relating to the SFMTA unit. The City's priorities included requiring all employees, including those without dependents, to share a portion of monthly healthcare premium costs.

During the parties' negotiations, Gran and Isen repeatedly reminded SEIU of the upcoming submission deadline. However, many of the issues in dispute were complex, and the parties made only very slow progress in exchanging views and attempting to reach a successor MOU for each unit. Faced with this reality, in both March and April the SEIU team asked the City to add additional released time and bargaining dates beyond those already scheduled. We credit testimony from SEIU that the City largely declined SEIU's requests to add more days, except when Hirsch eventually ordered the City to do so. Indeed, a City negotiator's own bargaining notes reflect this fact, acknowledging that SEIU "has expressed[ed] the concern [over] lack of time and wanting to get more days and release time. Have told [them] I don't have a lot of authority at this point to do that."

SEIU also proposed yet another potential means to increase the parties' efficiency in making progress toward an agreement: assigning certain topics to issue-specific committees of the parties' respective bargaining teams, so that the parties

[14] SEIU Bargaining Team Member Larry Bradshaw testified that de-skilling occurs when the City decides to lay off employees and hire them back in a lower classification, performing the same work for less pay.

could negotiate on multiple issues simultaneously. However, the City rejected this approach.[15]

Overall, the weight of the evidence supports SEIU's contentions that the 2014 negotiations were "rushed" and "truncated," and that there was insufficient time for good faith negotiations over the many complex and important issues at stake.[16]

With the May 15 submission deadline in mind, the parties scheduled interest arbitration to begin on April 25, but the parties also calendared earlier dates with Hirsch to allow him opportunities to act as a mediator. On April 3, Hirsch attended the parties' negotiations for a preliminarily check-in on the parties' progress. The parties explained that they had not, as of yet, made much progress. Isen referenced 91 unresolved issues that SEIU had initially raised and 33 more unresolved issues that the City had initially raised. This amounted to substantially all the significant proposals and the vast majority of the other proposals as well. The City had withdrawn six proposals at that point, while SEIU had withdrawn two proposals. The parties had only achieved one minor and non-substantive tentative agreement, regarding the City's "clean-up" proposal.

Also on April 3, SEIU stated that there was insufficient time remaining to address the many outstanding proposals. SEIU noted that the City had not yet made even a single wage proposal, which meant that the parties had barely addressed

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[15] In its exceptions, the City suggests the parties could have broken up into smaller groups for greater efficiency. However, the City rejected this idea when SEIU proposed it.

[16] We also credit testimony from SEIU that the City asserted that there was not enough time to discuss certain issues.

compensation, and it was difficult for SEIU to evaluate its position on many other issues without also addressing compensation. Isen acknowledged that the City had not yet presented a wage proposal, but she promised that the City would do so later that same day. The City followed through and presented its opening wage proposal on April 3. This opening offer provided for 1.0 percent increases on January 3, 2015, June 30, 2015, January 2, 2016, and June 30, 2016, plus a mid-contract reopener for the third year of the proposed MOU (fiscal year 2016-2017).

On April 7, SEIU reported to Hirsch that 59 union proposals were still outstanding. On the same day, SEIU agreed to the City's earlier proposal to waive the ten-day cooling off period, thereby extending the submission deadline for the miscellaneous unit from May 10 to May 15.

On April 9, the parties engaged in an initial day of mediation with Hirsch. As of this date, the parties had not reached agreement as to any matters of substance, though they had achieved a second minor tentative agreement, this time on SEIU's proposal for certain language strike-outs.

On April 10, the City made its second wage proposal. This offer included wage increases of 2.0 percent on January 3, 2015 and 2.0 percent on January 2, 2016, plus an MOU reopener for the 2016-2017 fiscal year. The proposal was therefore roughly equivalent to the City's opening offer, except that it eliminated the six-month staggering of increases, instead consolidating the same aggregate 4.0 percent of wage increases into annual 2.0 percent adjustments in each of the first two years.

On April 12, SEIU presented an amended wage proposal and an amended healthcare proposal. In its wage proposal, SEIU sought increases corresponding to

inflation as measured by the Consumer Price Index (CPI), plus an additional 3.0 percent, 2.5 percent, and 2.25 percent, respectively, in the proposed MOU's three years.

On April 22, Isen declared that the parties were at impasse in their negotiations. She expressed the City's view that after three days of mediation, the parties were sufficiently far apart to declare impasse. She acknowledged the parties were still exchanging proposals, but said that they were at a point where they were "not going to see a lot of movement," and interest arbitration was quickly approaching. SEIU disputed the parties were at impasse, reiterating that there had not been enough time to discuss many important issues. Isen conceded some progress could still be made, but claimed the parties would need Hirsch's help to make progress on economic issues. Hirsch was present and told the parties they could decide whether or not they were at impasse. He also initially stated he would limit the parties to eight proposals from each side during interest arbitration, citing the Charter's broad grant of authority permitting an arbitrator to expedite the process and reduce costs. The City agreed with this limit, but SEIU did not. In the face of SEIU's opposition, Hirsch withdrew the limit.[17]

The parties commenced interest arbitration for the miscellaneous unit on April 25, with additional days on April 28, and May 3 and 7.

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[17] Hirsch had consulted with Arbitrator Barry Winograd (Winograd). Winograd had handled the parties' 2012 negotiations, during which he had ordered the parties each to submit no more than five issues to him. Isen testified that Winograd's ruling was unusual in that he ordered the parties to comply. Isen explained that in her experience arbitrators try to limit the number of issues—so they can give more detailed attention to them—but usually do not require compliance.

On April 25, SEIU amended its wage proposal. The new proposal sought increases corresponding to the CPI plus 2.0 percent in each of proposed MOU's three years. In subsequent days, SEIU made revised healthcare proposals. On April 28, SEIU informed Hirsch that it had reduced to 12 its total number of outstanding proposals for the miscellaneous unit, including wages and healthcare.

On or about May 1, the City made a revised healthcare proposal. This proposal would cap the City's healthcare premium contribution at 93 percent of the cost of the second-most-expensive plan for employees who had zero dependents or a single dependent, and at 83 percent for employees with two or more dependents. SEIU's final proposal was for a 100 percent contribution for employees with zero dependents, a 93 percent contribution for employees with one dependent, and an 83 percent contribution for employees with two or more dependents.

The City also made its final wage proposal. In this proposal, it offered increases of 3.0 percent effective October 11, 2014, 3.25 percent on October 10, 2015, and between 2.0 and 3.25 percent on July 1, 2016, depending on the CPI.

On May 3, SEIU presented Hirsch with a list of its 12 outstanding union proposals for the miscellaneous unit, corresponding to the topics it had referenced on April 28.

On May 8, the day after the arbitration hearing concluded, the arbitration board issued its findings for the miscellaneous unit. The arbitrator made awards as to six issues in total. He agreed with the City's final proposal offering wage increases of 3.0 percent, 3.25 percent, and between 2.0 and 3.25 percent, respectively, in the MOU's three years. SEIU largely prevailed on the issue of healthcare. SEIU's arbitration

board member dissented on wages, use of part-time employees, and union approval of hiring above the entrance rate. The City's arbitration board member dissented on healthcare, a new provision to address de-skilling of patient care assistants, and an additional salary step for food service workers.

In subsequent bargaining for the service-critical unit, SFMTA and SEIU reached a deal on across-the-board wages, agreeing to follow the arbitrator's recent decision covering the miscellaneous unit. The parties submitted three issues to the service-critical unit arbitration board. In an award dated May 20, Hirsch sided with SFMTA as to its proposals giving management greater flexibility in step placement. SEIU prevailed on its healthcare proposal, as it had with respect to the miscellaneous unit.

Notably, when the parties reached their May 16 agreement on wages for SFMTA employees, they not only agreed to submit three issues to the arbitration board immediately, but they agreed that there had not been sufficient time to work toward the right resolution on two other issues—break rooms and dedicated parking spaces for station agents at SFMTA stations. Accordingly, the parties signed a side letter stating that they would negotiate over these issues mid-contract, and if they were unable to reach an agreement on one or both issues by February 1, 2015, then the arbitration board would reconvene to decide the unresolved issue(s), with Hirsch as the neutral arbitrator. The City explained that this procedure "was a way to make sure that the MOU got submitted in time, but the parties still had additional time to negotiate" on the two issues.

