STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CITY AND COUNTY OF SAN FRANCISCO, Employer, and SAN FRANCISCO DEPUTY SHERIFFS' ASSOCIATION, Petitioner, and SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1021, Exclusive Representative.	Case No. SF-SV-132-M PERB Order No. Ad-497-M October 17, 2022

Appearances: Katzenbach Law Offices by Christopher W. Katzenbach, Attorney, for San Francisco Deputy Sheriffs' Association; Weinberg, Roger & Rosenfeld by Kerianne R. Steele, Attorney, for Service Employees International Union Local 1021.

Before Banks, Chair; Shiners, Krantz, and Paulson, Members.

DECISION

PAULSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on San Francisco Deputy Sheriffs' Association's appeal from an administrative determination by PERB's Office of the General Counsel (OGC). The Association filed a severance petition (Petition) pursuant to PERB Regulation 61400 and Government Code section 3509, subdivision (a) of the Meyers-Milias-Brown Act (MMBA), seeking to sever five classifications from existing bargaining units in the City and County of San Francisco (City) currently exclusively represented by Service

Employees International Union Local 1021 (SEIU).[1] OGC issued an administrative determination finding that PERB has jurisdiction over the Petition because the City's local rules do not include a provision that can accomplish severance without an undue burden on the Association, and as a result PERB Regulations apply to "fill the gap." However, OGC found the Petition was untimely under PERB Regulations and dismissed the Petition.

The Association appealed the administrative determination, primarily arguing that the City's local rules required the City to apply PERB Regulations and process an earlier severance request the Association filed directly with the City, and that PERB erred by not correcting the City's failure to do so. SEIU filed a timely response, urging that OGC should have dismissed the Petition for lack of jurisdiction as the City's local rules provide a process for the Association to remove classifications from a bargaining unit and become formally recognized as the exclusive representative, and further that whether an "undue burden" exists is a factual question that should be adjudicated through a formal hearing.[2]

Having reviewed the entire record in this case and considered the parties' arguments, we deny the Association's appeal. We conclude that (1) the City does not have local rules which can accomplish severance without an undue burden; (2) OGC

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[1] The MMBA is codified at Government Code section 3500 et seq. All further statutory references are to the Government Code. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

[2] As detailed further *post*, PERB's Appeals Office rejected the City's response to the Association's appeal. The Board upheld the determination rejecting that filing in *City and County of San Francisco* (2022) PERB Order No. Ad-494-M.

did not abuse its discretion in deciding that no hearing was necessary to make that determination; (3) PERB, not the City, is empowered to apply PERB Regulations; and (4) applying PERB Regulations, the Association's Petition was untimely. We accordingly affirm the administrative determination, as explained and supplemented below.

BACKGROUND[3]

A. The City's Local Rules and the Association's April 1 Severance Request

The City is a public agency within the meaning of MMBA section 3501, subdivision (c) and PERB Regulation 32016, subdivision (a). The Association and SEIU are employee organizations within the meaning of MMBA section 3501, subdivision (a).

The City has adopted an Employee Relations Ordinance (ERO or local rules) pursuant to MMBA section 3507 to govern labor relations.[4] Relevant portions of the City's ERO include:

> "**SEC. 16.205. UTILIZATION OF ADMINISTRATIVE LAW JUDGES.** The City and County is hereby authorized to enter into an agreement or contract with the Office of Administrative Hearings, California State Personnel Board, for the purpose of obtaining the services of an administrative law judge. Such agreement or contract shall provide that said administrative law judge shall be responsible for the duties as hereinafter set forth in this Ordinance. . . . The authority of the administrative law judge shall be to the extent as set forth in this Ordinance and in

[3] This factual background is drawn from the case file, including the filings of the parties and their respective attachments.

[4] The ERO is composed of sections 16.200 through 16.220 of the San Francisco Administrative Code.

no event shall any decision of the administrative law judge conflict with, alter or attempt to alter the provisions of the Charter or rules and regulations of the Civil Service Commission.

[¶] . . . [¶]

"**SEC. 16.210. ESTABLISHMENT OF REPRESENTATION UNITS.**

"(a) The Employee Relations Director shall make determinations as to appropriate bargaining units. In the event an employee or employee organization disagrees with the Employee Relations Director's determination, the aggrieved party may, within 60 days from the date of the Employee Relations Director's determination, submit a protest to the Civil Service Commission. The Civil Service Commission will select an administrative law judge who will schedule the matter for a hearing and final determination. In arriving at said determination, the administrative law judge shall consider the factors described in subsection (b) immediately below.

"(b) The criteria for determining the appropriateness of bargaining units shall include: the community of interest among employees; the history of employee representation in the unit; the extent to which employees have common knowledge, skill and abilities, working conditions, job duties or similar educational requirements; the need to avoid undue fragmentation of bargaining units; the wishes of the affected employees; and any impact on the City and County's ability to effectively and efficiently deliver services.

[¶][5]

"(d) Bargaining Units in effect as of the effective date of this Ordinance shall remain unchanged and treated as separate

[5] ERO section 16.210, subdivision (c) lists the 59 bargaining units currently established by the City.

bargaining units unless modified by action of the Employee Relations Director as provided herein [. . .]

