STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL FEDERATION OF PROFESSIONAL & TECHNICAL ENGINEERS, LOCAL 21, AFL-CIO, Charging Party, v. CITY AND COUNTY OF SAN FRANCISCO, Respondent.	Case No. SF-CE-1663-M
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1021, Charging Party, v. CITY AND COUNTY OF SAN FRANCISCO Respondent,	Case No. SF-CE-1675-M
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1021, Charging Party, v. CITY AND COUNTY OF SAN FRANCISCO (SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY) Respondent.	Case No. SF-CE-1676-M PERB Decision No. 2867-M July 24, 2023

Appearances: Weinberg, Roger & Rosenfeld by Kerianne R. Steele, Attorney, for Service Employees International Union, Local 1021; Leonard Carder by Peter Saltzman and Mollie Simons, Attorneys, for International Federation of Professional and Technical Engineers, Local 21; Sloan, Sakai, Yeung & Wong by Timothy G. Yeung, Attorney, for City and County of San Francisco and San Francisco Municipal Transportation Agency.

Before Banks, Chair; Krantz and Paulson, Members.

DECISION

BANKS, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Respondents City and County of San Francisco and San Francisco Municipal Transportation Agency (collectively, the City or Respondents) and cross-exceptions filed by Charging Parties International Federation of Professional & Technical Engineers, Local 21 (IFPTE) and Service Employees International Union, Local 1021 (SEIU) (collectively, Charging Parties). This case is the latest in a series of cases challenging various provisions of the San Francisco City Charter (Charter).[1]

At issue here is the validity of two Charter provisions that prohibit municipal workers from striking and that, among other things, mandate termination of striking employees. First, Charter section A8.346 prohibits municipal employees from engaging in strikes, sets forth procedures for terminating employees who the City finds violated the section, and limits the seniority and compensation rights of such employees whom the City later rehires. This is reiterated in section A8.409 which provides that any municipal employee who engages in a strike "shall be dismissed from his or her employment pursuant to Charter section A8.346." Second, a Declaration of Policy at the outset of Charter section A8.409 declares that "strikes by city employees are not in the public interest."

---

[1] These decisions are: *City and County of San Francisco* (2007) PERB Decision No. 1890-M (*CCSF I*); *City and County of San Francisco* (2009) PERB Decision No. 2041-M (*CCSF II*); *City and County of San Francisco* (2017) PERB Decision No. 2536-M (*CCSF III*); *City and County of San Francisco* (2017) PERB Decision No. 2540-M (*CCSF IV*); *City and County of San Francisco v. Public Employment Relations Board* (Cal. Ct. App., July 22, 2019, No. A152913) 2019 WL 3296947; *City and County of San Francisco* (2019) PERB Decision No. 2540a-M; and *City and County of San Francisco* (2020) PERB Decision No. 2691-M (*CCSF V*).

Charging Parties allege the challenged Charter provisions conflict with the Meyers-Milias-Brown Act (MMBA) by constituting an absolute ban on strikes by employees, and they are therefore unenforceable.[2] Charging Parties also allege that the Charter provisions interfere with the rights of employees to be represented by Charging Parties and deny Charging Parties their right to represent employees. Respondents contend that section A8.346's strike prohibition, enacted in the 1970's, is part of a quid pro quo for binding interest arbitration under section A8.409-4, which was enacted in the 1990's. Charging Parties further allege that Respondents have required employees to sign a document acknowledging receipt of a form stating that any employee who participates in a strike shall be terminated. Charging Parties argue this constitutes direct dealing.

The Administrative Law Judge (ALJ) found that the Charter provisions conflict with the MMBA facially and as applied to the extent they prohibit striking, and that the City's home rule power does not exempt it from MMBA compliance. However, the ALJ did not find that the City's requiring employees to sign an acknowledgement and receipt of the Charter provisions constitutes direct dealing. As a remedy, the ALJ found Charter section A8.346 unenforceable in its entirety and severed the reference to that section's strike prohibition from Charter section A8.409.

For the reasons explained below, we affirm the proposed decision's findings that the Charter's strike prohibition is unlawful facially and as applied. We further find unlawful the portion of the Declaration of Policy in A8.409 stating that City employee strikes are not in the public interest. We also affirm the remedial order deeming the unlawful Charter provisions void and unenforceable. Lastly, we exercise our discretion

[2] The MMBA is codified at Government Code section 3500 et seq.

not to resolve Charging Parties' cross-exception regarding direct dealing, since that claim would not impact our order even were it meritorious.

HISTORIC OVERVIEW

Because this case is the latest in litigation over various provisions of the Charter, we begin by providing a brief overview of how this matter is before us.

The City and County of San Francisco is both a charter city and a county under California law, meaning the City has the plenary power to make and enforce all ordinances and regulations in respect to its municipal affairs, with such laws having the force and effect of legislative enactments. (Cal. Const., art. XI, § 5, subd. (a); § 3, subd. (a).) Through voter initiatives, section A8.346 was added to the Charter in 1976 and section A8.409 was added to the Charter in 1991. To date, the Board and courts have considered multiple challenges to the Charter's provisions. We briefly summarize those that have relevance to our inquiry.

In *CCSF I*, *supra*, PERB Decision No. 1890-M, the Board held that Charter section A8.409-4, which provides impasse resolution procedures, was lawful on its face and as applied because it presumes the parties reach impasse after good faith bargaining.

In *City and County of San Francisco v. International Union of Operating Engineers, Local 39* (2007) 151 Cal.App.4th 938, the court held that PERB had exclusive initial jurisdiction over whether the Charter's interest arbitration provisions conflict with the MMBA.

In *CCSF II*, *supra*, PERB Decision No. 2041-M, the Board again held that Charter section A8.409-4 was a lawful local rule. The Board explicitly left open the question of whether the Charter's prohibition of strikes was unlawful. (*Id*., adopting proposed

decision at p. 33, fn. 19.) The most that the Board held regarding strikes was that the Charter forced a union bargaining with the City to decide between striking to pressure the City to make contract concessions or resolving the contract negotiations via interest arbitration. (*Id*., adopting proposed decision at pp. 31-32.)

In *CCSF III*, *supra*, PERB Decision No. 2536-M, the Board found that Charter section A8.346 was unlawful as applied to sympathy strikes and unfair practice strikes because such strikes typically cannot be resolved by binding interest arbitration. (*Id*. at pp. 25-26 & adopting proposed decision at p. 20.) The majority decision "reserved for another day" the determination of whether the Charter's prohibition was unlawful as to primary economic strikes. (*Id*. at p. 26, fn. 24.) While again explicitly leaving that question open, this time the Board strongly warned the City that to the extent it continued its position that interest arbitration was a lawful quid pro quo for prohibiting all strikes, it was acting "at its peril." (*Ibid*.) In explaining this warning, the Board cited precedent protecting the right to strike and noted that the *actual* quid pro quo in the Charter was more limited: a union that strikes to pressure the City to make contract concessions would lose the right to resolve the matter via interest arbitration. (*Ibid*.) The Board also found that the City's use of a memorandum to all employees represented by SEIU, reminding them of the Charter provision banning them from participating in strikes, was inherently destructive of employee rights. (*Id*. at p. 28.)

CCSF IV, *supra*, PERB Decision No. 2540-M, which involved impasse procedures for transit employees under Charter section 8A.104, held that an employer's

local rules violate the MMBA to the extent that they tilt labor relations toward management's priorities. (*Id.* at p. 15.)[3]

Finally, in *CCSF V*, *supra*, PERB Decision No. 2691-M, the unions challenged a Charter provision that cut off negotiations as of a certain date and disfavored new contract terms that created additional costs to the City. The Board found that this provision, as applied, left insufficient time for good faith negotiations and unlawfully tilted labor relations toward management's priorities. (*Id*. at pp. 36, 45.) As in *CCSF II* and *CCSF III*, the Board reiterated that it was leaving for another day whether the Charter's strike prohibition was unlawful as to economic strikes, and that the City acts at its peril in maintaining that position. (*Id*. at p. 32, fn. 21.)