DISCUSSION

Under the MMBA, a local agency may adopt reasonable rules and regulations pertaining to resolution of collective bargaining disputes. (MMBA, § 3507, subd. (a)(5).) In order to be lawful, such rules and regulations may not undercut or frustrate the MMBA's policies and purposes. (*Internat. Federation of Professional & Technical Engineers, Local 21 v. City & County of San Francisco* (2000) 79 Cal.App.4th 1300, 1306 (*IFPTE*); *Huntington Beach Police Officers' Assn v. City of Huntington Beach* (1976) 58 Cal.App.3d 492, 500-502 (*Huntington Beach*).) Therefore, whether a local agency has adopted its rules, regulations, or charter provisions via a vote of its electorate, a vote of its governing board, or through any other means, the resulting policies must be consistent with the MMBA. (*Internat. Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, 202; *Voters for Responsible Retirement v. Bd. of Supervisors* (1994) 8 Cal.4th 765, 781 (*Voters for Responsible Retirement*) [MMBA restricts the local electorate's power to legislate through the initiative or referendum process]; *IFPTE*, *supra*, 79 Cal.App.4th at p. 1306, citing *Los Angeles County Civil Service Com. v. Superior Court* (1978) 23 Cal.3d 55, 63 ["Local regulation is permitted only if 'consistent with the purposes of the MMBA.'"].) We start from a position of presuming that an employer's rule is reasonable, which means that

the burden of proof is on the party challenging such a rule. (*San Bernardino County Sheriff's Assn. v. Bd. of Supervisors* (1992) 7 Cal.App.4th 602, 613.)[18]

SEIU challenges Charter sections A8.409-4(k) and 8A.104(n) both facially and as-applied. A facial challenge is based only on the text of the rule. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.) The California Supreme Court has noted that there are at least two possible standards for evaluating a facial challenge. (*Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1126.) Under the stricter standard, we should reject a facial challenge to a rule unless it totally and fatally conflicts with

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[18] In its 63rd and final exception, the City raises an argument that it did not brief to the ALJ, and which the ALJ accordingly did not consider: Whether the "home rule" doctrine bars SEIU's claims in this case. While the City waived this argument by not raising it before the ALJ, it is also untenable on its merits. The home rule doctrine does not alter the fact that a city's charter must be consistent with the MMBA. (*Boling*, *supra*, 5 Cal.5th at p. 913, citing *Seal Beach*, *supra*, 36 Cal.3d at p. 600 ["[G]eneral law prevails over local enactments of a chartered city, even in regard to matters which would otherwise be deemed to be strictly municipal affairs, where the subject matter of the general law is of statewide concern."]; *Huntington Beach, supra*, 58 Cal.App.3d at p. 500 ["With respect to matters of statewide concern, charter cities are subject to and controlled by applicable general state law if the Legislature has manifested an intent to occupy the field . . . . Labor relations in the public sector are matters of statewide concern."]; *San Leandro Police Officers Assn v. City of San Leandro* (1976) 55 Cal.App.3d 553, 557 ["[L]ocal legislation may not conflict with statutes such as the [MMBA] which are intended to regulate the entire field of labor relations of affected public employees throughout the state."]; *City of San Diego* (2015) PERB Decision No. 2464-M, pp. 28-35 [discussing interplay between the home rule doctrine and the MMBA]; accord *United Public Employees, Local 390/400, SEIU, et al. v. City and County of San Francisco* (1987) 190 Cal.App.3d 419, 423 [while salary structures are strictly local affairs and not preempted by general law, "the procedure by which such compensation is determined is subject to the provisions of the MMBA."]; *Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, 289-295 [A city's charter must comply with provisions in the Labor Code]. See also *post* at pp. 50-52, analyzing the unlawful delegation principles explained in *County of Riverside v. Super. Ct.* (2003) 30 Cal.4th 278, 286-89 (*County of Riverside*) and *County of Sonoma v. Super. Ct.* (2009) 173 Cal.App.4th 322, 340-348.)

the MMBA. (*Ibid.*) Courts often follow a more lenient standard, however. Under the more lenient standard, we can sustain a facial challenge to a rule if it conflicts with the MMBA "in the generality or great majority of cases." (*Ibid*.) Under either test, a party alleging a facial violation cannot prevail merely by suggesting that the challenged rule may run afoul of the law in "some future hypothetical situation." (*Beach & Bluff Conservancy v. City of Solana Beach* (2018) 28 Cal.App.5th 244, 264, citing other authority; *Zuckerman v. State Bd. of Chiropractic Examiners* (2002) 29 Cal.4th 32, 39.)

The difference between the above standards is often immaterial to facial challenges alleging that an employer's rule or policy conflicts with California labor law. This is true primarily because a facial challenge is an appropriate means to challenge an employer rule or policy that is alleged to have a chilling effect on employees or a union, or otherwise to interfere with or impinge on protected rights, even before being applied. (See, e.g., *Los Angeles County Federation of Labor v. County of Los Angeles* (1984) 160 Cal.App.3d 905, 908 [overbroad rule against striking has chilling effect, making facial challenge appropriate]; *Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, pp. 42-50 [analyzing the language of employer directive, as it would reasonably be understood by employees, without regard to how or whether it was enforced].) There are also other types of cases in which there may be no need to choose between the competing standards governing a facial challenge. (See, e.g., *Voters for Responsible Retirement*, *supra*, 8 Cal.4th at p. 781.)

Here, the two potential standards applicable to facial challenges lead to the same outcome. SEIU's facial challenge asserts that the submission deadline and

associated penalty provision unfairly tilt bargaining toward the City's priorities and leave insufficient time for good faith negotiations, in most or all instances. Under either standard for facial challenges, Charter sections A8.409-4(k) and 8A.104(n) are facially valid if but only if they are interpreted to avoid tilting the playing field in the City's favor and to allow adequate time for good faith negotiations and good faith impasse resolution. In explaining how the Charter must be interpreted in order to comport with the MMBA, we begin by reviewing prior cases involving these issues.

I. The Duty to Devote Adequate Time to Good Faith Negotiations

The MMBA's "centerpiece" is its requirement that every local agency "meet and confer in good faith regarding wages, hours, and other terms and conditions of employment" with unions representing the agency's employees. (*Boling*, *supra*, 5 Cal.5th at p. 913; *Voters for Responsible Retirement*, *supra*, 8 Cal.4th at p. 781.)

This central requirement is spelled out at MMBA section 3505, which requires that the parties should meet and confer

> "for a ***reasonable period of time*** in order to exchange freely information, opinions, and proposals, and to ***endeavor*** to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include ***adequate time*** for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent."

(MMBA, § 3505, emphasis supplied.)

In urging employers and unions to "endeavor" to reach agreement prior to when the agency adopts its budget, the MMBA is "only hortatory" rather than binding. (*Dublin Professional Fire Fighters, Local 1885 v. Valley Community Services Dist.*

(1975) 45 Cal.App.3d 116, 118 (*Dublin*).) This hortatory urging "contrasts starkly with the statute's other, obligatory mandates, such as the duty to continue bargaining for a reasonable and adequate amount of time to allow for good faith negotiations." (*San Ramon*, *supra*, PERB Decision No. 2571-M, p. 11, fn. 12, citing *Dublin*, *supra*, 45 Cal.App.3d at p. 118.) For this reason, an employer cannot use its budget cycle as a reason for shortening negotiations, if doing so does not permit sufficient time for good faith negotiations. (*Id*. at p. 10 [employer may not contend that its upcoming budget deadline constitutes exigent circumstances allowing the employer to insist on accelerated negotiations].) Therefore, like the ALJ, we note that an employer may not insist on completing negotiations in time to adopt or implement its budget. While the ALJ wrote without the benefit of *San Ramon*, he reached the same conclusion based on prior precedent. (*City of Selma* (2014) PERB Decision No. 2380-M, pp. 21-22 (*Selma*) [city violated MMBA when it asserted need to conclude bargaining prior to budget adoption] and *County of Riverside* (2014) PERB Decision No. 2360-M (*Riverside*), p. 15 [employer with "a fixed deadline by which it needed to conclude negotiations" violated MMBA's duty to bargain in good faith for an adequate time].)

Thus, one question at issue is whether the challenged Charter provisions facially violate the MMBA because, in all or most instances, they cut short bargaining after an insufficient opportunity for good faith negotiations and good faith dispute resolution. A related question is whether the Charter had that effect in this case, which would be sufficient to sustain SEIU's as-applied challenge.

II. Prior Litigation Involving Interest Arbitration under the City's Charter

In chronological order below, we summarize one precedential appellate decision, two unpublished and non-precedential appellate decisions, and four precedential PERB Board decisions, all relating to the City's interest arbitration procedures. We give the full citation to each case and adopt a shorthand nomenclature for ease of reference thereafter. In our shorthand, we will refer to the PERB decisions as *CCSF I, II, III,* and *IV*, and we will refer to the appellate decisions by their abbreviated captions: *Fire Fighters v. CCSF* , *SFPOA v. CCSF*, and *CCSF v. PERB*, respectively.[19]

A. The Court of Appeal's Published Decision in *Fire Fighters v. CCSF*

In *San Francisco Fire Fighters Local 798 v. City and County of San Francisco* (2006) 38 Cal.4th 653 (*Fire Fighters v. CCSF*), the Court of Appeal found that the City was not required to engage in interest arbitration over a change in promotional standards needed to ensure compliance with anti-discrimination laws. The question at issue was therefore quite different from any question before us in this case. *Fire Fighters v. CCSF* is relevant, however, in one respect: The Court of Appeal noted that the Charter's interest arbitration mechanism is intended to apply after the parties have reached impasse. (*Id*. at pp. 661, 662, 670, & 674.) As discussed below, the City later acknowledged, in subsequent PERB proceedings, that the definition of impasse under the Charter is the same as under traditional labor relations law.

[19] While the two unpublished decisions are non-precedential, we nonetheless review them carefully for their persuasive value, particularly as one of these unpublished appellate decisions involved a facial challenge to the Charter's submission deadline.