[¶]

“**SEC. 16.211. PROCEDURE FOR RECOGNITION OF EMPLOYEE ORGANIZATION.**

“(a) Any registered employee organization determined by Section 16.209 of this Ordinance may request recognition as the exclusive representative of a bargaining unit by filing with the Civil Service Commission a written statement indicating verification of employee approval in the form of a signed petition, authorization cards, or union membership cards signed and dated by employees not more than six months prior to submission of 30 percent of the employees in the particular bargaining unit.

“(b) Unless the provisions of Government Code section 3507.1(c) have been satisfied, the Civil Service Commission shall give written notice to the other registered employee organizations having members in the bargaining unit for which recognition is sought. Within 30 calendar days from the date of such notice, an employee organization with membership in the particular bargaining unit may file a challenging petition seeking to become the exclusive representative of said unit. The challenging statement shall contain verification, in the form of a signed petition, authorization cards, or union membership cards signed and dated by employees not more than six months prior to submission of 30 percent of the employees in the bargaining unit. Upon submission of such verification the challenging employee organization shall be placed on the ballot.

“(c) If a challenging petition has been filed, the Civil Service Commission Department shall, within 30 days after the period for filing a challenging petition expires or as soon thereafter as practicable, cause to be conducted a secret ballot election within the bargaining unit to determine which

organization, if any, shall be recognized as the exclusive representative of the bargaining unit.

“(d) If no challenging petition has been filed, and provided that the provisions of Government Code section 3507.1(c) are not applicable, the Civil Service Commission shall, within 30 days after the period for filing a challenging petition expires or as soon thereafter as is practicable, cause to be conducted a secret ballot election within the bargaining unit to determine which organization, if any, shall be recognized as the exclusive representative of the bargaining unit.

“(e) The ballot in any such election shall contain the choice of ‘no organization.’ Where there are three or more choices and no one receives a majority of the valid ballots cast, a run-off election shall be conducted between the two choices receiving the largest number of ballots cast.

“(f) Employees entitled to vote in a representation election shall be those employees within the bargaining unit with permanent status whose names appear on the last payroll bearing a date which is no less than 30 calendar days prior to the date on which the election is to be held or such other date within the discretion of the Civil Service Commission as may be practicable under the circumstances.

“(g) There shall be no more than one valid representation election in a 12 month period within the same bargaining unit.

“(h) As an alternative to the procedures outlined above, the provisions of MMBA, Government Code section 3507.1(c) may be employed to the extent that the requirements of that section are met. The Civil Service Commission will certify an organization as the exclusive representative upon verification that all such requirements are met. A determination as to whether the requirements have been met shall be made in accordance with the provisions of Government Code section 3507.1(c).

"**SEC. 16.212. DECERTIFICATION.** A decertification petition may be filed with the Civil Service Commission by employees or by an employee organization to determine whether or not the exclusive representative continues to represent a majority of the employees in the bargaining unit. Such petition must be accompanied by proof of employee approval in the form of a signed petition, authorization cards, or union membership cards signed and dated by employees not more than six months prior to submission equal to at least 30 percent of the employees within the bargaining unit, and must be filed within the period between the 90th and 60th day immediately preceding the expiration date of the exclusive representative's existing memorandum of understanding, provided that the existing memorandum of understanding does not exceed a two year period. In the event the existing memorandum of understanding does exceed a two year period, the decertification petition may also be filed within the period between the 90th and 60th day immediately preceding the expiration of the second year of the memorandum of understanding. When such a petition has been filed, the Civil Service Commission shall cause to be conducted a secret ballot election to determine whether the incumbent exclusive representative shall be decertified and whether another organization shall be recognized. If the challenging employee organization receives a majority of the valid votes cast, the present exclusive representative will be decertified and the employee organization receiving a majority of the valid votes cast will become the exclusive representative. There shall be no more than one decertification election in a 12 month period, and no more than one decertification election during the first three years of the term of a memorandum of understanding, within the same bargaining unit."

On April 1, 2022, the Association filed a "Request for Recognition - Petition to

Sever" (Request) with City Employee Relations Director Ardis Graham.[6] The filing was on a City Civil Service Commission (CSC) form titled "Recognition, Challenging, or Decertification Petition." The Association checked the box next to "Recognition," and typed below, in relevant part, "[t]his is a Petition To Sever certain peace officer classifications from the existing unit." In an attachment to the form, the Association provided additional information about the proposed unit. The proposed unit includes employees in the classifications of Medical Examiner's Investigator I, Medical Examiner's Investigator II, Medical Examiner's Investigator III, Park Ranger, and Head Park Ranger. The proposed unit contains approximately 14 employees in the Medical Examiner's Investigator I/II/III classifications, and 39 employees in the Park Ranger and Head Park Ranger classifications. Those classifications are currently in bargaining units represented by SEIU.[7] The governing Memorandum of Understanding (MOU) between the City and SEIU ran from July 1, 2019, to June 30, 2022.

On April 15, the City responded to the Association's Request via a letter from ERO Administrator Luz Morganti. The letter stated that the Association's Request did not meet the criteria and/or procedures set forth in the ERO:

> "Bargaining Unit determinations and/or modifications are at the discretion and authority of the Employee Relations Director . . . Neither employees [n]or Labor Organizations have the ability to make this determination independently or to request severance of these classifications from the Bargaining Units they are designated to. Request for

[6] All further dates are in 2022 unless otherwise noted.

