STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 18, Charging Party, v. CITY OF GLENDALE, Respondent.	Case No. LA-CE-1254-M PERB Decision No. 2773-M June 28, 2021
GLENDALE CITY EMPLOYEES ASSOCIATION, Joined Party.	

Appearances: Schwartz, Steinsapir, Dohrmann & Sommers by D. William Heine, Attorney, for International Brotherhood of Electrical Workers, Local 18; Liebert Cassidy Whitmore by Adrianna E. Guzman and Amit Katzir, Attorneys, for City of Glendale.

Before Shiners, Krantz, and Paulson, Members.

DECISION

PAULSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions and cross-exceptions to a proposed decision of an administrative law judge (ALJ). The complaint alleged that the City of Glendale violated its Employee Relations Ordinance (ERO), the Meyers-Milias-Brown Act

(MMBA),[1] and PERB Regulations[2] by: failing to recuse the City Manager from consideration of International Brotherhood of Electrical Workers, Local 18's (IBEW) severance petition despite his personal bias against IBEW; denying IBEW's severance petition; and requiring IBEW to demonstrate that its proposed unit of employees was "more appropriate" than the existing unit representing those employees. The City's conduct was also alleged to have interfered with the right of bargaining unit employees to be represented by IBEW and the right of IBEW to represent these employees. Following a formal hearing, the ALJ dismissed the complaint and underlying unfair practice charge.

The Board has reviewed the entire record in this matter and considered the parties' arguments in light of applicable law. We affirm the proposed decision based upon the following findings and discussion.

PROCEDURAL BACKGROUND

On November 2, 2017, IBEW filed the underlying unfair practice charge alleging that the City violated the MMBA, the ERO, and PERB Regulations by denying IBEW's petition to represent a proposed unit of employees in the City's Integrated Waste Management (IWM) Division. The employees in the proposed unit were already represented by the Glendale City Employees Association (Association). IBEW further alleged that the City's adoption of an unreasonable local rule for unit determinations

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

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

and its unreasonable application of that rule violated the MMBA and PERB Regulations.

On February 7, 2019, IBEW withdrew several allegations in the unfair practice charge without prejudice, and PERB's Office of the General Counsel (OGC) issued a complaint on the remaining allegations. On March 4, 2019, the City filed an answer to the complaint. OGC held an informal settlement conference on March 27, 2019, but it was unsuccessful.

On July 29, 2019, the Association filed an application for joinder as a party. On July 31, 2019, the ALJ granted the application.

The formal hearing took place on August 21, 22 and 28, and September 17, 2019. On December 31, 2019, the parties submitted post-hearing briefs.

On February 3, 2020, the Board issued *City of Glendale* (2020) PERB Decision No. 2694-M (*Glendale I*) [judicial appeal pending]. On February 19, 2020, IBEW filed a request to reopen the record to take administrative notice of *Glendale I* and to submit supplemental briefing on the relevance of that decision. The City and the Association opposed the request. On February 21, 2020, the ALJ issued an order denying the request to reopen the record, as *Glendale I* constituted binding precedent for which no administrative notice was necessary, but granting the request for supplemental briefing. On March 4 and 11, 2020, IBEW and the City filed their respective supplemental briefs. The Association did not file a supplemental brief. The ALJ issued a proposed decision on May 12, 2020.

FACTUAL BACKGROUND

The Parties

The City is a "public agency" within the meaning of MMBA section 3501, subdivision (c), and PERB Regulation 32016, subdivision (a). IBEW is an "employee organization" within the meaning of MMBA section 3501, subdivision (a), a "recognized employee organization" within the meaning of MMBA section 3501, subdivision (b), and an exclusive representative within the meaning of PERB Regulation 32016, subdivision (b). IBEW represents a bargaining unit of full-time salaried non-management and non-mid-management electrical, power, and water field operations employees of Glendale Department of Water and Power (GWP).

The Association is an "employee organization" within the meaning of MMBA section 3501, subdivision (a), a "recognized employee organization" within the meaning of MMBA section 3501, subdivision (b), and an exclusive representative within the meaning of PERB Regulation 32016, subdivision (b). It represents a bargaining unit of full-time salaried non-management and non-mid-management general employees of the City, including in the IWM Division of the City's Public Works Department, but excluding GWP.

Employee Relations Ordinance

In 1968, the City adopted an ERO pursuant to its authority under MMBA section 3507, subdivision (a). As relevant here, the ERO provides:

> "Section 7. EMPLOYEE REPRESENTATION UNITS.
>
> "(a) A petition for recognition as the representative of employees in an appropriate employee representation unit may be filed with the City Manager by an employee organization.

“(b) In the determination of appropriate employee representation units, the following factors, among others, are to be considered:

“(1) Which unit will assure employees the fullest freedom in the exercise of rights granted under this Ordinance;

“(2) The community of interest of the employees;

“(3) The history of employee relations in the unit;

“(4) The effect of the unit on the efficient operation of the public service and sound employee relations;

“(5) The effect on the existing classification structure of dividing a single classification among two or more units; and

“(6) No unit shall be established solely on the basis of the extent to which employees in the proposed unit have organized.

“(c) The City Manager shall determine the employee representation unit using the factors set forth in (b) above.”

“Section 8. RECOGNITION OF EMPLOYEE ORGANIZATIONS.

“(a) At the time of seeking recognition as the representative of an employee representation unit, the organization so seeking recognition must file with the City Manager and the City Clerk, the Articles of Incorporation of the organization, if the organization is incorporated; and if the organization is a foreign corporation, it must also file proof of its permission to do business in the State of California. The organization must also file with the City Manager and the City Clerk its Charter and Bylaws . . .

“(b) An organization seeking recognition must, after complying with Section 8(a) above, present to the City Manager proof that the organization represents a simple

> majority of the employees in the employee representation unit, as said unit is determined pursuant to Section 7 above."

IBEW's Severance Petition

On March 31, 2017, IBEW filed a "Petition to City Manager for Recognition of International Brotherhood of Electrical Workers, Local 18 (AFL-CIO) as the Exclusive Representative of Integrated Waste Employees" (Petition). IBEW sought to represent a unit of approximately 56 employees consisting of all full-time, non-management and non-mid-management and non-supervisory positions or classifications in the IWM Division of the City's Public Works Department. The classifications to be included in the unit were Integrated Waste Driver, Integrated Waste Worker, Maintenance Worker, and Motor Sweeper Operator. Together with its Petition, IBEW provided 46 signed authorization cards as proof of majority support. The cards read:

> "I, the undersigned employee of the City of Glendale, no longer desire to be represented by the Glendale City Employees Association and hereby declare my support for the decertification of GCEA as my exclusive representative in the current bargaining unit. I hereby authorize International Brotherhood of Electrical Workers, Local 18 to become my exclusive representative for purposes of meeting and conferring with my employer, the City of Glendale, over wages, hours and all other terms and conditions of my employment and representing me in all matters of employer-employee relations."