B. *CCSF I*

City & County of San Francisco (2007) PERB Decision No. 1890-M (*CCSF I*) arose out of 2006 negotiations between the City and Stationary Engineers Local 39 (Local 39), in which the union refused to comply with the Charter's mediation and arbitration provisions. Local 39 filed an unfair practice charge alleging that the City engaged in surface bargaining during 2006 negotiations, and further alleging that Charter section A8.409-4 was unreasonable, facially and as applied, because it allowed the City to begin impasse resolution procedures before the parties reached impasse. PERB's General Counsel dismissed the charge without issuing a complaint, and Local 39 appealed. In that procedural posture, we had before us only a brief factual record consisting of the unfair practice charge and the City's position statement. The skeletal facts available did not present a colorable as-applied challenge, particularly given that Local 39 adamantly refused to pick an arbitration board member or otherwise operate under the Charter's interest arbitration framework. (*Id.*, p. 3; see also pp. 9-12 [finding no evidence that the City declared impasse prematurely or otherwise engaged in surface bargaining].)[20]

We found no facial violation, either, and our reasoning in reaching that conclusion is significant. We relied on the fact that the Charter restricts "the use of the impasse procedure to situations where disputed issues remain unresolved after good faith bargaining." (*CCSF I*, *supra*, PERB Decision No. 1890-M, p. 9.) Our analysis

[20] Not only did *CCSF I* involve a skeletal record, but it did not consider the significant precedent regarding an employer's duty to afford sufficient time to negotiations, some of which has issued since *CCSF I*. For these reasons, among others, SEIU's facial and as-applied challenges in this case are substantially more complex issues than may be apparent from reading *CCSF I* in isolation.

must be read to mean that the Charter, by requiring good faith bargaining, mandates that negotiations "continue for a reasonable period of time," a standard that we specifically noted. (*Id*. at p. 8.) We did not consider whether, in all cases, there is sufficient time for good faith negotiations and impasse resolution prior to the submission deadline. Ultimately, then, *CCSF I* left open future challenges contesting whether the City has interpreted and applied its rules to leave sufficient time for good faith negotiations and impasse resolution, as well as whether the City has maintained a level playing field for negotiations. Our analysis here follows this approach in finding Charter sections A8.409-4(k) and 8A.104(n) to be facially valid, while analyzing the City's interpretation of these provisions to determine whether that interpretation is consistent with the MMBA.

C. *CCSF II*

City & County of San Francisco (2009) PERB Decision No. 2041-M (*CCSF II*) arose as an offshoot of the same fact pattern at issue in *CCSF I*. When Local 39 refused to participate in the City's interest arbitration mechanisms, the City sued Local 39 in superior court, seeking to force it to comply with the Charter. The superior court dismissed the action because the subject matter was within PERB's exclusive jurisdiction, and the California Court of Appeal affirmed in a published decision. (*City and County of San Francisco v. Internat. Union of Operating Engineers, Local 39* (2007) 151 Cal.App.4th 938.) Two days after the superior court dismissed the City's lawsuit, the City filed an unfair practice charge with PERB. The parties litigated the case before an ALJ, who issued a proposed decision. After Local 39 filed exceptions, we

adopted the ALJ's proposed decision as our own, while adding additional analysis as to Local 39's procedural defense. (*CCSF II*, *supra*, PERB Decision No. 2041-M, p. 2.)

Notably, we rejected Local 39's contention that the City could not mandate interest arbitration through its Charter. In reaching this conclusion, we confirmed our above-described interpretation of *CCSF I*, interpreting that decision to mean that the Charter "must be read so as to 'restrict the use of the impasse procedure to situations where disputed issues remain unresolved after good faith bargaining.'" (*CCSF II*, *supra*, PERB Decision No. 2041-M, adopting proposed decision at p. 24, citing *CCSF I*, *supra*, PERB Decision No. 1890-M, p. 9.) Similarly, we reiterated that the Charter provisions are facially valid, because those provisions required good faith negotiations. (*CCSF II*, *supra*, PERB Decision No. 2041-M, adopting proposed decision at p. 33, citing *CCSF I*, *supra*, PERB Decision No. 1890-M, p. 9.) Rounding out this analysis, we relied on the City's admission that the term "impasse" under the Charter has the same meaning as it does under PERB precedent. (*CCSF II*, *supra*, PERB Decision No. 2041-M, adopting proposed decision at p. 34, citing *CCSF I*, *supra*, PERB Decision No. 1890-M, p. 9.)

CCSF II clarified that if the City declares impasse in bad faith, or the parties are not at a true impasse, then a union can decline to participate in the impasse resolution procedures and raise an as-applied challenge to the City's conduct. (*CCSF II*, *supra*, PERB Decision No. 2041-M, adopting proposed decision at pp. 34 & 38-39.) Critically, we adopted the ALJ decision noting this understanding as the basis for finding the Charter to be facially valid: "[T]he traditional meaning of impasse is the meaning incorporated in the Charter. It should be noted that PERB's conclusion that impasse

must be reached after good faith bargaining also serves to confirm the reasonableness of the requirement of mandatory interest arbitration." (*Id*., adopting proposed decision at p. 39.) On the facts before us in *CCSF II*, Local 39 was not able to establish an as-applied violation, especially given that Local 39 that had acted in bad faith by refusing to operate under the Charter's mediation and arbitration provisions from the outset, even before it could possibly have known whether the parties would reach a good faith impasse. (*Id*., adopting proposed decision at pp. 9-10 & 42.)

The ALJ in the instant case also issued the proposed decision that we adopted in *CCSF II*. While this affords the ALJ's decision in this case no special weight, it is noteworthy that the ALJ was particularly aware of the factual differences between the cases when he found that in the instant case there was insufficient time for good faith negotiations. We, too, note that significant difference, which forms part of the basis for upholding SEIU's as-applied challenge. Unlike the ALJ, however, we find that factual difference does not render the Charter facially invalid.

D. The Court of Appeal's Unpublished Decision in *SFPOA v. CCSF*

The Court of Appeal issued an unpublished decision regarding the Charter's submission deadline, in a case that arose after the City's 2009 ballot measure first applied the submission deadline to public safety employee bargaining units. The San Francisco Police Officers' Association (SFPOA) sued the City in superior court, alleging that the submission deadline set forth in section A8.590-5(h)—which is identical to the deadline set forth in A8.409-4(k)—facially violated the MMBA. The trial court rejected this facial challenge. SFPOA appealed and the First Appellate District affirmed, interpreting the submission deadline as facially consistent with the MMBA.

(*San Francisco Police Officers' Assoc. v. City and County of San Francisco* (Cal. Ct. App. Sept. 24, 2014, No. A137684) 2014 WL 4731879 (*SFPOA v. CCSF*).)

To begin, the court found that the submission deadline is procedural rather than substantive. (*SFPOA v. CCSF*, slip op., p. 5.) Turning to the crux of the matter, the court found no facial infringement on good faith negotiations given that the Charter allows parties to begin negotiations early, and/or to bargain even after the submission deadline, and/or to implement economic enhancements "retroactive to any date." (*SFPOA v. CCSF*, slip op., p. 7.)

Thus, several common principles emerge from *CCSF I*, *CCSF II,* and *SFPOA v. CCSF*. From this trio of cases, we learn that the submission deadline is facially valid because it requires good faith negotiations in compliance with MMBA precedent; parties must afford adequate time for negotiations; and in order to do so, parties may need to begin negotiations early and/or submit an MOU by the deadline but resume negotiations thereafter and work toward enhancements "retroactive to any date." These cases left the door open to future as-applied claims that would necessarily clarify how to interpret the facially valid submission deadline in a lawful manner if, as will inevitably happen in some negotiations, parties approach the deadline without having had sufficient time to complete good faith negotiations and/or without being at a legitimate impasse. While PERB subsequently decided two other cases touching on the City's interest arbitration framework (*CCSF III* and *CCSF IV*), and we recount those decisions below, neither related to the as-applied questions left open in *CCSF I*, *CCSF II*, and *SFPOA v. CCSF*.

The instant case, in contrast, reaches these open questions regarding how to apply the Charter when the parties approach the submission deadline but have not had enough time to complete good faith negotiations. Our full analysis, set out *post* at pages 35-50, is consistent with several critical lessons from prior precedent. First, the Charter's purpose is to provide for good faith mediation and interest arbitration if parties bargain in good faith but nonetheless reach a true impasse as that term of art is defined by labor relations precedent. (*CCSF II*, *supra*, PERB Decision No. 2041-M, adopting proposed decision at p. 34; accord *Fire Fighters v. CCSF*, *supra*, 38 Cal.4th at pp. 661, 662, 670, & 674.) Depending on the specific facts of a given negotiation, parties may not have adequate time to reach a good faith impasse and complete interest arbitration regarding all issues by the submission deadline. This creates a tension within the Charter, as well as a tension between the Charter and the MMBA.