[7] While not stated in the Association's Request, the classifications it seeks to sever come from Bargaining Unit 24 Security and Investigative, and Bargaining Unit 27 Supervisory.

> consideration to review the classifications you have cited in the petition for bargaining unit modification may be submitted to the Employee Relations Director of Human Resources."

The City's letter further stated that the Association's Request was neither timely filed nor did it meet the proper threshold of signatures for decertification under ERO section 16.212. The City also noted that a unit modification request involving the Medical Examiner's Investigator II and III classifications was "reviewed in 2019 by the [CSC] and the Employee Relations Director" and that the same issue was "submitted to the Office of Administrative Hearings in 2018 . . . The Employee Relations Director's decision to maintain these classifications in their current bargaining units was upheld by the Administrative Law Judge." Ultimately, the City concluded that "the request for Recognition and to sever or decertify the classes petitioned by [the Association] from SEIU, Local 1021 does not meet the established criteria; is untimely and cannot be processed by the [CSC]."

B. Procedural History at PERB

1. Petition and Order to Show Cause

The Association filed its Petition with PERB on April 28, seeking to sever the same classifications and create the same miscellaneous peace officers' unit it had sought via its April 1 Request. On May 6, the Association perfected its filing by submitting proof of employee support. On May 9, OGC sent correspondence to the parties asking "whether the City has adopted local rules in accordance with MMBA section 3507 that would allow severance without placing an undue burden on the

Association" and requesting that, if so, the City provide a copy.[8] Additionally, OGC stated, "if applicable, the City may also provide information regarding instances where severance has been pursued or accomplished under its local rules." The City's May 31 response stated it received PERB's letter "asking if the City has Local Rules in accordance with MMBA section 3507 regarding procedure for establishment of an employee organization" and attached a copy of its ERO. The City did not indicate what part of its ERO would allow severance, nor did it provide any information regarding instances where severance had been pursued or accomplished under the ERO.

On June 2, OGC issued an order to show cause (OSC) why the Petition should not be dismissed based on either lack of PERB jurisdiction or untimeliness. The OSC initially noted that it "appears that the City's local rules can accomplish what the Association is seeking without placing an undue burden on the Association." Specifically, the OSC posited that severance could be accomplished by applying the City's local rules for unit modification under ERO section 16.210 followed by a decertification petition under ERO section 16.212. The OSC went on to explain that even assuming the City's local rules did not apply, the Petition was subject to dismissal for untimeliness. Under PERB Regulation 61400, subdivision (b), a severance petition must be filed within the window period defined by PERB Regulation 61010: "the 29-day period which is less than 120 days but more than 90 days prior to the expiration date of a lawful memorandum of understanding negotiated by the public agency and the exclusive representative." According to the

[8] While these requests were directed to the City, the letter was addressed to "Interested Parties" and included SEIU's representative.

Petition, the MOU between SEIU and the City expired on June 30, meaning the window period ran from March 3 to April 1.[9] The OSC noted the Association's Petition was filed well outside of this window period and thus untimely.

On June 10, the Association responded to the OSC, arguing that severance cannot be accomplished under the City's local rules without an undue burden. As part of its argument, the Association cited to and attached the decision of an Office of Administrative Hearings (OAH) Administrative Law Judge (ALJ), *In re Krzysztof Barbrich,* OAH No. 2018020670, October 12, 2018 (Barbrich decision).[10]

The Barbrich decision addressed whether the City erred by denying an employee's July 16, 2016 request to transfer the Medical Examiner's Investigator II and III job classifications from their incumbent bargaining units represented by SEIU into an existing bargaining unit represented by the Supervising Probation Officers Association. The OAH ALJ determined that the City did not err in denying the request, reasoning in part that the ERO contains no regulations governing requests to move classifications into a different unit, and therefore PERB Regulations must apply to "fill in the gap." The OAH ALJ applied PERB Regulation 61400 governing severance, and found the employee's request did not comply with the procedural requirements set

[9] The OSC noted that this window period was extended by one day because PERB offices were closed on March 31, a state holiday. (See *Planada Elementary School District* (2017) PERB Order No. Ad-450, pp. 3-4.)

[10] The Barbrich decision is not publicly available or otherwise published. While the record contains limited information about this prior dispute, we deduce that it was submitted to OAH for decision as part of the process set out in ERO sections 16.205 and 16.210, subdivision (a), and is the OAH decision Morganti referenced in her April 15 denial of the Association's April 1 Request.

forth therein and therefore was properly denied by the City. The Barbrich decision demonstrated, according to the Association, that the City previously applied PERB Regulations in a similar circumstance. Based on this contention, the Association's response to the OSC further argued that its April 1 Request to the City was timely under PERB Regulations, and that PERB should review the City's underlying April 15 denial as part of the Petition.

SEIU responded to the OSC on June 21, arguing that the City's local rules provide a process for the Association to remove classifications from a bargaining unit and become formally recognized as the exclusive representative of employees in those classifications, and that therefore, there is no "gap" in the City's rules that may be filled by PERB Regulations. SEIU further responded that to the extent the City's rules are inconsistent with the MMBA, or the City incorrectly or arbitrarily applied them, the appropriate avenue for such a challenge is PERB's unfair practice charge process.