In the instant matter, we consider the question left open in these prior CCSF decisions: whether a bar against economic strikes, as reflected in Charter section A8.346 and two sentences found in an introductory Declaration of Policy in section A8.409, conflicts with the MMBA. Although both provisions have long remained in effect, the Board has not until now squarely considered whether the MMBA permits such a prohibition against economic strikes.

---

[3] In one of the three charges consolidated in this case, Charging Party SEIU named the San Francisco Municipal Transportation Agency (SFMTA) as a separate Respondent. There is no dispute that SFMTA is a constituent City department. (*CCSF V*, *supra*, PERB Decision No. 2691-M, p. 4; *CCSF IV*, *supra*, PERB Decision No. 2540-M, adopting proposed decision at p. 4; see also, e.g., *Stitt v. San Francisco Municipal Transportation Agency* (N.D. Cal. May 2, 2014) 2014 WL 1760623, at *1 & fn. 2 [City admits that SFMTA is a constituent department].) Charter section 8A.104, which governs SFMTA personnel matters, incorporates by reference the Charter provisions challenged herein.

FACTUAL AND PROCEDURAL BACKGROUND

Background of the Charter and the provisions at issue

In 1976, the voters of the City and County of San Francisco passed Proposition B, amending the Charter to add section 8.346.[4] Motivated by a recent city-wide strike, Proposition B created a total ban on strikes by all City employees, mandating termination of any employee proven to have engaged in strike activity, with no discretion on the part of supervisors or the Civil Service Commission to overrule a strike-related termination, and a forfeiture of any seniority or other rehire rights in the event that a striking employee was later rehired to City employment.

In the late 1980's, the City implemented salary freezes to mitigate the impact of its financial difficulties. The salary freezes were controversial and resulted in litigation with affected unions, including SEIU and IFPTE. As a result of the City's desire to implement salary freezes for a third year, the City's unions began advocating for a system of interest arbitration in lieu of the existing salary standardization procedure, which was a formula system for establishing wages and benefits. The City eventually reached a deal with SEIU and IFPTE to propose a Charter amendment to provide interest arbitration in exchange for the unions agreeing to a third wage freeze and some additional fringe benefits.

SEIU and IFPTE strongly supported interest arbitration. The majority of unions representing City employees, including SEIU and IFPTE, participated in *Seal Beach*[5]

---

[4] In 1996, Charter section 8.346 was moved to an Appendix and relabeled "A8.346."

[5] In *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591 (*Seal Beach*), the California Supreme Court held that a charter city was required to comply with the MMBA's meet-and-confer requirements before

negotiations over a ballot measure to add an interest arbitration system to the Charter. During these negotiations, the City wanted to include a reference to Charter section 8.346's strike prohibition in the interest arbitration provisions, but the unions opposed it. The unions took the position that Charter section 8.346 was no longer enforceable based on the Supreme Court's decision in *County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn.* (1985) 38 Cal.3d 564 (*County Sanitation*). Jonathan Holtzman, the City's Chief Negotiator, understood that if the interest arbitration provision were to include a reference to Charter section 8.346, the unions, including Charging Parties SEIU and IFPTE, reserved their right to challenge that provision. However, the parties understood there would be a tradeoff where interest arbitration would not be available to a union that engaged in a strike.

Ultimately, the parties' negotiations resulted in the placement of Proposition B on the ballot in 1991. Proposition B allowed unions, at their discretion, to opt out of salary standardization, and instead to collectively bargain over wages and benefits, with binding interest arbitration for impasse resolution. Over objection from some of the unions, Proposition B included the reference to the strike prohibition in Charter section 8.346. SEIU supported the proposition with a paid argument in favor of Proposition B in the voter information pamphlet stating:

> "We support Proposition B because it represents a fair and equitable form of labor relations for City workers.
>
> "Collective bargaining and binding arbitration are basic labor issues. Proposition B changes the current City employee salary setting standards to provide greater flexibility for City workers and their families.

---

referring to voters a charter amendment that affected matters within the scope of representation. (*Id*. at pp. 597-602.) "*Seal Beach* negotiations" refers to such statutorily-required negotiations.

> "Proposition B will provide, for the first time, the ability for City workers to negotiate for health benefits for their families. This is a basic necessity whose time has come.
>
> "WE URGE YOU TO VOTE YES ON PROPOSITION B.
>
> "*Strikes will be precluded, since Proposition B utilizes the peaceful method of arbitration to settle grievances and discharges*.
>
> "Proposition B will bring San Francisco in line with other Bay Area cities and counties who already allow their workers to negotiate through collective bargaining and binding arbitration.
>
> "For fairness, equity, and flexibility, we urge you to support Proposition B. VOTE YES ON PROP B." (Italics added.)

In 1991, the City's voters passed Proposition B, amending the Charter to add sections 8.409, 8.409-1, 8.409-2, 8.409-3, 8.409-4, 8.409-5, and 8.409-6. Section 8.409-4 created a system of interest arbitration to resolve bargaining disputes between the City and the exclusive representatives of its employees. The interest arbitration method adopted was known as "baseball arbitration," where each party submitted a package last offer of settlement on the outstanding issues in dispute, and the interest arbitration panel would choose one package or the other in its entirety.

Charging Parties immediately opted into the new system.[6] At some point after, the City and SEIU engaged in arbitration under the new provisions, which resulted in an award against the City that it viewed as so unfavorable it raised concerns of bankruptcy. As a result, the City's mayor, Frank Jordan, sought to repeal the Charter's interest

[6] The Registered Nurse Unit, which is represented by SEIU, never opted into the interest arbitration system and continues to have a survey-based method for setting wages and benefits.

arbitration provisions entirely. Rather than repeal interest arbitration in full, however, the City reached a deal with the unions to propose a ballot proposition to modify interest arbitration under the Charter to make it issue by issue, rather than baseball arbitration. This resulted in Proposition F, which also eliminated the provisions allowing unions to opt into the system if they had not yet done so.

Proposition F added two provisions regarding strikes, which are set out in full below. Briefly, however, section 8.409-4(a) stated that after striking in support of its contract demands, a union could not insist on resolving the dispute via interest arbitration, though the City could waive that forfeiture and agree to interest arbitration. The other provision, the Declaration of Policy at the outset of section 8.409, stated: "If any officer or employee covered by this part engages in a strike as defined by section 8.346(a) of this Charter against the City and County of San Francisco, said employee shall be dismissed from his or her employment pursuant to Charter section 8.346." The parties mainly did not discuss these strike prohibitions in detail during *Seal Beach* negotiations over Proposition F, but the City did state to the unions that they "can't do both," viz., striking would preclude them from arbitrating.

In 1994, City voters adopted Proposition F, which significantly revised, among other sections, Charter sections 8.409, 8.409-1, 8.409-3, and 8.409-4. Other Charter sections relating to employees' compensation and collective bargaining were struck entirely.

Relevant Charter Provisions

The current version of section A8.346 states in relevant part:

> "A8.346 DISCIPLINARY ACTION AGAINST STRIKING EMPLOYEES OTHER THAN MEMBERS OF POLICE AND FIRE DEPARTMENT

The people of the City and County of San Francisco hereby find that the instigation of or participation in, strikes against said City and County by any officer or employee of said City and County constitutes a serious threat to the lives, property, and welfare of the citizens of said City and County and hereby declare as follows:

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

"(b) No person holding a position by appointment or employment under the civil service provisions of this Charter, exclusive of uniformed members of the police and fire departments as provided under Section 8.345[7] of this Charter, which persons are hereinafter referred to as municipal employees, shall strike, nor shall any municipal employee cause, instigate, or afford leadership to a strike against the City and County of San Francisco. For the purposes of this section, any municipal employee who willfully fails to report for duty, is willfully absent from his or her position, willfully engages in a work stoppage or slowdown, willfully interrupts City operations or services, or in any way willfully abstains in whole or in part from the full, faithful, and proper performance of the duties of his or her

[7] Following the renumbering of the Charter, this became section A8.345, which is a strike prohibition that applies to uniformed members of the police and fire departments employed under the civil service provisions of the Charter.

employment because such municipal employee is 'honoring' a strike by other municipal employees, shall be deemed to be on strike.[8]

"(c) No person exercising any authority, supervision, or direction over any municipal employee shall have the power to authorize, approve, or consent to a strike by any one or more municipal employees, and such person shall not authorize, approve, or consent to such strike. No officer, board, commission or committee of the City and County of San Francisco shall have the power to grant amnesty to any person who has violated any of the provisions of this section, and such officer or bodies shall not grant amnesty to any person who has violated any of the provisions of this section.