Precedent requires us to harmonize the Charter with the MMBA if possible. (*Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 665 [noting important goal of harmonizing the San Francisco City Charter with the MMBA, if possible].) We do so by reasonably and necessarily interpreting the Charter's penalty provision to have no impact so long as the parties submit some type of MOU by the deadline, and by noting that what the parties submit by that deadline may take a variety of forms. For instance, we find that the Charter does not proscribe the submitted MOU from including provisions that provide for mid-contract negotiations and mid-contract interest arbitration allowing potential economic enhancements to take effect mid-year and/or retroactive to any date. Such MOU provisions may be agreed-upon or ordered by the arbitrator, and may be included for

any reason, including if there was insufficient time to complete good faith negotiations or good faith interest arbitration before the deadline.

E. *CCSF III*

In *City & County of San Francisco* (2017) PERB Decision No. 2536-M (*CCSF III*), we found that the City Charter violated the MMBA to the extent it banned sympathy strikes and unfair practice strikes, because such strikes cannot be resolved by binding interest arbitration. (*Id*. at pp. 25-26 & adopting proposed decision at p. 20.)[21] Thus, although the case touched on several aspects of the Charter's impasse resolution procedures, *CCSF III* did not involve any facial or as-applied challenge to the submission deadline or its associated penalty provision.

F. *CCSF IV* and the Court of Appeal's Unpublished Decision in *CCSF v. PERB*

In 2017, we issued a decision regarding challenges to certain aspects of the interest arbitration mechanism that are unrelated to the submission deadline. (*City & County of San Francisco* (2017) PERB Decision No. 2540-M.) The Court of Appeal, in

[21] The majority opinion "reserved for another day" the question whether the Charter's prohibition was unlawful even as to primary, economic strikes, while citing PERB and appellate precedent suggesting that the City acts "at its peril" if it seeks to enforce such a strike prohibition. (*CCSF III*, *supra*, PERB Decision No. 2536-M, p. 26, fn. 24.) The majority noted that the Board had previously left open the same question. (*Id*. at p. 26, citing *CCSF II*, PERB Decision No. 2041-M, adopting proposed decision at p. 33, fn. 19.) Member Banks, concurring and dissenting in *CCSF III*, averred that the Board should decide the open issue and find that the Charter's prohibition on strikes is entirely unlawful. (*CCSF III*, *supra*, PERB Decision No. 2536-M, pp. 48-64.) In his concurrence today, Member Banks observes that the events described in *CCSF IV*, as well as those at issue in the instant case, provide a further basis for questioning the City's claim that its interest arbitration framework justifies it in purporting to require employees and unions to forego their statutory right to call a primary economic strike. This question necessarily remains unsettled in the wake of today's decision, as the instant case involved no strike of any type.

an unpublished decision, partially affirmed and partially set aside our decision. (*City and County of San Francisco v. PERB* (Cal. Ct. App. July 22, 2019, No. A152913) 2019 WL 329647 (*CCSF v. PERB*).) After the court's unpublished decision became final, we issued a brief decision noting which of our earlier conclusions remain precedential and which were set aside. (*City & County of San Francisco* (2019) PERB Decision No. 2540a-M.) In the below analysis, we refer to decision numbers 2540-M and 2540a-M, collectively, as *CCSF IV*, though we disaggregate the two cases when citing to specific pages numbers. All references to PERB Decision No. 2540-M are to precedential parts of the decision that the Court of Appeal did not set aside.

In *CCSF IV*, five unions brought purely facial challenges to newly enacted language in Charter sections 8A.104(o) and (q), relating to interest arbitration provisions for SFMTA bargaining units. Charter section 8A.104(o) provided as follows:

> "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 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."

(*CCSF IV*, *supra*, PERB Decision No. 2540, pp. 3-4, emphasis added.)

While we initially found several sentences in this section to violate the MMBA on a facial basis, after review by the Court of Appeal, *CCSF IV* holds that only the third sentence, italicized above, is facially invalid. (*CCSF IV*, *supra*, PERB Decision No. 2540-M, p. 24 & Decision No. 2540a-M, p. 2.) The "clear and convincing evidence" standard and the "best practices" standard, both found in that sentence, each independently violate the MMBA because they serve as a "one-way ratchet" that impacts unions more than the City, thereby "tilting" labor relations toward management's priorities. (*CCSF IV*, *supra*, PERB Decision No. 2540-M, pp. 15 & 17-18, affirmed, *CCSF v. PERB*, *supra*, slip op., p. 17 [affirming PERB, noting that an interest arbitration process "must maintain its neutrality," but the City enacted a provision that "unreasonably hampers a union's leverage."].) We found that the City can raise public interest concerns before the interest arbitrator, but the City cannot put its thumb on the scale by directing the arbitrator that the union has a greater burden than management in litigating such issues. (*Id*. at p. 17.) Therefore, we concluded that the City, by turning "what should be a level table into a warped surface," would likely alter the balance of power at the bargaining table "long before the parties reach impasse and arbitration," as the unlawful provision would reduce incentives for management to reach agreement in negotiations. (*Id*. at p. 23.) In sum, *CCSF IV* clarified that rules for collective bargaining and dispute resolution "must be faithful to

the premise of equal leverage in the process to fulfill the purposes of the statute." (*Id*. at p. 8, internal quotation marks and citation omitted.)[22]

III. The Facts of this Case Reflect an As-Applied Violation

The above-described cases involving the City leave no doubt that adopting an interest arbitration framework does not immunize the City from MMBA compliance. In *CCSF IV*, for instance, the City noted that if it had not adopted an interest arbitration mechanism, it would have the right to impose its last, best, and final offer (LBFO) following impasse, and the City therefore argued that it should be permitted to adopt an interest arbitration mechanism favoring its priorities over union priorities. (*CCSF IV*, *supra*, PERB Decision No. 2540-M, p. 18 & fn. 10.) Rejecting this argument, we noted that City voters adopted interest arbitration procedures, thereby giving up the City's right to impose an LBFO, and that those procedures must be neutral and compliant with the MMBA, even if the City was not required to adopt them in the first place. (*Ibid*.)

Applying *CCSF IV* to the instant case, we cannot adopt a Charter interpretation that permits cost savings to take effect at any time during the course of an MOU, irrespective of the submission deadline and associated penalty provision, while strictly

[22] *CCSF IV* also analyzed newly added Charter section 8A.104(q) and found that the final sentence of that section, mandating that all side letters shall expire no later than the MOU, is facially invalid because it conflicts with the City's duty to maintain the status quo following an MOU's expiration, pending negotiations and interest arbitration. (*CCSF IV*, *supra*, PERB Decision No. 2540-M, adopting proposed decision at p. 30.) Furthermore, because *CCSF IV* involved a purely facial challenge (*CCSF IV*, *supra*, PERB Decision No. 2540-M, p. 19), it left open whether additional parts of Charter sections 8A.104(o) and (q) might be applied in a manner that violates the MMBA.

limiting the extent to which mid-contract negotiations or interest arbitration may lead to new economic terms that add to the City's cost, immediately or retroactively. Such an interpretation would constitute exactly the type of "one way ratchet" that unlawfully tilts labor relations toward management's priorities. (*CCSF IV*, *supra*, PERB Decision No. 2540-M, pp. 15-18, affirmed, *CCSF v. PERB*, *supra*, slip op., p. 17.) This principle forms part of the basis for finding that the Charter does not foreclose reopener provisions that may require mid-contract negotiations and interest arbitration as to certain issues, with the possibility of enhancements that take effect mid-year or are retroactive to any date. As discussed below, our interpretation also draws support from numerous other sources, including but not limited to the language of the Charter itself, the parties' practice thereunder, and the MMBA's requirement that there be sufficient time for good faith negotiations.

Just as adopting an interest arbitration mechanism does not immunize the City from a claim that its framework tilts the playing field, it also does not allow the City to evade the rule that an MMBA employer must devote sufficient time to negotiations and dispute resolution. (*San Ramon*, *supra*, PERB Decision No. 2571-M, p. 10; *Selma*, *supra*, PERB Decision No. 2380-M, pp. 21-22; *Riverside*, *supra*, PERB Decision No. 2360-M, p. 15.) This principle—that the submission deadline must be applied in a manner that preserves good faith negotiations—was the bedrock principle on which we decided *CCSF I* and *CCSF II*. Indeed, we found the Charter facially valid so long as the parties apply it to comport with the MMBA's good faith bargaining requirement,

which is the law's "centerpiece." (*Boling*, *supra*, 5 Cal.5th at p. 913; *Voters for Responsible Retirement*, *supra*, 8 Cal.4th at p. 781.)[23]

Neither the City's budget process nor its high number of bargaining units is sufficient to exempt the City from any MMBA requirements. As the ALJ pointed out in the proposed decision, the State of California provides a useful analogy, as it also has a complex and time sensitive budget process, plus numerous bargaining units represented by many unions. The State is governed by a separate labor relations statute that PERB enforces, the Ralph C. Dills Act (Dills Act).[24] Interpreting that statute, we have held that "collective bargaining has no necessary linkage with the State budgetary process." (*State of California (Department of Personnel Administration)* (1994) PERB Decision No. 1067-S, adopting proposed decision at p. 9.) Rather, "[t]he two activities can take place at the same time and no resolution of collective bargaining is required before introduction or approval of the budget." (*Ibid*.) Interpreting federal labor law, the National Labor Relations Board has similarly found that an employer cannot insist on a firm deadline for negotiations. (*Newcor Bay City Division of Newcor, Inc.* (2005) 345 NLRB 1229, 1239-1240.)