Response from the Director of Human Resources

On May 19, 2017, Matthew Doyle, the City's Director of Human Resources, issued a statement regarding the Petition. The statement referenced the fifth unit determination factor, the effect on the existing classification structure of dividing a single classification among two or more units. Doyle stated that one of the four

classifications IBEW petitioned to represent, Maintenance Worker, was "a generic classification, which performs more of a support or ancillary role, rather than a 'core mission' function of the Integrated Waste Management Division." Doyle further stated that multiple City departments used the Maintenance Worker classification, noting that only two of the six then-filled Maintenance Worker positions in the City were in the IWM Division. With this in mind, he concluded that "the adverse effect and the City-wide morale problems will be greater if employees, not working side-by-side, but performing the same or a similar set of duties in another department are compensated differently solely because they are represented by a different bargaining unit." Doyle therefore recommended against inclusion of the Maintenance Worker classification in the proposed unit.

Response from the Association

On May 29, 2017, the Association filed an opposition to the Petition. The Association contended that its general employees unit was the most appropriate unit for the four classifications IBEW sought to sever, primarily because the Public Works Department included four other divisions whose employees were all represented by the Association. In analyzing the unit determination criteria under the ERO, the Association argued that severing the four classifications would create two competing bargaining units not only within the Public Works Department, but also within the IWM Division. The Association requested that the City deny the Petition.

The Hearing and City Manager's Determination

On June 1, 2017, City Manager Scott Ochoa held a hearing on the Petition at which representatives for IBEW, the Association, and the City were present. Legal

counsel for Ochoa in his capacity as City Manager also attended.[3] On June 23, 2017, IBEW and the Association filed post-hearing briefs.

Ochoa issued his decision denying the Petition on July 24, 2017, finding that "the unit proposed by IBEW is not an appropriate unit." Under the heading "Unit Determination Criteria," Ochoa analyzed each of the six unit determination criteria in the ERO before ultimately denying the Petition, concluding: "Accordingly, because IBEW has not demonstrated that its proposed unit is more appropriate than the existing unit, the petition is denied."

The City's Alleged Bias Against IBEW

IBEW alleged that the City was biased in its handling of the Petition, based on the following history between the parties.

1. Facts from *Glendale I*

On November 24, 2010, IBEW submitted a petition seeking to sever approximately 54 GWP classifications from the bargaining unit represented by the Association. (*Glendale I*, *supra*, PERB Decision No. 2694-M, p. 8.) On April 18, 2011, the City formally recognized IBEW as the exclusive representative of the new GWP Unit. (*Ibid*.)

Bargaining for a first contract between IBEW and the City commenced in June 2011 and continued through the summer of 2012. (*Glendale I*, *supra*, PERB Decision No. 2694-M, p. 8.) It proved to be contentious, as well as unsuccessful, leading to frustration that was expressed in e-mail messages between City managers during and

[3] Ochoa was City Manager of Glendale from January 2012 through November 2017.

after the lengthy negotiations process. (*Id*. at p. 25.) For example, Doyle referred to IBEW supporters as "bums," described their presence at City Council meetings as a "mob," and characterized the union's tactics as "thuggery." (*Ibid*.) Ochoa said of IBEW that "[t]he rattlesnake commits suicide." (*Ibid*.)

In Fall 2012, the City decided to lay off all employees in one IBEW-represented classification and to assign the work performed by those employees to outside contractors and City employees not represented by IBEW.

In April 2013, GWP management was considering a cross-training program for IBEW-represented electrical employees, but electrical employees resisted the idea. GWP General Manager Steve Zurn suggested laying off two employees, one of whom had been a member of IBEW's bargaining team, and having other IBEW-represented employees "pick up the slack." (*Glendale I*, *supra*, PERB Decision No. 2694-M, p. 28.) Ochoa responded:

> "Hard pill to swallow. But I think we continue to smile until we implement [terms and conditions of employment]. They want to bait us into an action that they can point to as [a] basis for retaliation, a TRO on the implementation, etc.
>
> That said, we need to organize all of this bullshit into a single narrative that we can use for Council. I think the complete body of subversive activity gets drowned out by the [meet and confer] issues. Especially for the new councilmember, we need to be able to tell a complete and concise story."

(*Id*. at p. 29.)

On May 7, 2013, at a regular meeting of the City Council, Doyle presented a resolution to impose new terms on the IBEW bargaining unit. Following public comment, Ochoa made a statement to the Council that IBEW was "a group that has

heard only that what it wants to hear" and that "the philosophy of 'I've got mine' is that which seeks to destroy those cities that are otherwise the 88 municipal corporations of Los Angeles County." By contrast, according to Ochoa, "all of our other association groups . . . have sought to make sure the City remains a viable ongoing concern for the community."

Following a lengthy hearing and proposed decision by an ALJ, the Board held that the City had declared impasse prematurely (*Glendale I*, *supra*, PERB Decision No. 2694-M, pp. 60-63), that it thereafter engaged in bad faith conduct amounting to a refusal to bargain (*id*. at pp. 63-67), and that it had imposed terms of employment that could not have been lawfully imposed even following a legitimate, bona fide impasse (*id*. at pp. 70-71). The Board further held that the City violated its obligation to bargain by unilaterally contracting out and transferring work previously performed by IBEW-represented employees. (*Id*. at pp. 36-55.) Most significantly in the present context, the Board concluded that anti-union animus was at least one motivating cause of the City's decision to contract out and transfer traditional bargaining unit work:

> "Like the ALJ, we find that animus against protected activity was at least a motivating factor for the City's [layoff] decision. In reaching this conclusion, we consider all of the facts recounted above, including numerous statements by managers demonstrating anti-union animus and indicating that employees should blame themselves and their union for having caused the layoff."

(*Id*. at pp. 57-58.)

2. 2013 Severance Petition

On June 18, 2013, the Glendale Power Association (GPA), by its own description "a self-governing unincorporated association," filed a petition for

recognition with the City. The GPA sought to represent 21 employees in a proposed unit consisting of four classifications: Power Plant Control Operator, Power Plant Control Operator Apprentice, Power Plant Operator, and Power Plant Auxiliary Operator. At the time, IBEW represented the employees in the stated classifications. GPA attached 18 "interest cards" as proof of majority support in the proposed unit.