"(d) Notwithstanding any other provision of law, a person violating any of the provisions of this section may subsequent to such violation be appointed or reappointed, employed or re-employed as a municipal employee of the City and County of San Francisco, but only on the following conditions:

"(1) such person shall be appointed or reappointed, employed or re-employed as a new appointee or employee, who is appointed or employed in accordance with all Charter provisions, ordinances, rules or regulations of said City and County in effect for new employees at the time of appointment, reappointment, employment or reemployment;

"(2) the compensation of such person shall not be increased by virtue of any previous employment with said City and County.

"(e) In the event of a strike, or if the Mayor with the concurrence of a majority of the Board of Supervisors determines that a strike is imminent, a special committee shall convene forthwith, which special committee shall consist of the presidents of the airports commission, civil

[8] Though the second sentence of this subsection remains in the Charter, in *CCSF III* the Board declared it void and unenforceable. (*CCSF III*, *supra*, PERB Decision No. 2536-M, p. 40.)

service commission, fire commission, police commission, public transportation commission and public utilities commission. The president of the civil service commission shall serve as chairman of the special committee. Notwithstanding any other provision of law, it shall be the duty of the special committee to dismiss in accordance with the provisions of this section any municipal employee found to be in violation of any provisions of this section. Any person may file with the special committee written charges against a municipal employee or employees in violation of any of the provisions of this section and the special committee shall receive and investigate, without undue delay, and where necessary take appropriate actions regarding any such written charge(s), and forthwith inform that person of its findings and action, or proposed action thereon. In the event of a strike or determination of imminent strike as specified above, each appointing officer shall deliver each day no later than 12:00 o'clock noon to the chairman of the special committee a record of the absence of each employee under his or her authority for the prior day and a written report describing incidents of and the participant(s) in violations of this section wherever the identity of the participant(s) is known to him or her and the participant(s) is (are) under his or her authority. In addition each appointing officer shall provide to the special committee, whenever it has been convened under authority of law, any other information determined by the special committee to be necessary for the discharge of its duties. The failure of an appointing officer to discharge any of the duties imposed upon him or her by this section shall be official misconduct.

"(f) An employee charged by the special committee with a violation of this section shall be notified of the time and place of the hearing on the charges and of the nature of the charges against him or her. Said employee shall be given such other information as is required by due process. Said employee shall respond to said charges by a sworn affidavit, signed by him or her, and by such other information and documentation and in such a manner as is prescribed by the special committee. An employee failing to provide the responses required by this section or in any way failing to

comply with the procedural time limitations and information requirements imposed by the special committee shall be immediately suspended and shall not be entitled to a hearing until he or she has fully complied with the aforementioned requirements.

“If the special committee, after a hearing, determines that the charges against the employee are supported by the preponderance of the evidence submitted, said special committee shall dismiss the employee involved and said employee shall not be reinstated or returned to City and County service except as specified in Subsection (d). A dismissal or suspension invoked pursuant to the provisions of this section shall not be appealable to the civil service commission.

“(g) The special committee shall discharge its duties in a timely manner while preserving the due process rights of employees with the objective of obtaining immediate sanctions against striking employees. The willful failure of any member of this special committee faithfully and fully to discharge his or her duties in a timely manner and to accord absolute priority to the performance of those duties shall be deemed official misconduct.

“In the event the special committee determines that it shall be unable to comply with constitutional due process requirements that a timely hearing be provided or that it shall be unable to comply with its obligations fully and in a timely manner to investigate and hear all violations of this section, then the special committee may, subject to the budget and fiscal provisions of the Charter, engage the administrative and clerical personnel, investigators, and one or more hearing officers to conduct hearings hereunder. In conducting hearings, the hearing officers shall have the same powers of inquiry and disposition as the special committee.

“(h) In order to provide for the effective operation of this section in the event of a strike or determination of imminent strike, the president of the civil service commission, not later than 30 days after this section becomes effective, shall

> convene the special committee which shall adopt rules, regulations, and procedures for the investigation, hearing and disposition of all violations of this section.
>
> "(i) In order to bring the provisions of this section to the attention of any person who may be affected thereby, each municipal employee on the effective date of this section, exclusive of members of the uniformed forces of the police and fire departments . . . and each person appointed or employed as a municipal employee pursuant to the civil service provisions of this Charter, exclusive of persons appointed to the entrance positions in the uniformed forces of the police and fire departments . . . on or after the effective date of this section shall be furnished a copy of this section and shall acknowledge such receipt in writing. The signed, written receipt shall be filed in the office of the civil service commission and maintained therein for the term of his or her employment with the City and County of San Francisco.
>
> [¶] . . . [¶]
>
> "(k) If any clause, sentence, paragraph, subsection, or part of this section shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subsection, or part thereof directly involved in the controversy in which such judgment shall have been rendered."

Charter sections 8.409 through 8.409-6 were also moved to the appendix and renumbered as A8.409 through A8.409-6. Section A8.409 includes multiple subsections covering various employment-related topics, including medical benefits, retirement benefits, death allowances, employee relations rules, bargaining, and impasse resolution. Before any of these subsections is an introductory part titled "Declaration of Policy," which includes five paragraphs that state several general principles. Charging Parties challenge the first and third sentences, which reference strikes, as follows:

> "It is hereby declared to be the policy of the City and County of San Francisco that strikes by City employees are not in the public interest and that, in accordance with Government Code Section 3507(e), a method should be adopted for peacefully and equitably resolving disputes . . .
>
> "If any officer or employee covered by this part engages in a strike as defined by section 8.346(a) of this charter against the City and County of San Francisco, said employee shall be dismissed from his or her employment pursuant to charter section 8.346."

Among the subsections following this Declaration of Policy is section A8.409-4, which includes the following provision regarding availability of interest arbitration:

> "A8.409-4 IMPASSE RESOLUTION PROCEDURES
>
> "(a) Subject to Section A8.409-4(g), disputes pertaining to wages, hours, benefits or other terms and conditions of employment which remain unresolved after good faith bargaining between the City and County of San Francisco, on behalf of its departments, board and commissions, and a recognized employee organization representing classifications of employees covered under this part shall be submitted to a three-member mediation/arbitration board ('the Board') upon the declaration of an impasse either by the authorized representative of the City and County of San Francisco or by the authorized representative of the recognized employee organization involved in the dispute; provided, however, that the arbitration procedures set forth in this part shall not be available to any employee organization that engages in a strike unless the parties mutually agree to engage in arbitration under this section. Should any employee organization engage in a strike either during or after the completion of negotiations and impasse procedures, the arbitration procedure shall cease immediately and no further impasse resolution procedures shall be required."

City Documents Referencing the No-Strike Charter Provisions

The City Employee Handbook, dated January 2012, contains the following provisions:

> "**No Strike Provision**
>
> "Unless you are a uniformed member of the Police or Fire departments, you will be required to sign an acknowledgement of receipt of a copy of Charter Section A8.346 - Disciplinary Action Against Striking Employees. A separate Charter provision prohibits strikes by public safety employees. For more information, see the 'Employee Obligations' section of this Handbook.
>
> [¶] . . . [¶]
>
> "**Disciplinary Action against Striking Employees**
>
> "The City Charter prohibits municipal employees from engaging in a strike or failing to report to work in support of a strike. Any employee who willfully fails to report for duty, who participates in any concerted work stoppage or slowdown, or who willfully abstains in any way from the full, faithful, and proper performance of his or her job duties for the purpose of inducing, influencing, or coercing a change in the conditions of employment may be dismissed. This provision does not prohibit employees from communicating a view, grievance, complaint, or opinion on any matter related to the conditions of municipal employment as long as it does not interfere with the full, faithful, and proper performance of the duties of employment."