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[23] The Legislature did create one MMBA exemption for employers like the City that have adopted interest arbitration. As set forth in MMBA section 3505, subdivision (e), such employers need not also comply with the MMBA's factfinding procedures. The Legislature thus recognized that interest arbitration is a worthy substitute for factfinding. The limited nature of this exemption further demonstrates that interest arbitration procedures are governed by all MMBA principles except to the extent the Legislature has adopted specific exemptions for interest arbitration.

[24] The Dills Act is codified at Government Code section 3512 et seq.

Substantially all public employers of which we are aware sign multi-year MOUs while knowing that the near future could bring unforeseen costs and changes in revenue streams due to fluctuations in tax revenues or other sources of income. Scheduled or unscheduled cost increases and decreases in revenue, or, alternately, positive fluctuations arising from increased revenue or salary savings, commonly occur during a single fiscal year and repeatedly in the course of a multi-year MOU. For this reason, any public employer must rely on the best projections it can and then make adjustments thereafter as needed, knowing that an economic downturn could occur in virtually any year, and that some variance from projections is almost certain. Public entities facing unforeseen mid-MOU deficits typically must either tap into reserves, implement one-time or ongoing measures to raise revenue or cut costs, or notify the unions with which they bargain that there is a need to lay off employees if the parties cannot negotiate mid-MOU cost savings.

Moreover, the City can explain these matters to the interest arbitrator. Under the Charter, the arbitration board must take into account, among other factors: the City's financial resources, revenue projections, and budgetary reserves; "other demands on the City and County's resources including limitations on the amount and use of revenues and expenditures;" the City's "ability to meet the costs of the decision;" and reports from the Controller, Mayor, and Board of Supervisors regarding the City's projected financial condition for the next three fiscal years. (Charter, § A8.409-4(d).) For all these reasons, we find nothing in the Charter that warrants a change from the principle underlying all of California's public sector collective bargaining law: While "budget exigencies may have consequences" for bargaining,

they "do not suspend the duty to meet and confer in good faith." (*Selma*, *supra*, PERB Decision No. 2380-M, p. 22.)

Thus, our expertise in the practical realities of California public sector collective bargaining leads us to continue interpreting state labor relations law to prohibit an employer from declaring impasse merely because a particular deadline is approaching. (*San Ramon*, *supra*, PERB Decision No. 2571-M, p. 10; *Selma*, *supra*, PERB Decision No. 2380-M, p. 21; *Riverside*, *supra*, PERB Decision No. 2360-M, p. 20.) Furthermore, in assessing SEIU's as-applied challenge to determine if the City prematurely declared impasse in this case, we rely on the City's acknowledgement that the term "impasse" under the Charter has the same meaning as it does under PERB precedent. (*CCSF II*, *supra*, PERB Decision No. 2041-M, adopting proposed decision at p. 34.)

A bona fide impasse exists if parties' differences are so substantial and prolonged that further meeting and conferring is futile, despite good faith negotiations that were free from unfair labor practices. (*San Ramon*, *supra*, PERB Decision No. 2571-M, p. 6; *Riverside*, *supra*, PERB Decision No. 2360-M**,** p. 13.) A party evidences bad faith if it rushes to impasse or issues an impasse declaration that is premature, unfounded, or insincere. (*San Ramon*, *supra*, PERB Decision No. 2571-M, p. 10.) If an employer declares impasse without reaching a bona fide impasse after good faith negotiations, but the employer neither changes employment terms nor refuses to continue bargaining, we consider that evidence under the totality of conduct test. (*San Ramon*, *supra*, PERB Decision No. 2571-M, p. 7, fn. 9; *Riverside*, *supra*, PERB Decision No. 2360-M, p. 12.) In contrast, if the employer in those circumstances

refuses to bargain further or proceeds to change employment terms, that constitutes further evidence of bad faith under the totality test, and it also constitutes a per se violation. (*San Ramon*, *supra*, PERB Decision No. 2571-M, p. 7, fn. 9; *Riverside*, *supra*, PERB Decision No. 2360-M, p. 12.)

The "reasonable period of time" that the MMBA requires for good faith negotiations will vary greatly from negotiation to negotiation, depending on many factors. (*City of San Jose* (2013) PERB Decision No. 2341-M, p. 41.) In determining the existence of impasse on a given date, PERB focuses on numerous factors, including: the number and length of negotiation sessions; the extent to which the parties have exchanged information and thoroughly discussed proposals and counterproposals in good faith; and the nature of the unresolved issues and the parties' discussions of such issues to date. (*San Ramon*, *supra*, PERB Decision No. 2571-M, pp. 9-12; *Riverside*, *supra*, PERB Decision No. 2360-M, pp. 13-14.) Continued movement on minor issues will not prevent a finding of impasse if the parties remain deadlocked on one or more major issues. (*Regents of the University of California* (1985) PERB Decision No. 520-H, p. 17.) However, both parties must believe they are at the "end of their rope," which is typically negated if one party displays continuing movement, or if the other party references a deadline for completion of negotiations and acts in accordance with that deadline. (*Riverside*, *supra*, PERB Decision No. 2360-M, p. 13.)

Based on these principles, we find that the City and SEIU were not actually at impasse when the City declared impasse on April 22.[25] The parties' negotiations involved numerous proposals, many of them complex. The City did not make its first wage proposal until April 3, merely 19 days before it declared impasse. Testimony at the hearing confirmed what is self-evident: the absence of a wage offer made it difficult to assess or make progress overall, especially given that there is an integral connection between wages and other key issues, including health care.

Normally, an impasse occurs when both parties indicate that they have no more material movement to make on the key issues, at least temporarily. As of April 22, neither party had asserted an inability to make such movement. Both parties continued to make movement before and after the City declared impasse. Some continuing resolution of differences is typical in the course of post-impasse dispute resolution procedures, but in this case it was striking that the parties were not close to the final stages of bargaining when the City declared impasse. Indeed, the parties had not even reached the point in negotiations in which one or both parties make package proposals, offering concessions on certain issues in exchange for advances on others. It is evident that the parties were not legitimately at impasse on April 22, and that the City declared impasse mainly due to the upcoming submission deadline. (See, e.g., *Riverside*, *supra*, PERB Decision No. 2360-M, pp. 14-16 [noting

[25] The record is not clear as to whether this declaration of impasse explicitly included the parties' SFMTA negotiations. As a practical matter, the SFMTA negotiations largely trailed the main negotiations, with an assumption that many significant terms in the new successor MOU for the SFMTA unit would simply follow from an eventual resolution at the main table. As a result, there is no doubt that the City's premature impasse declaration impacted both sets of negotiations.

contemporaneous movement and narrowing of issues, in context of pressure for completion of negotiations by a deadline, coupled with insubstantial justification for impasse declaration].)

Our finding that the City relied on the Charter's submission deadline to declare impasse prematurely is significant evidence that the submission deadline, as applied in this case, prevented the parties from devoting sufficient time to hear and reflect on one another's positions and endeavor in good faith to reach a mutual accommodation. Other significant evidence also supports this conclusion. For instance, as noted in our factual findings, we credit evidence showing that bargaining was rushed and there was insufficient time for the process to play out. An SEIU witness summed up the situation by observing that the lack of sufficient time before the submission deadline made it too difficult to "actually talk about what our members' concerns were and try to explain to management and see if we could, you know, engage management in a conversation." The 2014 negotiations, then, were entirely antithetical to the MMBA's core purpose of promoting "full communication" between public employers and employees' chosen organizations, through a robust duty to meet and confer in good faith for a reasonable period of time. (MMBA, § 3500, subd. (a).)

For all of these reasons, we find in SEIU's favor on its as-applied challenge.

IV. The Challenged Sections Can be Interpreted in a Lawful Manner

The above facts also raise the possibility that Charter sections A8.409-4(k) and 8A.104(n) are facially invalid, notwithstanding our precedential decisions in *CCSF I* and *CCSF II*, as well as the nonprecedential decision in *SFPOA v. CCSF*. We do not so find. Instead, we build on prior precedent that found the Charter facially valid

because it restricts "the use of the impasse procedure to situations where disputed issues remain unresolved after good faith bargaining," which includes the requirement that negotiations "continue for a 'reasonable period of time.'" (*CCSF I*, *supra*, PERB Decision No. 1890-M, pp. 8 & 9.) To do so, we necessarily answer the questions that prior precedent left open regarding how the Charter should be interpreted in cases such as the instant one.[26] In answering these questions, our focus is to harmonize the Charter with the MMBA. (*Building Material & Construction Teamsters' Union, Local 216*, *supra*, 41 Cal.3d at p. 665; *CCSF IV*, *supra*, PERB Decision No. 2540-M, p. 15, fn. 7.)