On July 24, 2013, Ochoa held a hearing on the petition at which representatives for GPA and counsel for IBEW were present. This was Ochoa's first unit determination hearing and decision. Prior to the 2013 hearing, he had not received any training in making unit determinations, nor had he reviewed any of the City's prior unit determinations. The ERO does not prescribe any rules for conducting such hearings.

Both at the 2013 hearing on GPA's petition and at the PERB hearing in the instant matter, IBEW argued that GPA's petition was procedurally deficient on several counts. First, GPA's petition failed to include GPA's charter as required by the ERO for an organization seeking recognition as the representative of a bargaining unit. Second, GPA's bylaws did not identify GPA as an "employee organization," which the City's ERO defines as "any lawful organization which includes employees of the City and which has as one of its primary purposes representing such employees in their employment relations with the City." Instead, GPA's bylaws stated: "[t]he Glendale Power Association, serving the employees of the City of Glendale California, is committed to working together to achieve a better working environment for its employees while working together with management to benefit the City of Glendale California" and "[t]he purposes for which we have formed this Association are to promote any issue that would improve the general welfare of all City employees" and

"to have an active role in the collective bargaining process." Third, GPA did not present proof to the City Manager that it represented a simple majority of employees in the proposed unit as required by the ERO. Rather, the "interest cards" GPA filed with its petition stated only: "I am interested in joining the Glendale Power Association (GPA)."

Furthermore, IBEW asserted that the manner in which Ochoa conducted the 2013 hearing demonstrated his bias against IBEW. First, at the 2013 hearing, IBEW's counsel asked Ochoa whether "the Chair [Ochoa] believes he will be impartial in this determination." Ochoa's counsel interjected that "[t]he Chair need not answer questions such as that." IBEW's counsel then moved for Ochoa to be disqualified from conducting the hearing. Ochoa did not rule on the motion and instead determined that the hearing should move forward. Ochoa stated that IBEW's counsel would be given an opportunity to address him "as to the appropriateness of this particular hearing." After IBEW's counsel objected, Ochoa told him to sit down. IBEW's counsel added: "I think you are biased in this proceeding and cannot act in this position." IBEW's attorney renewed this objection again later in the hearing.

After a representative for GPA had begun to make a statement in support of GPA's petition, IBEW's counsel argued that the representative was testifying and asked that he and other witnesses be put under oath. Ochoa denied the request, commenting that "[t]his is not a court of law."[4] Ochoa again asked IBEW's counsel to be seated.

[4] At the PERB hearing in the instant matter, Ochoa described the conduct of unit determination hearings as a "very loose and informal process."

Also during the 2013 hearing, Ochoa asked a GPA representative, "Tell me a little bit more about the issues relating to the similarity of the services that are provided by the classifications in the group that you hope to represent and why that is distinct from IBEW." When IBEW's counsel objected to the line of questioning as leading, Ochoa told IBEW's counsel that he would ask him the same question. At the PERB hearing below, Ochoa explained that he "was trying to help [the GPA representative] articulate what he was intending to communicate," but he was "[n]ot trying to goad him into one direction or another."

Later during the 2013 hearing, IBEW's counsel asked Ochoa if he would be given an opportunity to ask questions of GPA's witnesses. Counsel for the Chair said no.

Still later during the same hearing, Ochoa asked a GPA witness: "Is there any interest in moving back to [the Association]?"[5] Following repeated objections by IBEW's counsel to this question as irrelevant, and repeated attempts by Ochoa to move past those objections, the GPA witness answered that he did not believe there was any such interest.

Following GPA's unit determination hearing, GPA and IBEW filed post-hearing briefs. On October 4, 2013, Ochoa denied GPA's petition. After an "Introduction" and a section summarizing the "July 24, 2013 Hearing," Ochoa concluded under the heading "Unit Determination": "After reviewing and considering all the information submitted in this matter, it is my decision that the unit proposed by GPA is not an appropriate unit."

[5] The classifications that GPA sought to represent had been formerly represented by the Association before they were placed in IBEW's bargaining unit.

Under the heading “Unit Determination Criteria,” he then analyzed the six factors listed in the City’s ERO. Finally, under the heading “Conclusion,” Ochoa stated: “Accordingly, because GPA has not demonstrated that its proposed unit is more appropriate than the existing unit, GPA’s Petition for Recognition is denied. This determination renders moot the other issues IBEW raised in its post-hearing brief in opposition to GPA’s petition, and thus, those other positions need not and shall not be addressed in this determination.”

3. 2017 Severance Petition

At the PERB hearing below, IBEW presented evidence in support of its allegation that Yasmin Beers, Ochoa’s successor as City Manager, was biased against IBEW and that her bias affected the City’s handling of IBEW’s Petition.

At the time of the hearing on IBEW’s Petition, Beers was Assistant City Manager. She became interim City Manager in November 2017, and the City appointed her as City Manager in February 2018. Beers attended but did not participate in the June 1, 2017 hearing on the Petition. Ochoa did not consult with Beers or receive any input from her regarding his decision on the Petition.

In November 2018, Beers held a meeting in her office with Assistant City Manager Roubik Golanian and two employees in the IWM Division, Ignacio Saavedra and Jason Mercado. Golanian was present at the meeting for approximately 45 minutes, but left toward the end of the meeting at Saavedra’s request. The ALJ made a credibility determination that, during the meeting, Beers stated that she did not want IBEW to represent employees in the IWM Division. However, the ALJ did not credit

Saavedra's testimony regarding similar statements Beers allegedly made to him in 2017 and early 2018.

DISCUSSION

The Board resolves exceptions to a proposed decision using a de novo standard of review. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5; *Hartnell Community College District* (2018) PERB Decision No. 2567, p. 3.) Under this standard, we review the entire record and are free to make different factual findings and reach different legal conclusions than those in the proposed decision. (*Eastern Municipal Water District* (2020) PERB Decision No. 2715-M, p. 7.) However, to the extent that a proposed decision adequately addresses issues raised by certain exceptions, the Board need not further analyze those exceptions. (*City of San Ramon*, *supra*, PERB Decision No. 2571-M, p. 5.) The Board also need not address alleged errors that would not impact the outcome. (*Ibid*.)

I. Timeliness of IBEW's Exceptions

As an initial matter, the City argues that we should reject IBEW's exceptions for untimeliness. A party may file with the Board a statement of exceptions to a proposed decision within 20 days following the date of service of the decision. (PERB Reg. 32300, subd. (a).) The statement of exceptions or supporting brief must state the specific issues of procedure, fact, law or rationale to which each exception is taken; identify the page or part of the decision to which each exception is taken; designate by page citation or exhibit number the portions of the record, if any, relied upon for each exception; and state the grounds for each exception. (*Id*., subds. (a)(1)-(4).)