It is the City's practice, in conformity with Charter section A8.346, to require employees to sign and submit an "Acknowledgement and Receipt" form when starting employment and upon reassignment. The form requires employees to acknowledge the Charter's strike prohibition and states in relevant part:

“Charter Section A8.346
Disciplinary Action Against Striking Employees Other than
Member of Police and Fire Departments
Acknowledgment and Receipt Form

“The City Charter prohibits City and County of San Francisco (City) employees from going on strike. Any employee who participates in a strike can be fired. Participating in a strike means taking the actions listed below in an attempt to change the terms and conditions of employment. These actions include:
• Not coming to work;
• Taking part in a work stoppage or slowdown; and
• Coming to work but not doing your job.

“Employees may express their views, complaints, or opinions about the terms and conditions of City employment as long as they don’t interfere with getting the work done.

“**The full text of Charter Section A8.346 is included on the following pages.**

“The City will not enforce these no strike provisions in the case of a strike described in the second sentence of section A8.346(b) (highlighted on the next page). There is an exception to this because some of the City’s labor agreements (MOUs) specifically prohibit sympathy strikes. Employees must check their labor agreements to find out if they are prohibited from sympathy strikes based on their MOU language.”

Just above the signature line, the document states:

“I acknowledge that I have received a copy of Charter Section A8.346 – Disciplinary Action Against Striking Employees Other than Members of the Police and Fire Departments.

“I acknowledge that I am responsible for checking my labor agreement (MOU) to find out if it prohibits sympathy strikes.”

Procedural Background

IFPTE filed Case No. SF-CE-1663-M against the City on March 19, 2019. On March 25, 2019, SEIU filed Case No. SF-CE-1675-M against the City and Case No. SF-CE-1676-M against SFMTA. The unfair practice charges stated the same core allegations, i.e., Charter section A8.346 was unlawful, and the City's use of the acknowledgement and receipt form referencing section A8.346 interfered with protected employee and union rights. PERB's Office of the General Counsel (OGC) issued complaints on each of the charges in January and February 2020. Respondents timely filed separate answers to each of the complaints.

On November 5, 2020, SEIU filed a request to consolidate Case Nos. SF-CE-1675-M and SF-CE-1676-M. On March 8, 2021, IFPTE moved to consolidate Case No. SF-CE1663-M with Case Nos. SF-CE-1675-M and SF-CE-1676-M. At the commencement of the first day of the formal hearing on April 12, 2021, Charging Parties moved to amend the complaints to add that the City maintained and enforced Charter section A8.409 in violation of the MMBA. Charging Parties later filed a proposed amended consolidated complaint, which Respondents did not oppose. Accordingly, on April 15, the ALJ granted the motion. The hearing took place on April 13, 14, 15, and 16, 2021, after which the hearing record was closed. The parties subsequently filed their closing briefs and reply briefs, and the ALJ issued a proposed decision on May 27, 2022.

As a preliminary matter, the proposed decision held that the charge was timely filed based on the continuing violation doctrine. The proposed decision further held that the Charter provisions prohibiting employee strike activity are unlawful on their face and as applied because they totally and fatally conflict with the MMBA's right to strike as

recognized in *Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M (*Fresno IHSS*). The ALJ found multiple portions of Charter section A8.346 void and unenforceable, along with the references to that provision within section A8.409. Because the invalid portions permeated section A8.346, and excising them would leave the few remaining portions unintelligible, the ALJ deemed the entirety of section A8.346 and any references to it void and unenforceable. For the same reason, the ALJ found that the City's requiring employees to sign the Charter section A8.346 acknowledgement and receipt form was unlawful. However, the ALJ did not sustain Charging Parties' claim that the City's dissemination of the acknowledgement and receipt form constituted direct dealing. Finally, the ALJ found that the home rule doctrine did not alter the requirement that a city's charter must be consistent with the MMBA, as found in *CCSF V*, *supra*, PERB Decision No. 2691-M, p. 21, fn. 18.

On July 18, 2022, the City timely filed its statement of exceptions and amended statement of exceptions to the proposed decision.[9] On September 6, 2022, Charging Parties filed a joint opposition to the amended statement of exceptions and cross-exceptions. On October 3, 2022, the City filed its reply and opposition to Charging Parties' cross-exceptions. On October 13, 2022, Charging Parties filed their reply.

[9] The City has requested oral argument in this case. The Board typically denies requests for oral argument "when an adequate record has been prepared, the parties had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear as to make oral argument unnecessary." (*County of Santa Clara* (2018) PERB Decision No. 2613-M, p. 6, fn. 3.) Because these criteria are met, we deny the request.

DISCUSSION

I. Statute of Limitations

PERB generally may not issue a complaint with respect to an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1077.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177, p. 4.)

The continuing violation doctrine is an exception to the statute of limitations that applies to charges other than those alleging a unilateral change, where the respondent's allegedly unlawful policy or conduct is ongoing both before and during the limitations period. (*County of San Diego* (2020) PERB Decision No. 2721-M, pp. 7-14 (*San Diego*).)[10] "The continuing violation doctrine applies if a charging party alleges that a respondent's rule or policy on its face interferes with protected rights or discriminates against protected activity, and the policy was in effect during the six months prior to the filing of the charge." (*Id.* at p. 13.) In such cases, it is not the act of adopting the policy, but its continued existence that constitutes the offending conduct. (*Ibid*.)

PERB adopted this rule as early as *Long Beach Unified School District* (1987) PERB Decision No. 608, which addressed an employer policy limiting the times and

[10] The continuing violation doctrine is a distinct exception from the new wrongful act doctrine. (*San Diego*, *supra*, PERB Decision No. 2721-M, pp. 6-7 & 14; *San Dieguito Union High School District* (1982) PERB Decision No. 194, p. 5.) The new wrongful act doctrine applies if the charging party alleges that within the limitations period the respondent committed a new wrongful act that goes beyond merely reiterating a prior policy. (*San Diego*, *supra*, p. 14.)

locations that union representatives were permitted to meet with employees. (*Id.* at pp. 9-10.) The Board held that the specific date the employer adopted or revised the rule or policy "has no legal significance" because the rule's continued existence qualifies as a continuing violation. (*Id*. at p. 12.) In so holding, the Board noted that the union need not show that it attempted to violate the policy within the limitations period for its charge to be timely under the continuing violation doctrine. (*Ibid*.)[11]

The City urges us to adopt precedent from Fair Employment and Housing Act (FEHA, § 12900 et seq.) discrimination cases, where the continuing violation doctrine does not apply when the employer's actions have acquired a degree of permanency. (See *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823 [holding that "an employer's persistent failure to reasonably accommodate a disability, or to eliminate a hostile work environment targeting a disabled employee, is a continuing violation if the employer's unlawful actions are (1) sufficiently similar in kind—recognizing [. . .] that similar kinds of unlawful employer conduct, such as acts of harassment or failures to reasonably accommodate disability, may take a number of different forms . . . ; (2) have occurred with reasonable frequency; (3) and have not acquired a degree of

[11] The Board wrongly deviated from this rule in *County of Orange* (2006) PERB Decision No. 1868-M (*Orange*), holding that a party challenging a local rule must do so within six months of the rule's promulgation. (*Id*. at pp. 5-7.) The Board corrected this error when it fully overruled *Orange* in *San Diego*, *supra*, PERB Decision No. 2721-M, p. 12, noting that *Orange* was out of step with longstanding PERB precedent, as well as persuasive National Labor Relations Board precedent. It also bears noting that, three years before fully overruling *Orange*, the Board had held *Orange* did not apply where employees are subject to potential discipline for testing a rule. (*CCSF III*, *supra*, PERB Decision No. 2536-M, pp.14-15 & fn. 12.) While employees in this case are certainly subject to potential discipline for testing the rule in question, the continuing violation doctrine applies even irrespective of that circumstance.