As discussed *ante* at pages 35-36, adopting an interest arbitration mechanism does not immunize an employer from ensuring that such procedures comply with the MMBA. Nonetheless, it is important to recognize that the neutral interest arbitrator holds substantial power to make both substantive and procedural rulings, including to direct the parties to schedule further dates for negotiations, mediation, and interest arbitration, both before the submission deadline and as part of any mid-contract reopeners that the arbitrator may find warranted. Such reopener provisions may require mid-contract negotiations and interest arbitration as to certain specified unresolved issues, with the possibility of enhancements that take effect mid-year or are retroactive to any date. The arbitrator may order the parties to include such provisions in their MOU for any number of reasons, including if the arbitrator finds that there was insufficient time for full good faith negotiations or interest arbitration prior to

[26] As noted above, *CCSF I*, *CCSF II*, and *SFPOA v. CCSF* left open future as-applied challenges, including the issue of how to square the submission deadline with the need for adequate time for good faith negotiations.

the submission deadline. This arbitral power has the potential to help keep the parties in compliance with the MMBA.

Our interpretation draws support from the City's argument that the submission deadline does not impose an absolute cutoff on meeting and conferring. Specifically, the City acknowledged to the ALJ that the MMBA imposes a duty to bargain for a reasonable period of time, but the City argued that the submission deadline does "not affect this MMBA mandate in any way," as the Charter does not dictate when negotiations begin, and bargaining can continue even after the parties comply with the submission deadline.

The City is correct that parties can mutually agree to begin bargaining early, but that possibility alone does not necessarily lead to enough time for bargaining given that negotiations are a fundamentally unpredictable process that typically takes more time than anticipated, particularly when complex issues are at stake. For that reason, the more critical aspect of the City's argument is its acknowledgement that negotiations can continue as to certain issues, or resume later, even after the parties submit an MOU by the submission deadline and thereby avoid triggering the penalty provision. The ALJ dismissed this contention as "chimerical," and the City excepted to that finding, arguing that "if the parties fail to reach agreement on certain issues by [the submission deadline], they can agree to continue the meet and confer process on those issues in the body of a timely-submitted successor MOU." "For example," the City continues, "the parties agreed to defer binding interest arbitration to resolve proposals regarding SFMTA Station Agent parking and breakrooms." A City witness

explained that this "was a way to make sure that the MOU got submitted in time, but the parties still had additional time to negotiate" on the two issues.

The City's argument therefore further confirms that the submission deadline is not necessarily a hard cutoff for all bargaining. Rather, when the deadline arrives, the parties can submit an MOU containing any mix of agreed-upon and/or arbitrator-ordered provisions, including language specifying that one or more remaining issues will be subject to later, mid-contract bargaining and interest arbitration, thereby allowing further time for good faith negotiations and impasse resolution as to those issues shortly after the MOU is in place. During such mid-contract negotiations and interest arbitration, enhancements may be agreed upon, or ordered, to be "retroactive to any date" (*SFPOA v. CCSF*, *supra*, slip op., p. 7), because the parties will have satisfied the submission deadline by submitting an MOU as of that date.

Significantly, the opportunity for a neutral arbitrator to order such mid-year or retroactive enhancements, on an equal basis with mid-year cost savings, saves the Charter from being a "one-way ratchet" that unlawfully tilts labor relations toward management's priorities. (*CCSF IV*, *supra*, PERB Decision No. 2540-M, pp. 15-18, affirmed, *CCSF v. PERB*, *supra*, slip op., p. 17.) Should the parties disagree as to whether mid-contract negotiations and interest arbitration are warranted, the arbitrator has the final say, meaning the balance of power is not necessarily tilted to one side or the other. Absent the arbitrator's ability to carve out time for mid-contract negotiations and interest arbitration proceedings, and to order mid-year or retroactive enhancements, the challenged Charter sections would prematurely end negotiations

by a set deadline and would tilt labor relations in the City's favor by disallowing mid-year enhancements while allowing mid-year cost savings.

Thus, the challenged Charter provisions would be facially invalid, but for the necessary interpretation we explain herein: the submission deadline's language merely establishes a cutoff by which the parties must submit those portions of their next MOU that have been agreed-upon or ordered by that date, together with any needed reopener provisions covering those issues that have not yet been fully negotiated or ordered. The parties or the arbitrator may decide that such further negotiations and/or arbitration proceedings are appropriate because there was insufficient time prior to the submission deadline, or because external factors or other arguments suggest that one or more specified terms and conditions of employment should be addressed in the months to follow.[27]

In *SFPOA v. CCSF*, *supra*, the court noted that irrespective of whether parties satisfy the submission deadline, the Charter permits them to continue or resume bargaining at any time, and to agree to enhancements "retroactive to any date." (*Id.*, *supra*, slip op. at p. 7.) The court's non-precedential decision does not explain precisely why this is the case. The most logical way to give meaning to this holding is

[27] In this case, the parties reached that conclusion on their own as to the parking and break room issues. It is not difficult to imagine the parties or the arbitrator taking into account pending legislation potentially impacting employment terms (such as the Affordable Care Act), or likely changes in available revenues or market conditions, and determining that mid-contract proceedings, with the possibility of mid-year changes, would be the most rational and appropriate process. In our discussion *post* at page 49, we give further examples of external factors that might cause the parties or the arbitrator to find such further proceedings to be appropriate.

to note the following two critical principles.[28] First, as discussed above, the penalty provision applies only if parties submit no MOU whatsoever by the submission deadline, meaning the penalty provision has no impact on mid-contract reopener provisions submitted before the deadline. Moreover, even if parties in a future negotiation were to miss the deadline altogether and submit no MOU terms by that date, if MOU terms are ultimately agreed-upon or ordered after the submission date for one year, that is by definition prior to the submission deadline of the next year. We therefore find persuasive the conclusion in *SFPOA v. CCSF*, *supra*, that if parties submit their entire MOU following one fiscal year's submission deadline, the Charter nonetheless allows any or all MOU terms to be retroactive to any date.[29]

In the instant matter, the parties' side letter regarding parking and break rooms well illustrates these principles. As described *ante* at page 19, SEIU and SFMTA signed a side letter providing for mid-contract negotiations over break rooms and parking, ending in interest arbitration if the parties had not reached agreement as of the following February 1, seven months into the new MOU. Testimony left little doubt that providing break rooms and parking spaces to certain employees would cost money. In the words of a management witness, "these stations are like 40 years old.

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[28] We find *SFPOA v. CCSF*, *supra*, to be persuasive to the extent it appears to be consistent with these principles.

[29] Were the City to delay making any required retroactive payments until the following July 1, this would arguably violate the MMBA's prohibition against an unlawful one-way ratchet. Those facts are not before us, however, so we need not decide that issue. Those facts are also unlikely to arise, as most parties are likely to moot out the penalty provision altogether by submitting an MOU by the submission deadline, even if that MOU carves out certain issues for further negotiations and/or arbitration.

A lot of work had to be done. . . ." The parties' side letter indicated that the MOU would be amended to incorporate the result of any subsequent agreement or interest arbitration award on these topics, and the side letter did not require that implementation of such terms await the following fiscal year. The parties thus contemplated the possibility of mid-contract interest arbitration leading to mid-contract and mid-year enhancements having an economic cost. The side letter was not subject to the Charter's penalty provision, because it was part of an MOU submitted by the deadline.

Several discrete strands of Supreme Court precedent also support interpreting the Charter to grant the arbitrator discretion to include in the parties' MOU terms providing for mid-contract negotiations and interest arbitration. First, a city charter's interest arbitration provision must be interpreted to "require arbitration on the full range of negotiable issues." (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 623.) More generally, an arbitrator has broad remedial authority, subject only to any express limitations on that authority. (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 383 (*Advanced Micro Devices*).) Notably, *Advanced Micro Devices* interpreted a provision of the California Arbitration Act, codified in the California Code of Civil Procedure, section 1283.4, and the City's Charter incorporates by reference that Civil Procedure Code section. (Charter, § A8.409-4(c).) The Charter further confirms the arbitrator's substantial authority, authorizing the arbitrator to "adopt

other procedures designed to encourage an agreement between the parties, expedite the arbitration hearing process, or reduce the cost of the arbitration process." (*Ibid*.)[30]

These authorities further confirm that, if warranted, one possible element of an arbitrator's award is to order that the parties' new MOU must include a reopener provision calling for resumed negotiations on certain unresolved issues, plus mid-contract interest arbitration as to those issues in the event there is no agreement, and the possibility that the arbitrator could direct any economic terms to be retroactive to any date. The arbitrator thus can help assure good faith negotiations consistent with the MMBA and the Charter. In some of the more unfortunate possibilities on the continuum of possible circumstances, parties could face shortened time due to a natural disaster in or near San Francisco (earthquake, wildfire, flooding, etc.), an illness of a critical participant or his or her family member, or other such occurrences. However, no such unfortunate circumstances must occur for the parties or an arbitrator to establish such mid-contract proceedings. Rather, the type of mundane reasons the parties cited for establishing mid-contract proceedings—over parking and break rooms—are fully sufficient to lead the parties or the arbitrator to establish appropriate mid-contract proceedings.

Even where there is a plausibly valid interpretation of an employer rule, a facial challenge will still succeed if the rule has a chilling effect on employees or unions or otherwise interferes with or impinges on protected rights even before being applied. (See, e.g., *Los Angeles County Federation of Labor*, *supra*, 160 Cal.App.3d at p. 908.)