The City filed its reply related to the OSC on June 28. The entirety of the City's argument stated:

> "In its June 10 response to PERB's OSC, the [Association] argued that the City has a two-step process to achieve what [the Association] is attempting to accomplish in this process, i.e., moving a group of classifications from one bargaining unit to another. However, in fact, the [CSC] did consider [the Association's] application in one step, and determined that it had not followed the correct procedures, which are thoroughly set out in its denial of their April 1 Request/Petition. Therefore, [the Association] has already been afforded the exact one-step process they are now complaining of not receiving.
>
> "Finally, as PERB noted in its June 2 OSC, [the Association's] Severance Petition to PERB was untimely.

> [The Association] cannot point back to its original procedurally incorrect submission to the City and use that to get around the fact that its submission to PERB was untimely, regardless of the merits of [the Association's] arguments and jurisdiction of PERB as a venue."

2. Summary of Administrative Determination

On June 29, OGC issued its administrative determination. After review of the parties' responses to the OSC, OGC concluded that the City's ERO lacked a process that would allow the Association to seek severance without an undue burden. The two-step process in the local rules that would require the Association to first seek modification of the unit through ERO section 16.210, and then decertification under ERO section 16.212, OGC reasoned, would present a significant obstacle because the City's local rules do not contain a window period or require proof of support for a unit modification, but they do for decertification. The practical effect would require the Association to undertake the unit modification process and obtain a favorable decision before it could gather proof of support and file a timely decertification petition. This delay, OGC noted, could impact the Association's ability to gather proof of support among the affected employees. Applying relevant PERB precedent to the facts at hand, OGC found the City's local rules do not contain a process that would allow the Association to seek severance without an undue burden.

The administrative determination noted further that the Association's arguments in response to the OSC misstated the effect of this conclusion. An unfair practice charge, not a PERB severance petition, is the appropriate mechanism for enforcing an employer's duty to process a representation petition under its local rules. But in the absence of written local rules allowing the Association to sever classifications without

an undue burden, OGC noted, PERB cannot direct the City to process the Association's severance petition under PERB severance regulations. Rather, PERB Regulations fill gaps in local rules by supplying processes for PERB to apply when an employer does not have reasonable local rules.

The administrative determination went on to explain that the Association's only option, therefore, is for PERB to process the Petition filed on April 28 and perfected on May 6. But that Petition was filed well outside the window period established in PERB Regulation 61010. Therefore, the administrative determination dismissed the Association's Petition as untimely.

3. Appeal of Administrative Determination

On July 11, the Association appealed OGC's dismissal of its Petition, stating three issues for appeal: (1) "The Administrative Determination fails to apply PERB's authority under Government Code Section 3509(c): 'The board shall enforce and apply rules adopted by a public agency concerning unit determinations, representation, recognition, and elections'"; (2) "The Administrative Determination fails to acknowledge that the City's Rules required the City to process the unit severance petition the [Association] filed"; and (3) "The Administrative Determination allows the City to turn a timely petition into an untimely one simply by refusing to follow the City's own Rules that required the City to process the petition." The Association did not cite to any PERB or court precedent, and relied primarily on the Barbrich decision and its interpretation of MMBA section 3509, subdivision (c).

On July 18, SEIU filed a timely response to the Association's appeal, urging the Board to affirm the Petition's dismissal for lack of jurisdiction rather than untimeliness,

as the City has local rules which can provide a process for the Association to remove classifications from a bargaining unit and become formally recognized as the exclusive representative of those classifications. SEIU also argued that whether an "undue burden" exists is a factual question that should be adjudicated through an evidentiary proceeding that allows for the calling of witnesses.

On July 25, the City attempted to file a response, but PERB's Appeals Office rejected it as untimely. On August 4, the City appealed that determination, arguing it had good cause for late filing. On August 24, in *City and County of San Francisco*, *supra*, PERB Order No. Ad-494-M, the Board upheld the Appeals Office's determination rejecting the City's late-filed response.

DISCUSSION

When appealing an administrative determination, the appellant must demonstrate how or why the challenged decision departs from the Board's precedents or regulations. (*Children of Promise Preparatory Academy* (2018) PERB Order No. Ad-470, p. 4; *Regents of the University of California* (2016) PERB Order No. Ad-434-H, p. 8; *County of Santa Clara* (2014) PERB Order No. Ad-411-M, p. 5.) As discussed further *post*, in representation matters we apply an abuse of discretion standard to review a Board agent's decision whether to hold an evidentiary hearing.

A. Representation Determinations Under the MMBA and "Filling the Gap" with PERB Regulations

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." Such local rules may include provisions for, among

other things, recognizing employee organizations and determining appropriate bargaining units. (MMBA, § 3507, subd. (a)(3), (4); *County of Monterey* (2022) PERB Decision No. 2821-M, p. 9.) In allowing public agencies to establish local rules for managing labor relations, the MMBA differs from most other statutes under PERB's jurisdiction. (*Salinas Valley Memorial Hospital District* (2020) PERB Decision No. 2689-M, p. 20.)

When a public agency has adopted local rules, PERB has jurisdiction over a representation petition only if the agency's local rules contain no reasonable provision(s) that can accomplish what the petitioner is seeking without placing an undue burden on the petitioner. (*County of Orange* (2010) PERB Decision No. 2138-M, p. 9.) "[I]f an agency has not adopted a reasonable local rule on a particular representation issue, PERB Regulations fill the gap" by allowing PERB to process the petition. (*Central Basin Municipal Water District* (2021) PERB Order No. Ad-486-M, p. 8; MMBA, § 3509, subd. (a); PERB Reg. 61000.) Because the City has adopted local rules, the central question analyzed by the administrative determination was whether the City's ERO contains rules that can accomplish severance without an undue burden.