permanence"].) We decline to adopt this precedent and instead continue to follow long-established PERB precedent. We reach this conclusion for multiple reasons, including because "in the realm of labor relations, . . . as a matter of labor policy, it is reasonable to allow bargaining parties the opportunity to operate under a rule and attempt to work out adjustments or accommodations if possible, rather than requiring a charge at the earliest possible stage in response to every rule change." (*San Diego*, *supra*, PERB Decision No. 2721-M, pp. 11-12, quoting *CCSF V*, *supra*, PERB Decision No. 2691-M, p. 54; see also *Cellular Sales of Missouri, LLC* (2015) 362 NLRB 241, 242 ["The [National Labor Relations] Board has held repeatedly that the maintenance of an unlawful rule is a continuing violation, regardless of when the rule was first promulgated"].)[12]

Therefore, the continuing violation doctrine applies, and the allegations are timely.[13]

II. Analysis of the Charter provisions

Under the MMBA, a local agency may adopt reasonable rules and regulations pertaining to resolving collective bargaining disputes. (Gov. Code, § 3507, subd. (a)(5).) In order to be lawful, such rules and regulations may not undercut or frustrate the MMBA's policies and purposes. (*International Federation of Prof. & Technical Engineers*

[12] Furthermore, over the past 14 years the Board has thrice noted that the legality of the City's strike prohibition was an unresolved question, while twice noting that the City would act at its peril if it chose to maintain the prohibition. (*CCSF V*, *supra*, PERB Decision No. 2691-M, p. 32, fn. 21; *CCSF III*, *supra*, PERB Decision No. 2536-M, p. 26, fn. 24; *CCSF II*, *supra*, PERB Decision No. 2041-M, adopting proposed decision at p. 33, fn. 19.) These circumstances would make it difficult for the City to now argue that the rule has acquired a degree of permanence, even assuming for the sake of argument that could ever support a statute of limitations defense.

[13] We consider the City's laches defense *post* at pages 51-53.

v. City & County of San Francisco (2000) 79 Cal.App.4th 1300, 1306 (*IFPTE*); *International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, 201 (*Gridley*); *Huntington Beach Police Officers' Assn. v. City of Huntington Beach* (1976) 58 Cal.App.3d 492, 500-502.) Therefore, if a local agency has adopted its rules, regulations, or charter provisions, whether by a vote of its electorate, a vote of its governing board, or by any other means, the resulting policies must be consistent with the MMBA. (*CCSF V*, *supra*, PERB Decision No. 2691-M, p. 20, citing *Gridley*, *supra*, 34 Cal.3d at p. 202; *Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 781; *IFPTE*, *supra*, 79 Cal.App.4th at p. 1306; *Los Angeles County Civil Service Com. v. Superior Court* (1978) 23 Cal.3d 55, 63 [local regulation is permitted only if "consistent with the purposes of the MMBA"].) We start from a position of presuming that an employer's rule is reasonable and lawful, which means that the burden of proof is on the party challenging such a rule. (*San Bernardino County Sheriff's etc. Assn. v. Board of Supervisors* (1992) 7 Cal.App.4th 602, 613.)

Charging Parties challenge Charter section A8.346, which prohibits municipal employees from striking, mandates termination of employees who have engaged in strike activity and strips such employees of accrued seniority if they are rehired. Charging Parties also challenge the portion of Charter section A8.409 that declares strikes by City employees are not in the public interest and refers to the requirement in section A8.346 that any City officer or employee who engages in a strike must be terminated. Charging Parties contend these provisions are unlawful, both facially and as applied, because they are incompatible with the MMBA. Before analyzing the validity of these provisions, we briefly outline the statutory right to strike.

A. The Statutory Right to Strike

The MMBA provides that "[e]xcept as otherwise provided by the Legislature, public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." (Gov. Code, § 3502.) *Fresno IHSS*, *supra*, PERB Decision No. 2418-M explained in detail that this language confers a "qualified right to strike recognized by the Supreme Court, including the right to strike in protest against unfair practices." (*Id*. at p. 33.) "As such, strikes by public employees are statutorily protected, except as limited by other provisions of the MMBA or other public-sector labor relations statutes and controlling precedent." (*Ibid*.; accord *County of San Joaquin v. Public Employment Relations Bd.* (2022) 82 Cal.App.5th 1053, 1072, 1081-1082, 1088 (*County of San Joaquin v. PERB*) [county infringed on MMBA-protected right to strike when it discouraged employees from authorizing strikes, and county discriminated against employees for exercising this right by imposing adverse actions on them for doing so].)

The limitations on California public sector employees' right to strike are few and carefully defined. As the California Supreme Court explained, "strikes by public employees are not unlawful at common law unless or until it is clearly demonstrated that such a strike creates a substantial and imminent threat to the health or safety of the public." (*County Sanitation*, *supra*, 38 Cal.3d at p. 586; see *San Ramon Valley Unified School District* (1984) PERB Order No. IR-46, p. 10 [a strike provoked by an employer's unfair labor practices would be protected at any time during the bargaining process as long as the striking employee organization has not failed to participate in good faith in the statutory impasse procedure]; *CCSF III*, *supra*, PERB Decision No. 2536-M, p. 54

["an economic strike occurring after exhaustion of statutory or other applicable impasse-resolution procedures" is "statutorily protected"].)[14]

While at one time courts had exclusive jurisdiction to determine what strike activity imminently and substantially threatened public health or safety, in 2000 the Legislature shifted that duty to PERB. (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 605-606.) PERB does so based upon a fact-intensive inquiry into the nature of the services at issue and whether the employer has clearly demonstrated that disruption of such services for the length of the strike would imminently and substantially threaten public health or safety. (*County of San Mateo* (2019) PERB Order No. IR-61-M, p. 8.)

By the same token, it is PERB's role to "determine whether, and under what circumstances, public employees and employee organizations have a *statutorily-protected* right to strike." (*Fresno IHSS*, *supra*, PERB Decision No. 2418-M, pp. 26-27, italics in original, citing *El Rancho Unified School Dist. v. National Education Assn.* (1983) 33 Cal.3d 946, 958-959; *Modesto City Schools* (1983) PERB Decision No. 291, pp. 68-69; see *City of San Jose v. Operating Engineers Local Union No. 3*,

[14] In addition to the *County Sanitation* standard, there are other instances where a strike can be found unlawful. For example, a strike occurring before the completion of statutory impasse procedures creates a rebuttable presumption that the strike violated the union's duty to bargain and participate in the impasse procedures in good faith. (*Fresno IHSS*, *supra*, PERB Decision No. 2418-M, p. 28; *Sweetwater Union High School District* (2014) PERB Order No. IR-58, pp. 9, 18.) The presumption may be overcome by the union's showing that the strike was an "unfair practice strike." (*Rio Hondo Community College District* (1983) PERB Decision No. 292, pp. 22-23 [union required to demonstrate that the employer committed an unfair practice and that misconduct provoked the strike].) A strike may also be unlawful if it is found to constitute "unlawful pressure tactics." (See *Regents of the University of California* (2019) PERB Order No. IR-62-H, pp. 6-10.)

supra, 49 Cal.4th at pp. 605-607 [rejecting argument that MMBA-covered employees' right to strike is purely a common law right].) Thus, it is up to PERB to weigh competing policies and determine what standards are necessary to protect the right to strike under the MMBA. (*County of San Joaquin v. PERB*, *supra*, 82 Cal.App.5th at pp. 1072-1075.) With these principles in mind, we analyze Charging Parties' challenges to the Charter provisions.