The ALJ issued his proposed decision on May 12, 2020. Pursuant to PERB Regulation 32300, subdivision (a), any exceptions to the proposed decision were due by June 1, 2020. IBEW subsequently requested and received four extensions of time to file its exceptions, and the Appeals Office ultimately set June 30, 2020, as the new due date. On June 30, 2020, at 5:20 p.m., IBEW electronically filed its statement of exceptions, supporting brief, and request for official notice.[6]

Because IBEW filed its papers after the 5:00 p.m. close of business on June 30, 2020, PERB deemed them filed the next business day, July 1, 2020, pursuant to extant PERB Regulations.[7] (*City of San Gabriel* (2020) PERB Decision No. 2751-M, p. 15, fn. 13.) Because the Appeals Office served its letter granting IBEW a fourth extension of time via U.S. Mail, the time for responsive filings was extended by five days to July 5, 2020. (PERB Reg. 32130, subd. (c).) Since July 5, 2020 was a Sunday, the last day for filing was extended to Monday, July 6, 2020. (*Id*., subd. (b).) IBEW's

[6] The request for official notice contained a copy of *Glendale I* and copies of local ordinances from seven different localities. The notice did not set forth IBEW's reasons for the request. However, in its supporting brief, IBEW stated, "In apparent recognition of the inherent institutional bias that already exists when a local government agent makes unit determinations, some local agencies assign the responsibility for making the unit determinations to a neutral person or body."

[7] Subdivision (f) of PERB Regulation 32110, as added effective February 15, 2021, allows filers to electronically file a document through e-PERB at any time. Documents filed after 11:59 p.m. on a business day, or at any time on a non-business day, will be deemed filed the next regular PERB business day. A 5:00 p.m. deadline still applies, however, to documents filed under PERB Regulation 32450, subdivision (a), and OGC has full discretion to set deadlines for other injunctive relief filings under PERB Regulation 32455.

exceptions thus were timely despite being deemed filed on July 1, 2020, instead of June 30, 2020.

On July 8, 2020, IBEW filed a "Notice of Errata Re: Charging Party's Statement of Exceptions and Brief in Support of Exceptions," "[Corrected] Statement of Exceptions to Proposed Decision," and "[Corrected] Charging Party's Brief in Support of Exceptions to ALJ's Proposed Decision." In the brief supporting IBEW's errata, IBEW's counsel claimed that he was "unable to complete checking, correcting and inserting citations and cross references and adequately proofread the documents for typographical, spelling and other errors" due to the "length and the extraordinary number of citations" in IBEW's statement of exceptions and brief "filed on June 30, 2020." IBEW's counsel stated that he was filing corrected versions "to ensure that the Board is able to locate in the record the testimony and exhibits cited and discussed in the Statement of Exceptions and Brief" but "[n]one of these changes affect the substance of these documents." Attached to the notice were IBEW's corrected Statement of Exceptions with changes tracked in redline and its original brief.

IBEW's "corrected" filings were not timely because they were filed after July 6, 2020. And IBEW presents us with no good cause to excuse its late filing. (See *City and County of San Francisco* (2021) PERB Decision No. 2757-M, p. 9 ["In general, good cause to excuse a late filing exists where the delay is of short duration and based on circumstances that were either unanticipated or beyond the party's control"].) While PERB Regulations do not establish a right to file "corrected" documents after the due date, that is inconsequential here as IBEW's corrected exceptions do not substantially aid our review of the proposed decision in any event.

Rather, IBEW largely reiterates arguments the ALJ addressed, often without citing to the record as required by PERB Regulation 32300, subdivision (a). Thus, we consider IBEW's corrected exceptions only to the extent they include record citations that assist our review.[8]

II. Facial Challenge to the ERO

The proposed decision found that IBEW waived the issue of whether the ERO was facially unreasonable.[9] The ALJ's finding was based upon the following exchange at the PERB hearing:

> "MS. GUZMAN: In discussing your ruling on the subpoena duces tecum, you mentioned something that I just want to double-check. You mentioned that the hearing was going to be about the reasonableness of the City's rules. And I had understood that that portion of the unfair practice charge was withdrawn from the –
>
> "ADMINISTRATIVE LAW JUDGE ROHRBACHER: You're right. And I mean, there is an earlier decision by this Board that declared those rules reasonable. I'm well aware of this. I just gave you the normal standard –
>
> "MS. GUZMAN: Okay.
>
> "ADMINISTRATIVE LAW JUDGE ROHRBACHER: -- that is applied. But you're quite correct that, unless, I mean, you know, you can argue otherwise, but it seems to me that the

[8] The City argues that several of IBEW's corrections are prejudicial because "they require the City to consider and potentially respond to two sets of exceptions." Given that the City itself requested and received three extensions of time to file its response to IBEW's exceptions, and ultimately provided a single response to each exception, whether corrected or not, we find the City's argument unconvincing.

[9] In addition, the ALJ found that IBEW arguably waived the issue much earlier, in 2017, by failing to raise it at any time during the hearing on the Petition.

> reasonableness of the City's rules indeed isn't before me. Is that correct, Mr. Heine?
>
> "MR. HEINE: No, I think they are. The reasonableness of the way he conducted the hearing –
>
> "ADMINISTRATIVE LAW JUDGE ROHRBACHER: That is correct, but –
>
> "MR. HEINE: There's the application of the rules.
>
> "ADMINISTRATIVE LAW JUDGE ROHRBACHER: The application of the rules is very much at issue. But the reasonableness of the rules in theory or on paper –
>
> "MR. HEINE: You're talking about Section Seven of the EERO.
>
> "ADMINISTRATIVE LAW JUDGE ROHRBACHER: Exactly, exactly.
>
> "MR. HEINE: No, that is not at issue.
>
> "ADMINISTRATIVE LAW JUDGE ROHRBACHER: Right, so I misspoke and created confusion. I apologize for that. But you're quite right."

IBEW claims that the ALJ's question and its counsel's response were ambiguous, and that its counsel's statement could "only reasonably be taken as a reference" to ERO Section 7, subdivisions (b)(1)-(6), which list the unit determination factors and was the subject of the earlier decision the ALJ referenced above, not ERO Section 7, subdivision (c), which vests the City Manager with the authority to make unit determinations. However, we need not decide if IBEW clearly waived any facial challenge to the ERO because IBEW has not established such a violation.