In *County of Siskiyou/Siskiyou County Superior Court* (2010) PERB Decision No. 2113-M (*Siskiyou*), the Board considered whether it had the authority to address a petition for amendment of certification. (*Id*. at p. 14.) The employer argued that PERB lacked jurisdiction over the petition because amendment of certification could be achieved via the county's decertification process. The Board rejected this argument, finding amendment of certification and decertification to be fundamentally different

processes. (*Id*. at p. 15.) As the Board explained:

> "[A] decertification petition seeks to oust the current recognized employee organization and replace it with either a different employee organization or no representation. (*Jamestown Elementary School District* (1989) PERB Order No. Ad-187; *International Union of Operating Engineers, State of California Locals 3, 12, 39 and 501, AFL-CIO (California State Employees' Association, SEIU, AFL-CIO)* (1984) PERB Decision No. 390-S.) Amendment of certification, on the other hand, 'is appropriate where there is no change in the basic identity of the representative chosen by the employees but, rather, where the change is one of form and not of substance.' (*Ventura Community College District* (1982) PERB Order No. Ad-130.)"

(*Siskiyou*, *supra*, PERB Decision No. 2113-M, pp. 18-19.) The Board ultimately found that it would be an undue burden to require a union to participate in the onerous decertification process simply to obtain official recognition of a change in the organization's form. (*Id*. at p. 19.) Accordingly, the Board applied its own amendment of certification regulations to the union's petition. (*Ibid*.)

In contrast, in *City of Inglewood* (2011) PERB Order No. Ad-390-M, the Board found no undue burden. There, the employer asserted that a severance petitioner could reasonably use the local rules' procedure for recognition of a union as an appropriate unit's bargaining representative. (*Id*., adopting dismissal letter at p. 2.) There, the employer's local rule for recognition required that a petition be filed, that the petitioner demonstrate employee support, and the proposed unit be appropriate. (*Id*., adopting dismissal letter at p. 3.) Because this procedure did not distinguish between represented and unrepresented employees, and the employer identified that severance had previously been achieved through this process, the Board found the

procedure did not place an undue burden on the petitioner. (*Ibid*.)

In *County of Orange*, *supra*, PERB Decision No. 2138-M, the Board similarly found that the employer's local rule for unit modification could reasonably be used to sever classifications from an existing unit. (*Id*. at pp. 9-10.) In that instance, the Board found the employer's local rule for unit modification and "MMBA severance regulations [were] largely identical and serve[d] a similar purpose, namely to reconfigure an existing bargaining unit." (*Id*. at p. 10.)[11]

Here, the administrative determination found that the possible process for severance in the City's ERO, which it identified as a two-step process – unit modification under ERO section 16.210, followed by decertification under section 16.212 – constitutes an undue burden. SEIU asserts in its response that severance can be accomplished by a different two-step process – unit modification

[11] Although the employer's local rule on unit modification in *County of Orange* provided a sufficient single-step process to accomplish severance without imposing an undue burden, *County of Orange* does not alter the fact that "unit modification" and "severance" generally have different meanings. Under PERB Regulations, "unit modification" refers to a variety of actions to change an established bargaining unit. (See PERB Reg. 61450, subds. (a) and (b).) Most typically, unit modification refers to moving one or more classifications or positions from one established bargaining unit to another, or adding one or more unrepresented classifications to an existing bargaining unit. Severance, on the other hand, refers to a "petition to become the exclusive representative of an appropriate unit consisting of a group of employees who are already members of a larger established unit represented by an incumbent exclusive representative . . ." (PERB Reg. 61400, subd. (a).) Here, the parties and OGC at times have used "unit modification" to refer to a possible change to the City's bargaining units under ERO section 16.210, including the severance sought by the Association. However, the Association's requested severance is not typically considered a unit modification, and for the reasons we proceed to explain, the ERO does not provide a reasonable severance process.

followed by a petition for recognition.[12] Under either two-step process, we find an undue burden necessitating application of PERB Regulations.[13]

Unlike in *City of Inglewood* or *County of Orange*, severance under the City's ERO requires application of at least two separate rules. While unit modification and recognition are both components of severance, we find their bifurcation under the City's ERO renders them a fundamentally different process. ERO section 16.210, subdivision (a) requires the City's Employee Relations Director to make determinations as to appropriate bargaining units. It also provides a process for an employee or employee organization to submit a protest to the CSC within 60 days from the date of the Employee Relations Director's determination, followed by a hearing and final determination by an ALJ. ERO section 16.210, subdivision (d) states simply "Bargaining Units in effect as of the effective date of this Ordinance shall remain unchanged and treated as separate bargaining units unless modified by action of the Employee Relations Director . . ." The rule contains no process for initiating a request to modify a bargaining unit by adding or removing classifications. Other than requiring a protest be filed within 60 days of the Employee Relations Director's decision, the rule contains no timing and is administered at the discretion of the City's Employee Relations Director. While the record contains few facts, the Barbrich decision, which is the only example in the record of the City's timeline for resolving a

[12] While SEIU's argument does not cite the applicable ERO sections, we deduce that they are 16.210 and 16.211, respectively.