B. Legal Standard for Facial Challenges to Rules

A facial challenge to a rule is based solely on the text of the rule. (*CCSF V*, *supra*, PERB Decision No. 2691-M, p. 21, citing *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.) In *CCSF V*, we explained the standards that apply for facial challenges:

> "There are at least two possible standards for evaluating a facial challenge. (*Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1126.) Under the stricter standard, we should reject a facial challenge to a rule unless it totally and fatally conflicts with the MMBA. (*Ibid*.) Courts often follow a more lenient standard, however, wherein a facial challenge to a rule can be sustained if it conflicts with the MMBA 'in the generality or great majority of cases.' (*Ibid*.) Under either test, a party alleging a facial violation cannot prevail merely by suggesting that the challenged rule may run afoul of the law in 'some future hypothetical situation.' (*Beach & Bluff Conservancy v. City of Solana Beach* (2018) 28 Cal.App.5th 244, 264, citing other authority; *Zuckerman v. State Bd. of Chiropractic Examiners* (2002) 29 Cal.4th 32, 39.)
>
> "The difference between the above standards is often immaterial to facial challenges alleging that an employer's rule or policy conflicts with California labor law. This is true primarily because a facial challenge is an appropriate means to challenge an employer rule or policy that is alleged to have a chilling effect on employees or a union, or otherwise to interfere with or impinge on protected rights, even before being applied. (See, e.g., *Los Angeles County Federation of*

> *Labor v. County of Los Angeles* (1984) 160 Cal.App.3d 905, 908 [(*LA County*)] [overbroad rule against striking has chilling effect, making facial challenge appropriate]; *Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, pp. 42-50 [analyzing the language of employer directive, as it would reasonably be understood by employees, without regard to how or whether it was enforced].) There are also other types of cases in which there may be no need to choose between the competing standards governing a facial challenge. (See, e.g., *Voters for Responsible Retirement* [*v. Bd. Of Supervisors* (1994) 8 Cal.4th 765], 781.)"

(*CCSF V*, *supra*, PERB Decision No. 2691-M, pp. 21-22.) "Even where there is a plausibly valid interpretation of an employer rule, a facial challenge will still succeed if the rule has a chilling effect on employees or unions or otherwise interferes with or impinges on protected rights even before being applied." (*Id.*, p. 49, citing *LA County*, *supra*, 160 Cal.App.3d at p. 908.)

1. Analyzing the Facial Validity of Charter Section A8.346

Charter section A8.346 is facially invalid because it totally and fatally conflicts with established precedent recognizing the statutory right to strike. First, Charter section A8.346 initially declares that *all* strikes constitute a serious threat to the lives, property, and welfare of the citizens of the City. This totally conflicts with precedent recognizing that public employee strikes do not necessarily threaten the public more than private sector strikes, and MMBA-covered employees therefore have the right to strike except when doing so would imminently and substantially threaten public health or safety. (*County Sanitation*, *supra*, 38 Cal.3d at pp. 585-586 & 589-590; *County of San Joaquin v. PERB*, *supra*, 82 Cal.App.5th at pp. 1072-1075; *County of San Joaquin* (2021) PERB Decision No. 2761-M, pp. 29, 45.)

Charter section A8.346(a) defines strike activity as "the willful failure to report for duty, the willful absence from one's position, any concerted stoppage or slowdown of work, any concerted interruption of operations or services by employees, or the willful abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment, for the purpose of inducing, influencing, or coercing a change in the conditions of employment." This definition alone does not conflict with the MMBA. However, it defines the scope of the prohibited activity in the Charter sections that follow, which informs our analysis. Indeed, the Charter provisions set forth below violate the core principle that an employer generally may not discriminate between strikers and non-strikers in any manner other than refraining from paying strikers for work missed during the period of their strike. (*County of San Joaquin v. PERB*, *supra*, 82 Cal.App.5th at pp. 1078-1079, 1081-1082 & 1085-1086; *County of San Joaquin*, *supra*, PERB Decision No. 2761-M, pp. 60-67 & 71-74.)[15]

Charter section A8.346(b) provides that no "municipal employees[ ] shall strike, [or] cause, instigate, or afford leadership to a strike against the City and County of San Francisco. For the purposes of this section, any municipal employee who willfully fails to report for duty, is willfully absent from his or her position, willfully engages in a work stoppage or slowdown, willfully interrupts City operations or services, or in any way willfully abstains in whole or in part from the full, faithful, and proper performance of the duties of his or her employment because such municipal employee is 'honoring' a strike

[15] Under *County of San Joaquin*, *supra*, PERB Decision No. 2761-M, an absence for lawful strike activity must be excused as an authorized absence. (*Id*. at pp. 73-74.) Moreover, given that the Charter in this case in no way purports to focus narrowly on strike activity that would be unlawful under the MMBA, we do not tarry on the corresponding rule than an employer may not single out an employee who unlawfully strikes from others who have failed to clear an absence properly.

by other municipal employees, shall be deemed to be on strike." This section prohibits municipal employees from striking and engaging in strike related activity, which it broadly defines. Because this prohibition completely conflicts with the qualified right to strike by prohibiting all strike activity without exception, it is unlawful on its face.

Charter section A8.346(c) provides that City employees who exercise "authority, supervision, or direction over any municipal employee" cannot "authorize, approve, or consent to a strike by any one or more municipal employees," and cannot "grant amnesty" to any employee who has engaged in strike activity in violation of the Charter section. Insofar as this provision governs the authority that City managers and supervisors wield, employers may generally direct the actions of their employees, consistent with the MMBA. However, to the extent that this provision is a tool that exists for the purpose of ensuring that striking employees must be terminated, this section conflicts with the MMBA.

Charter section A8.346(d) provides that if an employee who was terminated for engaging in strike activity is rehired, they must lose any seniority accrued from their prior position. Specifically, they may only be "employed or re-employed as a new appointee or employee," whose compensation is not "increased by virtue of any previous employment" with the City. This provision operates as an additional penalty imposed upon employees who have engaged in a strike, stripping improperly terminated employees of benefits they have accrued by virtue of their seniority prior to striking. Because this section operates as another penalty for striking, it totally conflicts with the MMBA.

Charter subsections A8.346(e) through (h) mandate the creation of a special committee in the event of a strike, whose purpose is to "dismiss . . . any municipal

employee found to be in violation of any provisions of this section." These provisions also require appointing officers to provide the committee with "a record of the absence of each employee under his or her authority for the prior day and a written report describing incidents of and the participant(s) in violations of this section wherever the identity of the participant(s) is known to him or her and the participant(s) is (are) under his or her authority." A hearing is held for any charged employee, and any employee found to have engaged in strike activity by a preponderance of the evidence must be terminated. Finally, these subsections provide that the failure of any appointing officer to follow the requirements of section A8.346 constitutes official misconduct, as does any special committee member's willful failure to fully discharge their duties. These subsections totally and fatally conflict with the MMBA because they mandate termination of employees who have engaged in strike activity. Surveillance of protected activity, or creating the appearance of surveillance, also totally conflicts with the MMBA. (*County of San Bernardino* (2018) PERB Decision No. 2556-M, p. 20 [employer photographing or videotaping employees or openly engaging in recordkeeping of employees participating in union activities is unlawful surveillance because of the tendency to intimidate employees].) Here, the Charter creates both surveillance and the appearance thereof, which has a tendency to intimidate employees from engaging in protected activity. The remaining procedural provisions in subsections (e) through (h) do not conflict with the MMBA, but the ultimate outcome they serve is incompatible with the statute.

Charter section A8.346(i) requires that the City furnish copies of the Charter section to each municipal employee, requiring their acknowledgement in writing. Generally speaking, an employer may inform its employees of workplace rules. In *LA*

County, *supra*, 160 Cal.App.3d 905, the court held that a charter provision requiring employees to sign an acknowledgement of another charter provision mandating termination of striking employees was invalid because it required employees to "*agree* that I understand that during my term of employment with the County, I shall neither instigate, participate in, or afford leadership to a strike" and that by doing so "I shall be subject to discharge and shall not be reemployed by the County." (*Id*. at p. 909, italics added.) At that point in time, the court did not find objectionable the requirement that employees acknowledge and sign for service of the charter provision. (*Ibid*.) Rather, the court took issue with the requirement that employees agree to the threat of termination. (*Ibid*.) However, because this decision predated *County Sanitation*, *supra*, 38 Cal.3d 564, it did not fully contemplate the protected nature of the activities being chilled. Here, the Charter provision that employees are required to acknowledge is unlawful on its face because it requires surveilling employees suspected of engaging in strike activities and mandates terminating employees who have engaged in statutorily-protected strike activity. In addition to totally conflicting with the MMBA, these provisions also tend to chill employees from engaging in protected activity due to the threats of surveillance and termination. For these reasons, this acknowledgement requirement is unlawful on its face.