To prevail in a facial challenge, a charging party must at a minimum show that a local rule conflicts with the MMBA "in the generality or great majority of cases." (*City and County of San Francisco* (2020) PERB Decision No. 2691-M, p. 22 [judicial appeal pending].) Toward that end, IBEW argues that the City's ERO is unreasonable because it appoints the City Manager, an "agent of the City compelled to act in the interest of the City," to make unit determinations. IBEW's argument misses the mark.

MMBA section 3507, subdivision (a) authorizes public agencies to "adopt reasonable rules and regulations after consultation in good faith with representatives of a recognized employee organization or organizations for the administration of employer-employee relations." (*Ibid*.) The rules and regulations may include provisions for, among other things, recognition of employee organizations. (*Id*., subd. (a)(3).) Unit determinations must be handled and processed in accordance with rules adopted by a local public agency. (*Id*., § 3507.1, subd. (a).)[10]

Contrary to IBEW's bare claim, nothing in the MMBA's statutory language expressly or impliedly prohibits agency employers from making unit determinations. Well before PERB assumed jurisdiction over the MMBA in 2001, local agencies were authorized to make initial determinations as to the appropriateness of bargaining units. (*Covina-Azusa Fire Fighters Union v. City of Azusa* (1978) 81 Cal.App.3d 48, 60.) The standard then, as now, is whether such a determination is reasonable. (*Reinbold v.*

[10] The MMBA is one of three statutes PERB administers that empower local agencies to adopt reasonable rules and regulations for recognition of employee organizations. (See §§ 3507, subd. (a); 71636, subd. (a) [Trial Court Employment Protection and Governance Act]; 71823, subd. (a) [Trial Court Interpreter Employment and Labor Relations Act].)

City of Santa Monica (1976) 63 Cal.App.3d 433, 440; *Santa Clara Valley Water District* (2017) PERB Decision No. 2531-M, pp. 10-11.) The mere fact that a local rule allows for a local agency's agent or governing board to have the final authority on representation issues does not make the rule unreasonable. (*County of Orange* (2010) PERB Decision No. 2138-M, pp. 13-14; *County of Ventura* (2009) PERB Decision No. 2067-M, p. 12; *County of Monterey* (2004) PERB Decision No. 1663-M, p. 10.) Thus, the ERO does not facially violate the MMBA merely by vesting the City Manager with the authority to process and hear unit determination petitions.[11]

For the same reason, we reject IBEW's corollary contention that the Board should apply a heightened level of scrutiny to a local agency employer's unit determination when an agent of the employer oversees the recognition process. IBEW presents no authority for that proposition, nor have we found any. Inherent in IBEW's argument is the assumption that unit recognition petitions are fundamentally adverse to the interests of an employer, and that PERB therefore must presume a likelihood of bias if an employer vests its agent with authority to adjudicate such issues. We operate under no such presumption, however, and instead find bias or unlawful motive only where the record proves it by a preponderance of the evidence. (See, e.g., *Salinas Valley Memorial Hospital District* (2020) PERB Decision No. 2689-M, p. 33

[11] Because the MMBA's structure leaves no doubt that ERO Section 7, subdivision (c) is facially valid, we deny as irrelevant IBEW's request for official notice of selected other entities' local rules regarding unit determinations under the MMBA.

[judicial appeal pending] [record showed that in considering unit appropriateness issue, employer did not act in good faith].)[12]

In sum, for over four decades the MMBA has permitted local agencies, and by extension their agents such as employee relations officers and human resources managers, to preside over unit determinations pursuant to their own reasonable local regulations. That statutory authority remains intact. We thus reject IBEW's facial challenge.

III. Ochoa's Alleged Bias

As part of its as-applied challenge, IBEW contends that Ochoa demonstrated personal bias against IBEW in prior dealings and therefore should have recused himself from considering the Petition. The ALJ found that IBEW did not establish the merits of this claim and also arguably waived it by not raising it at any time during the Petition proceedings in 2017. Although the ALJ incorrectly analyzed the merits of the claim, we ultimately dismiss the claim on waiver grounds.

Beginning with the waiver analysis, we find that IBEW should have requested before or during the 2017 unit determination hearing that the City replace Ochoa or

[12] For the reasons stated in Member Shiners' dissent in *Salinas Valley Memorial Hospital District*, *supra*, PERB Decision No. 2689-M, he would continue to follow long-standing precedent holding that a public agency's subjective intent is irrelevant in deciding whether a local rule is reasonable on its face or as applied. (*Id*. at pp. 46-47 (dis. opn. of Shiners, M.); *City and County of San Francisco* (2017) PERB Decision No. 2540-M, p. 23 & fn. 14.) He recognizes, however, that a local rule granting a particular agency officer authority to make unit determinations may be unreasonable as applied when the officer is biased against one of the parties. Member Shiners accordingly joins in the discussion, *post*, of whether Ochoa's alleged bias rendered ERO Section 7, subdivision (c) unreasonable as applied here.

that he recuse himself from hearing the Petition. Courts have routinely held that a party must move for recusal at a hearing itself to preserve any such claim on appeal. (See, e.g., *People v. Cowan* (2010) 50 Cal.4th 401, 455 [defendant forfeited any claim that judge was prohibited from ruling on a motion after he recused himself from the case where defendant affirmatively sought a ruling from the recused judge and did not object to the judge's ruling on the motion]; *People v. Flinner* (2020) 10 Cal.5th 686, 712 [defendant waived his appellate claim that trial judge was biased against him as he failed to request the judge's recusal at the trial below].) Similarly, as the ALJ noted, we have found that a party's failure to request recusal of a Board agent at the outset of the investigation of an unfair practice charge resulted in waiver of the issue on exceptions before the Board. (*County of Riverside* (2014) PERB Decision No. 2360-M, pp. 28-29.) We have found the same to be true of a party's failure to move for recusal of a Board member upon filing of its exceptions. (*County of Tulare* (2016) PERB Decision No. 2461a-M, pp. 3-4.) The core principle is that "[e]vidence of bias or any lack of neutrality by PERB, its ALJs or any of its agents should be brought to the attention of the Board immediately." (*Hacienda-La Puente Unified School District* (1997) PERB Decision No. 1186, p. 11.)

In the instant case, IBEW had several opportunities after it filed its Petition to move for the City to replace Ochoa or to ask Ochoa to recuse himself: for instance, when it submitted its pre-hearing brief to Ochoa on March 19, 2017, participated in the unit determination hearing on June 1, 2017, or submitted its post-hearing brief to Ochoa on June 23, 2017. Unlike the 2013 hearing on GPA's severance petition, during which IBEW's counsel moved for Ochoa's recusal, IBEW inexplicably failed to make

the same request during the 2017 hearing on its Petition, which would have been the most logical time to do so. Instead, IBEW argued for the first time at the PERB hearing that Ochoa's bias disqualified him from considering the Petition. IBEW claims that it would have been futile to move for Ochoa's recusal at the 2017 hearing because Ochoa denied IBEW's similar request at the 2013 hearing on GPA's petition. The 2013 events standing alone are not sufficient to establish futility, and IBEW therefore should have afforded the City an opportunity to address the issue and, in doing so, preserve its position that the City was unreasonably applying its ERO by letting Ochoa decide the appropriateness of the petitioned-for unit.