[13] Because we find either two-step process would constitute an undue burden, we express no opinion on whether decertification or recognition would be the appropriate second step after a successful unit modification.

request for unit modification, demonstrates that more than two years elapsed between Barbrich's request to modify the bargaining unit on July 26, 2016, and the OAH ALJ decision on October 26, 2018. And unlike in *City of Inglewood*, the City's ERO would place any determination of an appropriate unit as a first step, rather than as an integrated step of the recognition process.

This first step is in tension with the timing of the required second step under either ERO section 16.212 or 16.211. A petition for decertification under ERO section 16.212 must be filed within a 30-day window period based on the term of the effective MOU.[14] To accomplish severance via section 16.212, as analyzed by OGC, the first unit modification step must necessarily be followed by a specifically timed decertification. Where, as discussed above, the City's unit modification process has no set timelines, is conducted at the discretion of the Employee Relations Director and may include a lengthy protest process, there is little hope that any petitioner could time its petition so that the conclusion of the first step would coincide with the decertification window period. Such a process constitutes an undue burden.

While a petition for recognition under ERO section 16.211 need not be filed within a designated window period, the ERO dictates that it must be supported by proof of support dated within six months of submission.[15] The potential that proof of

[14] An MOU-based window period generally does not bar a party from filing for decertification during a hiatus between contracts (*City of Long Beach* (2021) PERB Decision No. 2771-M, pp. 13-14), but there is no guarantee that any such hiatus will ever occur.

[15] In contrast to the City's ERO, PERB Regulation 32700 provides that proof of support is generally effective for one year. No party has asked us to assess whether the ERO's six-month proof of support requirement is lawful, and we express no

support could become stale during a protracted two-step severance process makes it unduly burdensome. An employee organization seeking to modify an existing bargaining unit cannot be assured it would retain sufficient employee support through that extended process, and nothing in the record indicates that the City would treat an eventual petition in the second step as having been filed retroactively or supported by proof of support collected prior to the first step. In the alternative, if an employee organization must wait until after a new unit is established to collect signatures, it disincentivizes any effort to seek a modified unit, as an employee organization has little assurance that it will have sufficient support by the time it gets to the second step. Because the steps are not integrated, severance petitioners proceeding under the ERO face an undue burden.

Notably, although OGC provided an opportunity to do so, the City did not directly address how a severance petition could be processed under the ERO without unduly burdening the petitioner. OGC asked "whether the City has adopted local rules in accordance with MMBA section 3507 that would allow severance without placing an undue burden on the Association." The City responded by providing a copy of its ERO, without explaining how severance could be accomplished under the ERO. Further, the City did not identify either two-step process in its reply to the Association's response to the OSC. Instead, it claimed it had followed a one-step process:

> "[I]n fact, the Civil Service Commission did consider [the Association's] application in one step, and determined that it had not followed the correct procedures, which are thoroughly set out in its denial of their April 1 Request/Petition. Therefore, [the Association] has already

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opinion on it.

> been afforded the exact one-step process they are now complaining of not receiving."

Most telling, the City's April 15 response to the Association's Request states that "[n]either employees [n]or Labor Organizations have the ability . . . *to request severance* of these classifications from the Bargaining Units they are designated to." The City's response to the Association's April 1 Request therefore provides no support that severance can reasonably be accomplished under the ERO. Consistent with the City's responses, no party has pointed to any instance where a severance petition has been processed under the ERO.[16]

For these reasons, we affirm OGC's conclusion that the ERO provides no avenue for processing a severance request without unduly burdening a petitioner.

B. SEIU's Request for a Hearing

SEIU asserts that a hearing was necessary to resolve whether the City's local rules constitute an "undue burden" such that PERB Regulations on severance apply. PERB Regulation 61420 provides "[w]henever a severance petition is filed with the Board, the Board shall investigate and, where appropriate, conduct a hearing and/or a representation election, or take such other action as deemed necessary to decide the questions raised by the petition." PERB recently noted that under a comparable regulation implementing the Educational Employment Relations Act (EERA), "[t]here is 'no guarantee or entitlement to an evidentiary hearing.'"[17] (*Alliance Morgan McKinzie*

[16] PERB's May 9 correspondence, which was also served on SEIU, asked the City for this information, if available.

[17] EERA is codified at section 3540 et seq.

High School, et al. (2022) PERB Order No. Ad-491, p. 13, quoting *Children of Promise Preparatory Academy* (2013) PERB Order No. Ad-402, p. 16.) Rather, after completing an investigation, the Board agent may either "determine that sufficient evidence has been submitted to raise a material issue that necessitates an evidentiary hearing," or "that no material issue of fact exists and thus that a hearing is unnecessary." (*Id*. at p. 17.) The Board applies an abuse of discretion standard in reviewing a Board agent's determination whether to conduct a hearing in a representation matter. (*Robert L. Mueller Charter School* (2003) PERB Order No. Ad-320, p. 11.)