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[30] Reflecting this broad authority, the parties' letter to the arbitrator authorized him "to hear any outstanding disputes that may be remaining from negotiations."

There is reason for concern that the challenged Charter sections could have a chilling effect on free and productive negotiations. However, either party can ask the arbitrator to order the parties to devote more time, with or without a slight delay in interest arbitration allowing the parties to negotiate, mediate, and determine whether they are at a legitimate impasse. The arbitrator can also include in the parties' new MOU terms providing for an earlier start date for bargaining in the next cycle, as well as the aforementioned mid-contract negotiations and interest arbitration over any matters for which there may have been insufficient time for negotiations. As noted above, such mid-contract proceedings can lead to new economic or noneconomic terms that are effective mid-year or retroactive to any date.

Thus, while no PERB or court decision could possibly assure any particular date by which the parties will always be at impasse, the neutral interest arbitrator's procedural and substantive decisions can aid in assuring that the parties make good faith efforts to meet and confer as the MMBA requires.[31] Because the parties must comply with the arbitrator's orders, neither has a unilateral right to "run out the clock," for instance by unilaterally refusing to agree to an MOU reopener provision. We therefore find there is no chilling effect only because a neutral third party—the arbitrator—can check the employer and ensure a balanced process.

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[31] With the interest arbitrator's assistance, most parties should be able to submit an MOU by the deadline while assuring adequate opportunity to negotiate (and if necessary, arbitrate) all disputed issues, either before or after the submission deadline, consistent with our explanation in this decision. Failure to do so could lead to allegations of bad faith levied against one party or the other, depending on the circumstances, but any such violation would normally be litigated on an as-applied basis.

For the foregoing reasons, our remedy in this case requires the City, in future negotiations with SEIU, to interpret the Charter consistently with this decision, and to cease and desist from failing or refusing to devote a reasonable and adequate amount of time to good faith negotiations, mediation, and interest arbitration. In the unique circumstances of this case, however, we find that ordering the parties to reopen their 2014 negotiations, or ordering any other retrospective remedy, would not effectuate the MMBA's purposes.[32]

V. Discussion of Waived Defenses

The City waived several defenses by failing to raise them at one or more stages of PERB proceedings. Nonetheless, we briefly address their merits, since they tend to recur repeatedly in cases involving the City's Charter and other agencies' local rules.

First, the City contends that SEIU's charge asks PERB to extend, unlawfully, the City's delegation of authority to an interest arbitrator. This contention, an element of the home rule argument that the City failed to raise before the ALJ, relies on *County of Riverside*, *supra*, 30 Cal.4th at pp. 286-89 and *County of Sonoma*, *supra*, 173 Cal.App.4th at pp. 340-348. Had the City not waived the argument, it would be collaterally estopped by virtue of having litigated and lost the issue before PERB in *CCSF IV*, *supra*, PERB Decision No. 2540-M, p. 17, as well as before the Court of Appeal on review of that decision.

[32] One such retrospective remedy is to order reimbursement of bargaining costs to remedy a party's bad faith. A charging party has the right to file a bad faith bargaining unfair practice charge and seek reimbursement of costs, including but not limited to costs of bargaining, mediation, or interest arbitration. (*City of Palo Alto* (2019) PERB Decision No. 2664-M, p. 8, fn. 6.)

The argument is also substantively untenable. As discussed in *CCSF IV* as well as *ante* at footnote 18, the MMBA addresses a matter of statewide concern, and a local agency's charter or rules accordingly may not undercut or frustrate the MMBA's policies and purposes. (*Boling*, *supra*, 5 Cal.5th at p. 913; *IFPTE*, *supra*, 79 Cal.App.4th at p. 1306; *Huntington Beach Police*, *supra*, 58 Cal.App.3d at pp. 500-502.) In requiring parties to afford sufficient time for good faith negotiation and dispute resolution, and in requiring that an employer's interest arbitration rules do not tilt the playing field toward the employer's priorities, the MMBA therefore provides valid guardrails for local dispute resolution mechanisms.

If a county has not adopted an interest arbitration framework on its own, the Legislature may not require the county to delegate wage determinations to an interest arbitrator, but any interest arbitration mechanism adopted by the county must comply with the MMBA. (See *County of Riverside*, *supra*, 30 Cal.4th at pp. 286-89 [distinguishing a local agency that has voluntarily adopted interest arbitration from one that has not done so].) Notably, *County of Riverside*, as well as *County of Sonoma*, *supra*, 173 Cal.App.4th 322, both involved newly enacted legislation requiring the counties, involuntarily, to adopt an interest arbitration mechanism. Here, in contrast, the City has long since agreed to such an approach, and the MMBA requires that the parties be afforded sufficient time for bargaining and dispute resolution, and that those processes must occur on a balanced playing field. (*CCSF IV*, *supra*, PERB Decision No. 2540-M, p. 17 [noting that the Supreme Court's *County of Riverside* decision, and related precedent, do not bar PERB from ensuring that the City's interest arbitration procedures are fair and neutral].) In other words, given that City voters determined to

amend the Charter to delegate authority to an interest arbitrator, interpreting the Charter to comply with the MMBA does not constitute an unlawful delegation. (See also *Kugler v. Yocum* (1968) 69 Cal.2d 371, 384 [unlawful delegation is found only in exceptional circumstances].)

Turning to the six-month statute of limitations that applies to all unfair practice charges, even had the City not waived this defense, it would bar neither SEIU's facial challenge nor, a fortiori, SEIU's as-applied challenge. As noted in *CCSF III*, *supra*, PERB Decision No. 2536, p. 8, "it is not the 'act' of adopting the policy, but its 'existence' continuing to the time of the hearing that constitutes the offending conduct." *CCSF III* therefore followed the rule set forth in *Long Beach Unified School District* (1987) PERB Decision No. 608, p. 12 (*Long Beach*), namely, that the date an employer adopts or revises a set of regulations has "no legal significance in deciding whether the regulations violate [EERA]," because a rule's continued existence qualifies as a continuing violation.

CCSF III modified two of our prior holdings. *CCSF III* first modified the continuing violation doctrine as explained in *County of Orange* (2006) PERB Decision No. 1868-M (*County of Orange*) and overruled that case to the extent it suggests only interference cases fall within the rule of *Long Beach*, *supra*, PERB Decision No. 608. (*CCSF III*, *supra*, PERB Decision No. 2536-M, pp. 14-15 & fn. 12.) Based on *CCSF III*, the continuing violation doctrine applies to most challenges to local rules, with just one exception: The statute of limitations bars a facial challenge filed more than six months after a new rule is adopted, if but only if a union or employee can violate the rule without risking any adverse consequence, as in that case we require

the union or employee to either bring the facial challenge within six months or else to test the rule and bring its charge within six months after doing so. (*Ibid*.) *CCSF III* also modified *County of Riverside* (2011) PERB Decision No. 2176-M and limited it to its unique facts. Specifically, we held that even in those instances in which the continuing violation doctrine does not apply pursuant to *County of Orange*, a charging party may normally file a charge within six months of any independent instance in which an employer applies a rule. (*CCSF III*, *supra*, PERB Decision No. 2536-M, pp. 15-16) The only exception is in the unusual circumstance in which an employer applied a rule to a set of facts more than six months prior to the union's charge, and the union asserts its charge is timely solely because, within the six-month period, the employer merely reiterated its position as to the same set of facts. (*Ibid*.)

Thus, a charging party timely challenges a local rule by filing a charge within six months of any independent instance in which the employer has applied the rule, or, alternatively, at any time under the continuing violation doctrine, if a union or employee would risk an adverse consequence by violating the rule. These rules make particular sense in the realm of labor relations, because, as a matter of labor policy, it is reasonable to allow bargaining parties the opportunity to operate under a rule and attempt to work out adjustments or accommodations if possible, rather than requiring a charge at the earliest possible stage in response to every rule change.

SEIU's challenge was timely under both theories. First, SEIU risked an adverse consequence under the Charter's penalty provision, should SEIU have missed the submission deadline. Second, SEIU filed its charge early in the 2014 negotiations, just as the City was beginning to apply its Charter provisions. The 2014 negotiations

qualify as an independent application of the Charter, which triggers a new statute of limitations.

Finally, we turn to the doctrines of waiver and laches. Even if the City had not waived these defenses, there is insufficient evidence that SEIU acquiesced to the challenged Charter sections, delayed in bringing the instant challenge, and/or prejudiced the City. We have weighed the available evidence and do not find the City to have met its burden as to any of these factors.

Even if there were greater evidence supporting a waiver or laches defense, we would reject these equitable defenses here as a matter of sound labor relations. When an employer approaches a union to initiate *Seal Beach* negotiations over a proposed ballot measure, the union has little choice but to bargain in an attempt to mitigate potential negative impacts to employees or unions and gain what improvements it can. In doing so, and in concluding those negotiations based upon the best mitigations it can negotiate, a union should not normally be found to have waived its right to later challenge the resulting rules to the extent they violate the MMBA, either facially or as-applied. Such a rule would strongly suggest that no union could or would reach an agreement in *Seal Beach* negotiations, as it would convert such negotiations from their current goal—providing an opportunity for input from employees' chosen representative—to the very different goal of providing the employer with a safe harbor from an otherwise illegal rule. Moreover, as noted above, it is reasonable to allow bargaining parties the opportunity to operate under a rule, see how it works in application, and attempt to work out adjustments or accommodations if

possible, rather than requiring a charge at the earliest possible stage in response to every rule change.