Although we reject IBEW's exception on procedural grounds, we exercise our discretion to address the substance of IBEW's claim to provide guidance to the labor-management community. We agree with IBEW's assertion that the ALJ wrongly presumed Ochoa's bias was extinguished by the passage of time. In the absence of Board precedent on this issue, the ALJ analogized to Board decisions addressing retaliation claims—specifically, when temporal proximity between protected activity by an employee and allegedly retaliatory conduct by an employer can constitute evidence of a causal connection between the two. The ALJ concluded that evidence of Ochoa's bias from 2013 was "too remote in time" to prove that Ochoa was still biased against IBEW four years later when he conducted IBEW's unit determination hearing and rendered the decision on IBEW's Petition.

In the context of retaliation allegations, the Board has found that "proximity in time between the protected activity and the adverse action goes to the strength of the inference of unlawful motive, but is not determinative by itself." (*Regents of the*

University of California (UC Davis Medical Center) (2013) PERB Decision No. 2314-H, p. 12.) We recently elaborated on the timing nexus in the following way:

> "We therefore continue to reject any bright line finding that certain time lags are so remote that timing alone could defeat a retaliation claim, irrespective of the other evidence. Indeed, even where an employee engages in protected activity for 'a long period of time without incident,' such timing does not necessarily undercut the employee's claim. This may be true, for instance, because there may not be 'a single triggering event,' and animus may instead build over time. More to the point in these circumstances, management had no opportunity to choose between [charging party] and other promotional candidates until well after he began engaging in protected activity. Where a realistic possibility of discrimination does not arise soon after protected activity, the timing factor has less relevance."

(*City of Santa Monica* (2020) PERB Decision No. 2635a-M, pp. 46-47, internal citations omitted.) We find it logical to view timing with respect to bias allegations in the same manner, i.e., the timing nexus exists on a continuum, such that no particular amount of time is dispositive for a finding of bias. In other words, we agree with the ALJ's decision to analogize to our precedent on retaliatory animus, but we disagree with the ALJ's statement that a four-year gap is necessarily too long for animus or bias to remain, especially given that the Board has recognized that management's first opportunity to act out of animus may not come for a significant period of time. (*Id*. at p. 47.)

Therefore, absent IBEW's waiver, it would have been appropriate for the ALJ to weigh all the evidence as to whether Ochoa demonstrated a "clear disposition" against IBEW (*Children of Promise Preparatory Academy* (2013) PERB Order No. Ad-402,

p. 20), including but not limited to: (1) Ochoa's April 2013 statement to Zurn and other managers referring to IBEW's actions as "subversive activity" (*Glendale I*, *supra*, PERB Decision No. 2694-M, p. 29); (2) Ochoa's May 2013 statement at a City Council meeting singling out IBEW and stating that other unions, unlike IBEW, "have sought to make sure the City remains a viable ongoing concern for the community;" (3) Ochoa's remark that a "rattlesnake commits suicide," referring to IBEW (*id*. at p. 25); and (4) Ochoa's question to a GPA witness during the 2013 severance petition hearing, "Is there any interest in moving back to [the Association]?" We decline to remand to the ALJ, however, given that IBEW waived its bias claim.

IV. Application of the ERO's Unit Appropriateness Criteria

IBEW argues that the City applied the ERO's unit appropriateness criteria in an unreasonable manner to deny its Petition.[13] We disagree, as we explain further below. While a severance petitioner has the burden of proving its proposed unit is an "appropriate unit," it need not demonstrate that its proposed unit is "the ultimate unit or the most appropriate unit." (*City of Lodi* (2010) PERB Decision No. 2142-M, adopting proposed decision at p. 10, citing *Alameda County Assistant Public Defenders Assn. v. County of Alameda* (1973) 33 Cal.App.3d 825, 830; *County of Orange* (2016) PERB Decision No. 2478-M, adopting proposed decision at p. 8.) Most importantly, however,

[13] The City argued in its post-hearing brief and exceptions that the reasonableness of Ochoa's determination was not at issue in the PERB hearing as it was not an issue identified in the complaint, and IBEW did not move to amend the complaint. We disagree. The complaint alleged, inter alia, that "Respondent, acting through City Manager Ochoa, issued a decision denying Charging Party's severance petition" and that such conduct was inconsistent with ERO Section 7. This allegation goes to Ochoa's denial of the Petition, as well as his role in processing it.

a severance petitioner must show that the proposed unit has a community of interest "separate and distinct" from other employees in the existing bargaining unit. (*City of Lodi*, *supra*, PERB Decision No. 2142-M, adopting proposed decision at p. 10.)[14]

In addition, when PERB evaluates a public agency's unit determination under its local rules, our inquiry is limited to whether the agency's determination was reasonable, provided the determinations conform to the MMBA and the employer's local rules. (*County of Orange*, *supra*, PERB Decision No. 2478-M, p. 13 & adopting proposed decision at p. 8; *City of Glendale* (2007) PERB Order No. Ad-361-M, p. 6; see also MMBA, §§ 3507 subds. (a)(1), (a)(3), 3509 [powers of Board include to adopt rules to apply in areas where a public agency has no rule]; PERB Reg. 61000 [Board will conduct representation proceedings only where a public agency has not adopted local rules].) The party challenging a unit determination has the burden of demonstrating the decision was not reasonable. (*City of Glendale*, *supra*, PERB Order No. Ad-361-M, p. 5.)