While SEIU asserts that whether an "undue burden" exists is a factual question that should be adjudicated through an evidentiary proceeding that allows for the calling of witnesses, a review of the relevant documents reveals no disputed material facts. Both the OSC and OGC's letter inviting replies noted that:

> "[f]actual assertions must be supported by declarations under penalty of perjury by witnesses with personal knowledge and should indicate that the witness, if called, could competently testify about the facts asserted. If the facts asserted are reliant on a writing, the writing must be attached to the declaration and authenticated therein."

No party submitted a declaration in support of its filing. And indeed, each party relies solely on interpretation of the ERO provisions and legal authority as support for its position.

Precedent also supports OGC's decision to determine an "undue burden" without conducting a hearing when there are no disputed facts. Like the instant matter, *City of Inglewood* came to the Board on appeal from OGC's dismissal of a petition,

where no hearing took place to determine whether there was an undue burden because it was undisputed that severance in that case had been achieved under the local rules. (*City of Inglewood*, *supra*, PERB Order No. Ad-390-M, pp. 1-2, adopting dismissal letter at p. 3.) *County of Orange*, in contrast, came to the Board from a different procedural posture, on exceptions to the proposed decision of an ALJ adjudicating the union's unfair practice charge and a resulting complaint. (*County of Orange*, *supra*, PERB Decision No. 2138-M, p. 1.) While *Siskiyou* involved a petition for amendment of certification, and thus arose from a posture more similar to this case, that matter included significant disputed facts. (See *Siskiyou*, *supra*, PERB Decision No. 2113-M, pp. 1-9.) In sum, there may be instances where there are material facts in dispute surrounding whether a local rule imposes an undue burden, but we find none here and conclude OGC did not abuse its discretion by declining to hold a hearing.

C. Application of PERB Regulations

The main thrust of the Association's arguments on appeal is that OGC erred by finding that PERB, and not the City, had jurisdiction to apply PERB Regulations. Instead, the Association argues, the City's rules required *the City* to process the Association's April 1 Request by applying PERB Regulations. The Association's appeal does not cite a single PERB decision, however, and instead relies on the Barbrich decision.

The administrative determination correctly noted that when PERB "fills the gap" in local rules, it is PERB, not the employer, who applies PERB Regulations. The administrative determination acknowledged that PERB directed an employer to apply

PERB Regulations in *County of Amador* (2013) PERB Decision No. 2318-M. There, after affirming the ALJ's finding that the county's local rule governing decertification was contrary to the MMBA and thus invalid, the Board upheld a proposed order requiring the employer to follow PERB Regulations when processing decertification petitions under its local rules, but only until the employer amended its local rules' decertification provisions to be consistent with the MMBA. (*Id*. at pp. 11-14.)

County of Amador does not support the Association's arguments. Rather, it reinforces that the Association had two primary options in light of the City's lack of a reasonable local rule on severance. First, the Association could have timely filed a severance petition with PERB.[18] Second, the Association could have filed an unfair practice charge alleging that the City maintained an unreasonable rule or applied its local rules unreasonably. As part of such a charge, the Association could have asked PERB to issue a tailored remedy. (See, e.g., *City of Long Beach*, *supra*, PERB Decision No. 2771-M, pp. 13-14 [directing employer to refrain from applying illegal provision in processing petitions]; *County of Ventura* (2018) PERB Decision No. 2600-M, pp. 44-45 [same].)[19]

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[18] While PERB would process such a petition given that the City has no reasonable local rule on severance, we express no opinion about the merits of the new unit the Association sought to create. (See generally, *City of Pasadena* (2021) PERB Decision No. 2788-M, pp.10-17 [discussing factors relevant to severance determinations].)

[19] We express no opinion as to whether the Board's remedy in *County of Amador*, *supra*, PERB Decision No. 2318-M, was suitable based on the unique facts of that case, nor as to what outcome or remedies might have been warranted had the Association brought an unfair practice charge asserting the City maintained an unreasonable rule or unreasonably applied its local rules. We reserve for future case-by-case determination the question of what circumstances may warrant an order

On appeal, the Association does not argue that the administrative determination misapplied PERB precedent. Instead, the Association grounds its argument in the Barbrich decision, which, it asserts, concluded that the City properly applied PERB severance regulations in that case. According to the Association, that decision now binds the City to continue to apply PERB severance regulations in the absence of an applicable local rule, and requires PERB to enforce the City's obligation to apply PERB Regulations. We do not so find.

In its appeal, the Association asserts "once the City adopted PERB's Regulations as the local rules for unit severance petitions, the City was obliged to follow the Regulations for future unit severance petitions. It cannot pick and choose whether or not to apply these rules."[20] The appeal also highlights that in the Barbrich decision, the ALJ noted "[the City] contends that there are no regulations in the ERO governing requests to move classifications into a different unit, and therefore PERB Regulations must apply to 'fill in the gap.'"

The doctrine of judicial estoppel prohibits a party from successfully taking inconsistent positions in the same or different judicial proceedings. (*Alliance Judy Ivie Burton Technology Academy High, et al.* (2020) PERB Decision No. 2719, pp. 36-37 (*Alliance*) (judicial appeal pending); *Jackson v. County of Los Angeles* (1997)

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directing an employer to follow PERB Regulations, either in a particular instance or on an interim basis until it adopts reasonable local rules.

[20] The Association also argues that "[t]he Administrative Determination allows the City to turn a timely petition into an untimely one simply by refusing to follow the City's own Rules that required the City to process the petition." We find this argument to be just a different phrasing of its central contention that the City should have applied PERB Regulations.