Finally, in this case, SEIU's successful as-applied challenge to the Charter provisions flows naturally and logically from *CCSF I*, *CCSF II,* and *SFPOA v. CCSF,* which upheld the Charter as facially valid only so long as it is interpreted in a manner that permits, rather than frustrates, good faith negotiations. The City has been on notice for over a decade that it must interpret and apply its Charter in such a manner, and it was appropriate for SEIU to have brought the instant case addressing the questions left open in those earlier cases.

ORDER

Based upon the foregoing factual findings and legal analysis, and the entire record in this case, we find that the City interpreted and applied City Charter sections A8.409-4(k) and 8A.104(n) in a manner that: (1) violated MMBA section 3507, subdivisions (a) and (d), as well as PERB Regulation 32603, subdivision (f); (2) violated the City's own rules in violation of PERB Regulation 32603, subdivision (g); (3) denied, and tended to interfere with, the right of employees to participate in an employee organization of their own choosing, in violation of MMBA section 3506, MMBA section 3506.5, subdivision (a), and PERB Regulation 32603, subdivision (a); and (4) denied, and tended to interfere with, SEIU's right to represent employees in their employment relations with the City, in violation of MMBA section 3503, MMBA section 3506.5, subdivision (b), and PERB Regulation 32603, subdivision (b).

Accordingly, pursuant to MMBA section 3509, subdivision (a), we hereby ORDER that the City, its governing boards, and its representatives, including SFMTA, shall, in future negotiations, mediation, or interest arbitration involving SEIU:

A. CEASE AND DESIST from failing or refusing to devote reasonable and adequate time to good faith negotiations, mediation, and interest arbitration; and

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

1. Interpret the City Charter to require good faith negotiations by parties in contract bargaining and impasse resolution procedures.

2. Interpret the City Charter to allow parties to agree, or a mediation/arbitration board to order: (a) that the parties' successor agreement or contract should include reopener language providing for mid-contract negotiations and mid-contract interest arbitration concerning certain specified unresolved economic or non-economic issues; and (b) that any economic or non-economic MOU adjustments resulting from such mid-contract negotiations and/or mid-contract interest arbitration proceedings may commence mid-year or retroactive to any date.

3. Within 10 workdays after this decision is no longer subject to appeal, post at all work locations in the City, where notices to City and SFMTA 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. 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 City and

SFMTA employees in the bargaining units represented by SEIU. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

4. Within 30 workdays after this decision is no longer subject to appeal, notify the General Counsel of PERB, or his or her designee, in writing of the steps taken to comply with the terms of this Order. Continue to report in writing to the General Counsel, or his or her designee, periodically thereafter as directed. All reports regarding compliance with this Order shall be served concurrently on SEIU.

Member Paulson joined in this Decision.

Member Banks' concurrence begins on page 59.

BANKS, Member, concurring: In view of the relevant precedents, I concur with my colleagues' conclusion that Respondent City and County of San Francisco (CCSF) violated the Meyers-Milias-Brown Act (MMBA) by interpreting and enforcing sections A8.409-4(k) and 8A.104(n) of the City Charter (Charter), governing interest arbitration, in a manner that interfered with the statutory rights of Service Employees International Union, Local 1021, and its members. I write separately to renew my concerns with the argument that mandatory interest arbitration in perpetuity is an equitable quid pro quo for the forfeiture of the critical right to strike. Indeed, this case, in combination with several other recent decisions, illustrates my belief, first articulated in my concurrence and dissent in *City & County of San Francisco* (2017) PERB Decision No. 2536-M (*CCSF III*), that the City's mandatory interest arbitration procedure should not be interpreted to forfeit the rights of employees and employee organizations to engage in strike activities.[33]

Because the majority's Decision describes in detail the historical evolution of the City's mandatory interest arbitration procedures, it is unnecessary to repeat it here. However, in summary, it may be observed that, since first mandating its use in 1994, the City has successfully introduced through successive ballot initiatives a host of substantive changes to the original interest arbitration process. Several of these

[33] The holding of *CCSF III* exempts sympathy strikes and unfair practice strikes from the Charter's otherwise broad prohibition on strike activities and suggests "that the City enforces the penalty provisions of its Charter (A8.346) against employees who engage in a lawful primary strike at its peril." (*CCSF III, supra*, PERB Decision No. 2536-M, p. 26, fn. 24.) But in my view, it did not go far enough and should have declared the categorical ban on strikes void in its entirety. (*Id*., concurrence and dissent at p. 48.)

changes resulted in unfair practice charges, the most recent of which we decided in *City & County of San Francisco* (2017) PERB Decision No. 2540-M (referred to here as *CCSF IV*, consistent with the Decision). In that case, it was determined that Proposition G, which amended the Charter to impose, *inter alia*, a heightened "clear and convincing" evidence standard for the arbitration panel to weigh employee organizations' bargaining proposals, constituted an impermissible "one-way ratchet" that substantially disadvantaged employees and their organizations. (*CCSF IV*, *supra*, PERB Decision 2540-M, p. 16, affirmed in relevant part, *City and County of San Francisco v. PERB* (July 22, 2019, A152913).)

In this case, we conclude that the City again misused the voter-backed amendments to its Charter to thwart the purposes of the MMBA. In my view, the City has once more availed itself of the ballot process to introduce new rules to the interest arbitration process, which it then applied in a manner that violated its duty to bargain in good faith. Such machinations call into question the City's commitment to a fair and neutral process for resolving bargaining impasses and promoting labor peace. Indeed, whether referred to as the application of unreasonable local rules or simply bad faith bargaining, this sustained pattern of misconduct suggests the City has converted the whole of the Charter's impasse resolution procedures into a one-way ratchet to confine and limit the effectiveness of collective bargaining. Stated another way, the City has chiseled the original deal that interest arbitration was supposed to represent, while employees and their organizations must always adhere to the Charter's original interdict against the right to strike under pain of termination. Such a

one-way shifting quid pro quo is, in my view, completely inconsistent with our precedent and the animating purposes of the MMBA.

In *CCSF III*, I urged that the Board squarely reject the legal fiction that employees and their organizations could be compelled to forfeit their right to strike in exchange for interest arbitration in perpetuity. (*CCSF III*, *supra*, PERB Decision No. 2536-M, pp. 62-63 [Banks dissenting].) That is, "PERB precedent expressly recognize[es] a qualified, but nonetheless *statutorily-protected* rights of employees and employee organizations to strike," which no public employer can permanently extinguish. (*Ibid.*, italics in original.) I stated there, and reiterate here, my conviction that the City Charter facially and irreconcilably conflicts with the MMBA to the extent it purports to permanently prohibit employees from striking in exchange for mandatory interest arbitration.

In this case, like *CCSF IV*, we are confronted with the reality of this so-called quid pro quo: not only does the City maintain through its Charter the power to extinguish permanently the right of its employees and their organizations to strike and replace that right with the mandatory duty to participate in the interest arbitration process, it also claims the authority to reengineer the arbitration process whenever it sees fit, and without regard to its obligations under the MMBA. While in my dissent in *CCSF III*, I identified the facial illegitimacy of the Charter's permanent forfeiture of the right to strike, I now question whether the City's unlawful application of its evolving interest arbitration procedures undermines the basic legitimacy of the entire quid pro quo bargain.

And while I concur fully in our conclusion that the City violated the MMBA through its application of the newest additions to the increasingly complex Charter rules governing interest arbitration, I remain concerned that the entire quid pro quo scheme is, in theory and practice, an unlawful theft of the basic right to strike.

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-1154-M, *Service Employees International Union, Local 1021 v. City & County of San Francisco*, in which the parties had the right to participate, it has been found that the City and County of San Francisco (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3506, 3506.5, subdivisions (a) and (b), and 3507, subdivisions (a) and (d), as well as PERB Regulation 32603, subdivisions (a), (b), (f) and (g), in the manner in which the City, as well as its San Francisco Municipal Transportation Agency, interpreted City Charter sections A8.409-4(k) and 8A.104(n).

We have been ordered to post this Notice and we will, in future negotiations, mediation, or interest arbitration involving Service Employees International Union, Local 1021:

A. CEASE AND DESIST from failing or refusing to devote reasonable and adequate time to good faith negotiations, mediation, and interest arbitration; and

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

1. Interpret the City Charter to require good faith negotiations by parties in contract bargaining and impasse resolution procedures; and

2. Interpret the City Charter to allow the parties to agree, or a mediation/arbitration board to order: (a) that the parties' agreement or contract should include reopener language providing for mid-contract negotiations and mid-contract interest arbitration concerning certain specified unresolved economic or non-economic issues; and (b) that any economic or non-economic adjustments resulting from such mid-contract negotiations and/or mid-contract interest arbitration proceedings may commence mid-year or retroactive to any date.

Dated: _____ CITY AND COUNTY OF SAN FRANCISCO

By: _____
Authorized Agent

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