In *City of Livermore* (2017) PERB Decision No. 2525-M, two employees represented by an incumbent union filed a "request for modification of an established representation unit" with the city manager pursuant to the city's employer-employee

[14] When the existing bargaining unit was certified by PERB, the severance petitioner must also show that the proposed unit is "more appropriate" than the existing unit. (*Los Rios Community College District* (2018) PERB Decision No. 2587, p. 2 (*Los Rios*); *State of California (Department of Personnel Administration)* (1990) PERB Decision No. 794-S, p. 7; compare *San Diego Community College District* (2001) PERB Decision No. 1445, p. 8 [when the current unit configuration was established voluntarily by the parties, "the standard against which the requested unit modification is judged is whether the proposed unit is an appropriate unit"].)

relations resolution. Although the petition was actually one for severance rather than modification, the city manager processed it based on his erroneous belief that it had the incumbent union's support. The city manager later issued an initial response to the petition in which he proposed a different unit. (*Id*., adopting proposed decision at p. 4.) After multiple members of the incumbent union objected to the city manager's proposed unit, the city manager issued a final determination denying the severance petition, but without any explanation or analysis of how he reached his decision. The Board held that the employer unreasonably applied its local rules by failing to provide written findings regarding the evidence it considered in making its determination to deny the petition. (*Id*., adopting proposed decision at p. 48 ["it is not sufficient for the City to simply state the standard that applies and then provide a conclusion without also including the analytical process in its decision"].) As a remedy, the Board remanded the matter to the city to make written findings and provide sufficient analysis for PERB to determine whether the required standard was reasonably applied. (*Id*., adopting proposed decision at p. 56.)

Contrary to IBEW's argument that the City's unit determination decision was conclusory like that in *City of Livermore*, *supra*, PERB Decision No. 2525-M, we find that the City's decision contains sufficient factual findings and analysis to determine that it reasonably applied its ERO to reach its unit determination. However, because the ALJ analyzed only the two factors mentioned in *City of Lodi*, *supra*, PERB

Decision No. 2142-M, rather than the entirety of the City's determination, we proceed to examine each factor.[15]

1. Fullest freedom

IBEW argued that it satisfied this criterion because it intended to submit authorization cards from 89 percent of the employees in the proposed unit, reflecting that the employee organization of their choosing is IBEW, not the Association. IBEW stated, "[a] separate and distinct unit of waste-management workers will therefore provide these employees with the 'fullest freedom' to exercise their right to be represented by a union of their own choosing." Furthermore, while waste-management employees were allocated one seat on the Association's Board of Directors, that director did not serve on the Association's bargaining committee. Thus, IBEW claimed, employees in the classifications IBEW petitioned to represent did not have a seat at the bargaining table.

Ochoa addressed these points in his decision. As to IBEW's evidence that most members of the proposed unit preferred to be represented by IBEW, he acknowledged the "importance of employee satisfaction with the representation being received" but stated that his "determination pertains to the appropriateness of severing the existing bargaining unit and establishing a new unit," not whether the Association should be

[15] The proposed decision observed that IBEW did not specifically argue that the City misapplied any of the six unit determination criteria listed in the City's ERO. IBEW excepts to this observation, pointing out that it addressed the relevant factors in the statement of facts section of its post-hearing brief. In its exceptions, IBEW includes detailed arguments regarding the six factors, and we therefore address those factors below. While IBEW did not provide the ALJ with such detailed analysis, IBEW's brief to the ALJ was minimally sufficient to avoid a finding that it waived this argument.

replaced. Ochoa noted that "not every subset of employees within a bargaining unit directly has a seat at the bargaining table, but this does not necessarily indicate that their interests are not represented." He further stated that allowing groups of employees to form a new unit merely to gain direct access to the bargaining table would result in a proliferation of units. Lastly, Ochoa concluded that IBEW did not sufficiently demonstrate the proposed unit would assure the fullest freedom of employee rights any more so than the existing unit.

We find Ochoa's conclusion was reasonable. Although IWM Division employees do not have their own seat at the bargaining table, PERB has never held that every employee group must be able to elect its own union official or bargaining representative, and in fact IWM Division employees do have a seat on the Association Board, which gives their concerns a voice. Because there is no evidence that the Association has "neglected or ignored" IWM employees' interests, the City reasonably concluded that this factor weighs against severance. (*Los Rios*, *supra*, PERB Decision No. 2587, p. 5.)

2. Community of interest

Relying on a combination of criteria from *International Brotherhood of Electrical Workers v. Aubry* (1996) 42 Cal.App.4th 861, *Los Angeles Unified School District* (1998) PERB Decision No. 1267, and *Marin Community College District* (1978) PERB Decision No. 55, IBEW presented evidence regarding the following community of interest factors: (1) similar skills, duties, and working conditions; (2) common supervision; (3) integration of work process; (4) geographic proximity; (5) employee interchange; (6) administrative structure; and (7) desires of employees in the unit.

IBEW argued that employees in the proposed unit shared similar skills, duties, and working conditions. Two of the positions, Integrated Waste Worker and Integrated Waste Truck Operator, have "virtually identical job descriptions," varying only by the level of skill required. In the same vein, the Motor Sweeper Operator "performs semi[-]skilled work operating a motor sweeper to clean City streets, alleys and parking lots," while a Maintenance Worker in the IWM Division "sweeps and cleans streets, alleys, culverts [and] collects and loads refuse into any accompanying truck." IBEW further contended that all of the classifications require a Class C driver's license, and none require secondary schooling or a college degree. Finally, IBEW argued that the IWM Division is funded by revenue from waste service customers, rather than tax revenue, which funds the wages and benefits of employees in the Association.

Regarding hours of work, IBEW claimed that the integrated waste classifications all share the same start time, except when the Motor Sweeper Operators start earlier twice a week. The proposed unit crews operate almost every day of the year, including holidays, as part of their regular shift. In contrast, most of the remaining Association employees in the unit work 9/80 shifts, with overtime pay for weekend and holiday work.

As to compensation, IBEW stated that employees in the proposed unit are compensated similarly, and their employee benefits are identical. IBEW asserted that all classifications in the proposed unit share common supervision that is exclusive to the IWM Division, i.e., the four first-line supervisors in the field services section of the IWM Division.

Regarding geographic proximity, IBEW presented testimony that all employees in the proposed unit work and attend meetings at the Chevy Chase Yard. Only workers from the proposed unit report and meet there. In addition, waste management employees share routes and communicate with each other throughout the day. Finally, as a regular part of their duties, waste workers often drive onto the private property of Glendale residents and businesses, which is rare for other employees in the Public Works Department.

On the integration of work processes, IBEW averred that the process of waste collection is completely integrated from beginning to end, and not integrated with any other work processes of the City.

IBEW also claimed that the positions in the proposed unit are interchangeable when necessary. Truck operators can do the work of waste workers and waste workers can be "bumped up" to truck operators. In contrast, these employees' duties are not interchangeable with any other positions in the Association-represented unit.

As to administrative structure, IBEW argued that the proposed unit is financially and administratively independent because funding for the positions is separate from the remainder of the City's workforce. According to IBEW, this meant that collective bargaining in the integrated waste unit would not be affected or limited by collective bargaining in the larger unit. Finally, IBEW stressed that employees in the proposed unit have "clearly and unambiguously" expressed their desire for a separate bargaining unit represented by IBEW.