60 Cal.App.4th 171, 181 (*Jackson*).) Judicial estoppel applies when (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake. (*Alliance*, *supra*, p. 37, citing *Jackson*, *supra*, 60 Cal.App.4th at p. 183.) The doctrine's purpose is to protect the integrity of the judicial process by preventing parties from playing fast and loose with the courts. (*Alliance*, *supra*, p. 37, citing *Jackson*, *supra*, 60 Cal.App.4th at p. 181.) But the Association's appeal fails to fully raise or argue that the City should be estopped from asserting it cannot apply PERB Regulations. Nor was that issue addressed in the OSC. In the absence of argument, we decline to find OGC erred in failing to apply estoppel principles here.

We also briefly consider whether OGC was bound to follow the OAH ALJ's conclusions. PERB is not bound by the findings and conclusions of another administrative decision unless collateral estoppel applies. (*San Diego Unified School District* (1991) PERB Decision No. 885, p. 74). The doctrine of collateral estoppel precludes the relitigation of an issue already decided in another proceeding where: (1) the issue decided in the prior proceeding is identical to that sought to be relitigated; (2) the previous proceeding resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party in the prior proceeding. (*State of California (Department of Developmental Services)* (1987) PERB Decision No. 619-S, p. 14, citing *People v. Sims* (1982) 32 Cal.3d 468, 484.) Collateral estoppel effect may be given to decisions of administrative agencies

when: (1) the agency is acting in a judicial capacity; (2) it resolves disputed issues of fact properly before it; and (3) the parties have had an adequate opportunity to litigate such disputed issues. (*State of California (Department of Developmental Services)*, *supra*, pp. 14-15; *People v. Sims*, *supra*, 32 Cal.3d at p. 484.) We need not proceed past the first step of analysis to conclude that collateral estoppel does not bind us to follow the Barbrich decision because the issues decided there are not identical to those raised by the Association's Petition. The underlying issue in the Barbrich decision was whether the City erred by denying Barbrich's July 26, 2016 request to transfer the Medical Examiner's Investigator II and III classifications from their existing bargaining units represented by SEIU into an existing bargaining unit represented by the Supervising Probation Officers Association. While Barbrich's request involved two of the same classifications the Association seeks to sever here, it was a different request, seeking a different result: transfer of two represented classifications into an existing bargaining unit, rather than creation of a new unit. That the OAH ALJ affirmed the City's application of PERB Regulations in those circumstances does not require that we reach the same conclusion here.[21]

The Association also argues that Civil Service Rule 107.1.5, which directs the CSC to resolve "[d]isputes over representation proceedings not expressly provided herein . . . in a manner consistent with MMBA," requires the City to apply PERB Regulations in the absence of local rules.[22] The Association further argues that "[t]he

[21] As no party sought review of the Barbrich decision via an unfair practice charge, we express no opinion about its analysis or conclusions.

[22] The Association included the text of Civil Service Rule 107.1.5 in its appeal, but no party otherwise introduced it. The CSC publishes the Rules related to the ERO

Administrative Determination fails to apply PERB's authority under Government Code Section 3509(c): 'The board shall enforce and apply rules adopted by a public agency concerning unit determinations, representation, recognition, and elections.'" These arguments misstate the process PERB uses to enforce local rules. If the Association hopes to obtain a PERB order directing the City to process petitions in a particular manner based on any combination of Civil Service Rule 107.1.5, other local rules, the MMBA, and applicable precedent, the Association must file an unfair practice charge.

As noted *ante* and in the administrative determination, the process for challenging the application or existence of local rules as contrary to the MMBA is not a representation petition, but rather an unfair practice charge. (*City of Parlier* (2015) PERB Order No. Ad-421-M, p. 8.) The Association had a right at the time of receiving the City's April 15 response to its April 1 Request to file an unfair practice charge, alleging that the City's local rules themselves violate the MMBA or that their application in this instance was unreasonable. Indeed, that would have been the proper avenue to allege that the City violated its local rules by failing to apply PERB severance regulations as it had in the Barbrich matter. Because we cannot resolve such an allegation in this representation matter, we accordingly cannot order the City to apply PERB Regulations to the Petition, as the Association urges.

D. Untimeliness of Petition

The Association fails to advance any argument that it had good cause for its untimely Petition to PERB or that the timeline should otherwise be tolled, except as

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on its website, and Rule 107.1.5 can be found at https://sfgov.org/civilservice/rule-107-rules-related-employee-relations-ordinance [last accessed October 13, 2022.]

already considered *ante*. The Association has not met its burden on appeal to demonstrate the administrative determination finding the Petition untimely was contrary to Board regulations or precedent.

In sum, no party has identified any error of law in OGC's determination, and we find none which impacts the outcome. We conclude that OGC cited to appropriate PERB precedent and properly applied the law to the facts underlying the Association's Petition, except as supplemented herein. OGC's conclusions are supported by the record. Therefore, we decline to set aside the administrative determination, and we affirm the decision to dismiss the Association's Petition as untimely.

ORDER

The San Francisco Deputy Sheriffs' Association's appeal of the Office of the General Counsel's June 29, 2022 order dismissing its severance petition in Case No. SF-SV-132-M is DENIED.

Chair Banks and Members Shiners and Krantz joined in this Decision.