Read as a whole, Charter section A8.346 is unlawful on its face. The entire section is dedicated to the prohibition of employee strikes, mandating City management surveil employees during a strike and terminate any employee found to have engaged in strike activity. This across-the-board approach to prohibiting all employee strikes is contrary to PERB's narrow, restrained methodology for determining the lawfulness of a strike, as dictated by *County Sanitation*, *supra*, 38 Cal.3d at p. 586. (*County of San*

Mateo, *supra*, PERB Order No. IR 61-M, pp. 6-8.) Because the Charter's strike prohibition and termination requirements are overbroad, they fatally conflict with the MMBA.

2. Analyzing the Facial Validity of Charter Section A8.409

Charging Parties also challenge the introductory "Declaration of Policy" in Charter section A8.409, which states that "[i]t is hereby declared to be the policy of the City and County of San Francisco that strikes by City employees are not in the public interest . . . [i]f any officer or employee covered by this part engages in a strike as defined by section A8.346(a) of this Charter against the City and County of San Francisco, said employee shall be dismissed from his or her employment."[16] Because we find Charter section A8.346 unlawful as a whole, any references to it elsewhere in the Charter are also unlawful.

Respondents argue that the strike prohibition is lawful because it is part of a system of binding interest arbitration. Like the ALJ, we find that Charter section A8.409-4(a) (quoted in full *ante* at pp. 16-17) validly forces a union to make this choice: if it calls an economic strike to pressure the City to make contract concessions, then the City at that point has sole discretion to decide whether it still wishes to engage in interest arbitration during that contract negotiation cycle. That is the quid pro quo that the Charter lawfully imposes, much as the City itself explained to the unions before the 1994 Charter amendments: the unions "can't do both." We therefore uphold Charter section A8.409-4(a) to the extent that it allows the City to decline to resolve a negotiation through interest arbitration after a union has engaged in an economic strike

[16] The Declaration of Policy in Charter section A8.409 precedes the subsections labeled A8.409-1 through A8.409-9.

to pressure the City to make concessions. But that tradeoff does not support the far broader flat ban on all strike activity, as the City's total ban improperly allows one of two negotiating parties to unilaterally impose interest arbitration while depriving its counterpart of the choice whether to strike or engage in interest arbitration. (See *City of Fresno v. People ex rel. Fresno Firefighters, IAFF Local 753* (1999) 71 Cal.App.4th 82, 96-97 [interest arbitration is a valid, binding mechanism to resolve contract negotiations if *voluntarily* agreed to by both parties].)[17] We therefore reject the City's argument that providing interest arbitration immunizes it from MMBA principles that would otherwise apply. (See also *CCSF V*, *supra*, PERB Decision No. 2691-M, p. 35 ["[A]dopting an interest arbitration framework does not immunize the City from MMBA compliance"].)

While the Declaration of Policy egregiously violates the MMBA by referencing the requirement that striking employees be terminated, it is a closer call whether the Declaration of Policy also violates the MMBA in stating that municipal strikes are not in the public interest. Established precedent recognizes that not all strikes are harmful to the public. (See *County Sanitation*, *supra*, 38 Cal.3d 564, 585-586.) Because the Charter is overly broad in stating that all strikes are not in the public interest, it is contrary to the body of precedent establishing a qualified right to strike, casts a negative light upon striking employees, and tends to coerce employees from engaging in their statutory right. While this is not a total and fatal conflict, it nonetheless conflicts with the MMBA generally and the majority of the time, and has a tendency to chill engagement in

[17] Furthermore, the flat ban purports to even bar unfair labor practice and sympathy strikes, where interest arbitration would be no use, though we struck down that application of the Charter in *CCSF III*, *supra*, PERB Decision No. 2536-M, pp. 25-26 & adopting proposed decision at p. 20.

protected activity. (*LA County*, *supra*, 160 Cal.App.3d 905, 908.) We therefore find this statement facially unlawful.

C. Severability of the unlawful Charter provisions

Having found the above portions of the Charter unlawful, we next determine whether the unlawful portions of the Charter's provisions are severable, or if the entire sections containing the unlawful provisions must be deemed void and unenforceable. The Supreme Court has set forth the following standard for determining severability, which we will apply:

> "In determining whether the invalid portions of a statute can be severed, we look first to any severability clause. The presence of such a clause establishes a presumption in favor of severance. We will, however, consider three additional criteria: '[T]he invalid provision must be grammatically, functionally, and volitionally separable.'"

(*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 270-271, citations removed (*Matosantos*).)

An invalid provision "is 'grammatically' separable if it is 'distinct' and 'separate' and, hence, 'can be removed as a whole without affecting the wording of any' of the measure's 'other provisions.'" (*Jevne v. Superior Court* (2005) 35 Cal.4th 935, 960–961 (*Jevne*), quoting *Hotel Employees & Restaurant Employees Intern. Union v. Davis* (1999) 21 Cal.4th 585, 613 (*Hotel Employees*).)

A provision will be considered "'functionally' separable if it is not necessary to the measure's operation and purpose." (*Jevne*, *supra*, 35 Cal.4th at pp. 960–961, quoting *Hotel Employees*, *supra*, 21 Cal.4th at p. 613; see also *Vivid Entertainment, LLC v. Fielding* (9th Cir. 2014) 774 F.3d 566, 576 [when assessing functional separability, "[t]he remaining provisions must stand on their own, unaided by the invalid provisions nor

rendered vague by their absence nor inextricably connected to them by policy considerations. They must be capable of separate enforcement"].)

A provision "is 'volitionally' separable if it was not of critical importance to the measure's enactment." (*Jevne*, *supra*, 35 Cal.4th at pp. 960-961, quoting *Hotel Employees*, *supra*, 21 Cal.4th at p. 613.) When assessing volitional separability, "the issue is whether a legislative body, knowing that only part of its enactment would be valid, would have preferred that part to nothing, or would instead have declined to enact the valid without the invalid." (*Matosantos*, *supra*, 53 Cal.4th at p. 273, citing *Gerken v. Fair Political Practices Com.* (1993) 6 Cal.4th 707, 719; *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 822; *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 320.) The Supreme Court explained:

> "[T]he provisions to be severed must be so presented to the electorate in the initiative that their significance may be seen and independently evaluated in the light of the assigned purposes of the enactment. *The test is whether it can be said with confidence that the electorate's attention was sufficiently focused upon the parts to be severed so that it would have separately considered and adopted them in the absence of the invalid portions.*"

(*Gerken v. Fair Political Practices Com.*, *supra*, 6 Cal.4th 707, 714-715, italics in original, quoting *People's Advocate, Inc. v. Superior Court* (1986) 181 Cal.App.3d 316, 332-333.)

In this case, Charter section 16.113 is a global severability clause that applies to all parts of the Charter, meaning we start with a presumption of severability.[18]

[18] Charter section 16.113, titled Severability, provides: "If any provision of this Charter, or its application to any person or circumstances is held invalid, the remainder of this Charter, and the application of such provision to other persons or circumstances, shall not be affected."

1. Severability of section A8.346

Charter section A8.346 contains 11 subsections, lettered (a) through (k). As discussed above, virtually every subsection would be unlawful even if viewed individually, but the parts are inextricably linked together by their purpose of assuring that any employee who strikes is terminated. Thus, even though we begin with a presumption in favor of severance,[19] it is easily overcome here. (*Matosantos*, *supra*, 53 Cal.4th at p. 270.) The invalid provisions of section A8.346—subsections (b), (c), (d), (e), (f), (g), (h) and (i)—are grammatically separable in the sense that they are separate subsections and can be removed without affecting the wording of subsections (a), (j) and (k). However, the unlawful provisions are not functionally or volitionally separable because they comprise the entire purpose of section A8.346. If we were to strike these unlawful provisions from section A8.346, the section would lose its entire purpose, and thus the reason for its enactment. (See *Jevne*, *supra*, 35 Cal.4th at pp. 960-961.) Indeed, the remaining provisions would be nonsensical, as all that would be left would be a definition for the word "strike" (subsection (a)), a clarification that the Mayor's emergency powers have no application to strikes (subsection (j)), and the severability clause itself (subsection (k)). For that reason, the entirety of Charter section A8.346 must be deemed unlawful. We do, however, find that section A8.346 is fully severable from the rest of the Charter, other than the subsequent reference to it in section A8.409's Declaration of Policy. We turn now to that provision.