Ochoa relied on slightly different community of interest factors as set forth in *County of Riverside* (2010) PERB Decision No. 2119-M: (1) the extent to which the

employees share education and other special qualifications; (2) job functions; (3) method of wages or pay schedule; (4) hours of work; (5) fringe benefits; (6) supervision; (7) frequency of contact with other employees; (8) integration with work functions of other employees; and (9) the extent to which employees belong to the same employee organization. According to Ochoa, while IBEW presented evidence that the subject classifications share similarities in their skills, duties, and work conditions, it did not demonstrate that the community of interest between the classifications was "sufficiently distinct" from that of other bargaining unit members to warrant severance. "Indeed, the dissimilarities IBEW references appear to be relatively minor." Ochoa concluded that IBEW did not establish a "significant lack of community [of] interest" based upon the fact that employees in the four classifications work different schedules and start their day in a different location. Similarly, Ochoa rejected IBEW's claim that the different source of funding for the positions in the proposed unit translated into a "division of interests" in the groups.

We find that Ochoa's conclusion was reasonable, if lacking in elaboration as to some of his reasoning. Most importantly, IBEW failed to establish that IWM Division employees share a community of interest that is separate and distinct from other Association-represented employees. (*City of Lodi*, *supra*, PERB Decision No. 2142-M, adopting proposed decision at p. 10; *Los Rios*, *supra*, PERB Decision No. 2587, p. 5.) Not even their job duties and functions are distinguishable from other Association-represented employees, as the Maintenance Worker classification is a generic classification that has historically been utilized by multiple City departments including GWP, Community Services and Parks, Community Development, and other divisions

within Public Works. At the time of the unit determination hearing, only two of the six then-filled Maintenance Worker positions were in the IWM Division; the remainder worked in Public Works Streets and Facilities.

Furthermore, IWM Division employees are assigned work locations similar to other Public Works divisions; they work in field operations similar to employees in Parks, Community Services, and other Public Works divisions; and their terms and conditions of employment are similar to other classifications within the bargaining unit, insofar as holiday schedules, overtime policies, and the requirement of a specialized driver's license. These characteristics establish that the community of interest is not unique to the proposed unit. (*Lodi Unified School District* (2001) PERB Decision No. 1429, adopting proposed decision at pp. 17-18.) Thus, Ochoa's finding was reasonable.

3. History of employee relations

IBEW contended that the history of the Association's bargaining with the City reflected that the Association has been ineffective in representing the interests of IWM Division employees. IBEW pointed to several examples of employees complaining to the Association about varied issues such as requests for uniforms and the difficulty of driving large heavy-duty waste trucks, without any resolution from the Association or the City.

Although Ochoa acknowledged IBEW's evidence of "legitimate employee frustrations" with the Association, he found that employee dissatisfaction with the incumbent union's representation was not a basis for severance. "Rather, the critical inquiry is whether there has been widespread conflict between the employees seeking

to be severed and other groups of unit members, thus indicating a problem with the existing unit structure." Ochoa concluded that IBEW had not presented sufficient evidence of such conflict, whereas the Association demonstrated that its unit had ratified MOUs in the last four negotiation cycles with at least two-thirds majority approval, as required by the Association's bylaws, without resort to impasse.

Ochoa's analysis was reasonable. While IBEW presented evidence that the Association may not have been responsive to all of the concerns of employees in the proposed unit, the record does not support a finding that the Association is "hostile" to the interests of these employees nor that the interests of these employees have prevented the Association and the City from reaching MOUs in recent history. (*Lodi Unified School District*, *supra*, PERB Decision No. 1429, adopting proposed decision at p. 19.)

4. Effect of proposed unit on the efficient operation of public service and sound employee relations

IBEW presented no evidence on this criterion and instead argued that concerns from the Association and Director of Human Resources Doyle about the potential negative effect on the efficient operation of the City and sound employee relations were purely speculative. In response, Ochoa stated that every new unit "invariably presents complications in the administration of employer/employee relations" due to the separate MOUs required. In turn, those separate MOUs "hinder the efficient administration of benefits and working conditions" because of the "greater variety in terms and conditions of employment." IBEW's proposed bargaining unit would bring the City's total units to six. While Ochoa noted that such a burden was not "untenable,"

it militated against granting the Petition, especially in the absence of other countervailing factors.

We find Ochoa's conclusion reasonable, though not determinative, as "the party seeking severance will never be able to demonstrate that adding an additional unit will improve an employer's efficiency of operations. Therefore, PERB only requires that the additional unit not be unduly burdensome." (*Los Angeles Unified School District*, *supra*, PERB Decision No. 1267, adopting proposed decision at p. 62.)

5. Effect on the existing classification structure

IBEW did not present any evidence on this criterion. Ochoa stated that, under the existing classification structure, all employees in the Maintenance Worker classification were in the Association's bargaining unit. In contrast, IBEW's proposed unit would include only some employees in that classification. Ochoa concluded that splitting the classification into two units was not "exceedingly problematic" though not adequately justified under the circumstances. This finding was reasonable, given the complications that can arise from fragmenting classifications among different bargaining units.

6. Extent to which employees in the proposed unit have organized

IBEW concedes that the ERO states no unit shall be established solely on the extent of organization of the employees. However, IBEW claims, "where there are other substantial factors on which to base a unit determination, the City Manager may give weight to the extent of the organization in establishing an appropriate unit." In IBEW's view, because employees in the proposed unit have expressed a desire for representation by IBEW, this factor points to severance and creation of a new unit.

Citing *Los Angeles Unified School District*, *supra*, PERB Decision No. 1267, Ochoa noted that severance is inappropriate where it is "solely due to the stated preference of a small group of its members," given the concern with proliferation of bargaining units. Ochoa concluded that IBEW's "limited evidence" supporting the Petition did not justify severing the classifications and creating the proposed unit.

Although Ochoa's analysis was not extensive in every instance, we find that the City's unit determination was sufficiently reasoned and explained, and consistent with the MMBA and ERO. (*Santa Clara Valley Water District*, *supra*, PERB Decision No. 2531-M, p. 15 [charging party failed to show that employer's reasons for denying petition were unreasonable interpretations of the "appropriate unit" criteria from the local rules]; *City of Livermore*, *supra*, PERB Decision No. 2525-M, adopting proposed decision at p. 40 ["[i]f reasonable minds could differ over the appropriateness of the bargaining unit, PERB should not substitute its judgment for [the employer's]"].) We therefore affirm the ALJ's dismissal of IBEW's allegations. We also dismiss IBEW's interference allegations, which were derivative of its other allegations.

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-1254-M are hereby DISMISSED.

Members Shiners and Krantz joined in this Decision.