[19] We begin with that presumption both as a result of Charter section 16.113 and the additional severability clause found in section A8.346(k).

2. Severability of section A8.409

Despite the two unlawful statements in the Declaration of Policy in Charter section A8.409, Charging Parties argue that the remainder of section A8.409 should remain in effect. Respondents argue that the no-strike provision in the Declaration of Policy cannot be severed from the interest arbitration provisions found in section A8.409-4 because "[t]he no-strike provision is integral to the system of binding interest arbitration established in the City charter, and if the no-strike provision cannot be enforced then Charging Parties cannot be allowed to take advantage of binding interest arbitration."

We again begin with a presumption in favor of severability. Moreover, here, in contrast to the above analysis, the three factors all favor severability. First, the reference to the section A8.346 strike prohibition is grammatically separable because it is an independent statement that does not impact the grammar of the remaining provisions.

The reference to section A8.346's strike prohibition is also functionally separable in that the remaining provisions stand on their own and are separately enforceable. In any event, Section A8.409-4(a) is clear. It provides that "that the arbitration procedures set forth in this part shall not be available to any employee organization that engages in a strike unless the parties mutually agree to engage in arbitration under this Section. Should any employee organization engage in a strike either during or after the completion of negotiations and impasse procedures, the arbitration procedure shall cease immediately and no further impasse resolution procedures shall be required." Thus, as discussed above, the Charter sets forth a clear, linked quid pro quo in which the tradeoff for interest arbitration in a given negotiation cycle is for the union to refrain

from an economic strike. To the extent the purpose of interest arbitration is to prevent a union from engaging in strike activity, section A8.409-4(a)'s excluding the availability of interest arbitration from striking unions renders the reference to A8.346's prohibition of strikes functionally separable.

The City emphasizes its volitional severability argument, arguing that section A8.346's complete prohibition on strikes was "of critical importance" to Proposition B's enactment in 1991, which created interest arbitration. The record largely shows otherwise. First, the City's lead negotiator, Holtzman, explained that the proposition resulted from a deal reached with SEIU and IFPTE in exchange for agreeing to a third year of salary freezes. During *Seal Beach* negotiations for the proposition, the unions and the City disagreed as to whether the strike prohibition in section A8.346 was even valid after *County Sanitation*. Further, as discussed above, in later *Seal Beach* negotiations prior to Proposition F in 1994, the City explained that unions "can't do both," thereby confirming that interest arbitration is linked to a union refraining from engaging in an economic strike in support of its demands in a given negotiation cycle.

Furthermore, as the Board noted in *CCSF III*, *supra*, PERB Decision No. 2536-M, "the ban on strikes pre-dated the provision providing for arbitration by nearly two decades." (*Id*. at p. 26, fn. 24.) This significant gap in time means the City cannot succeed in showing the provisions to be volitionally inseparable.

Finally, the ballot proposition for Proposition B did not place significant weight on the strike prohibition. Proposition B was titled "Collective Bargaining," and was phrased on the ballot as follows: "Shall wages, hours, and most benefits and working conditions for miscellaneous City employees be set though collective bargaining, with disputes resolved on an issue by issue basis by an arbitration board, subject to review by a

court?" The explanation of the proposition speaks to replacing the salary survey method of setting City employee salaries with collective bargaining. There is no mention of a strike prohibition in the explanation of the proposition.[20] Based on this evidence, and section A8.409-4(a)'s conditioning the availability of arbitration on a union's not striking, we find that the reiteration of section A8.346's strike prohibition is volitionally separable. (*Matosantos*, *supra*, 53 Cal.4th at p. 273.) If the electorate would not have voted in favor of adopting interest arbitration if it was available to a union who engaged in a strike, that concern is still ameliorated by section A8.409-4(a).

We therefore find it appropriate to sever the following statements in the Declaration of Policy in section A8.409:

> "It is hereby declared to be the policy of the city and county of San Francisco that strikes by city employees are not in the public interest . . .
>
> "If any officer or employee covered by this part engages in a strike as defined by section A8.346(a) of this charter against the City and County of San Francisco, said employee shall be dismissed from his or her employment pursuant to charter section A8.346."

[20] The City points to SEIU's paid argument in favor of Proposition B in the voter information pamphlet, *ante*, pp. 8-9, stating, among other things, "Strikes will be precluded, since Proposition B utilizes the peaceful method of arbitration to settle grievances and discharges . . ." We do not find this statement to be of overriding importance to the voters in the context of the many other changes being made by Proposition B and other statements provided in support of the proposition. In any event, even if avoiding union strikes was a voter concern, because section A8.409-4(a) conditions availability of arbitration on a union's not striking, voters would have likely still voted yes on Proposition B.

III. Strike prohibition acknowledgement forms

Because the Charter's strike prohibition is invalid based on its total conflict with the statutory right to strike, we agree with the ALJ that distributing copies of the unlawful prohibition as provided in Charter section A8.346(i) and requiring employees sign the acknowledgement form is invalid as applied and constitutes interference with protected rights.

Charging Parties except to the proposed decision's finding that the City requiring new and reassigned employees to sign an acknowledgement form that includes any reference to Charter section A8.346 does not establish a direct dealing violation. We exercise our discretion not to resolve that claim because the remedial order already requires the City cease and desist distributing the Charter acknowledgement forms. (*The Accelerated Schools* (2023) PERB Decision No. 2855, p. 3 [exercising discretion not to resolve or remand a claim that would not materially alter the remedy if proven], citing *City of Bellflower* (2021) PERB Decision No. 2770-M, p. 10; see also *County of San Joaquin*, *supra*, PERB Decision No. 2761-M, p. 83; *City of Glendale* (2020) PERB Decision No. 2694-M, pp. 58-59.)

IV. Affirmative Defenses

A. The home rule doctrine

1. Application of the home rule legal framework

Respondents argue that any right to strike provided by the MMBA is subject to regulation by charter cities and counties under the home rule doctrine. Sound PERB and judicial precedent compel us to disagree.

Preliminarily, we note that prior Board decisions involving the City have adjudicated the issue of whether the home rule doctrine impacts the general

requirement that the terms of a charter must be consistent with the MMBA. Collateral estoppel precludes the relitigation of an issue already decided in another proceeding where: "(1) the issue is identical to that decided in the former proceeding, (2) the issue was actually litigated in the former proceeding, (3) the issue was necessarily decided in the former proceeding, (4) the decision in the former proceeding is final and on the merits, and (5) preclusion is sought against a person who was a party or in privity with a party to the former proceeding." (*Castillo v. City of Los Angeles* (2001) 92 Cal.App.4th 477, 481; see also *City and County of San Francisco* (2022) PERB Order No. Ad-497-M, p. 27.)[21] These elements are met here. In *CCSF III*, *supra*, PERB Decision No. 2536-M and *CCSF V*, *supra*, PERB Decision No. 2691-M, the City actually litigated the issue of whether the Charter was immunized from PERB's scrutiny based on the home rule doctrine. In both decisions, the Board disagreed and instead found that "[t]he home rule doctrine does not alter the fact that a city's charter must be consistent with the MMBA." (*CCSF V*, *supra*, at p. 21, fn. 18; *CCSF III*, *supra*, at pp. 22-25.) Indeed, in *CCSF III* the Board provided a detailed analysis of the home rule doctrine, explaining why it did not prevent PERB from finding the Charter's prohibition of sympathy and unfair labor practice strikes in violation of the MMBA. (*CCSF III*, *supra*, at pp. 22-25.) Those decisions are final and on the merits. Last, SFMTA is a constituent department within the City, meaning there is no dispute as to privity.[22]

---

[21] To the extent there is a meaningful distinction between the test for collateral estoppel articulated in *Castillo* and the test used by PERB in *City and County of San Francisco*, it is the additional requirement that the issue was necessarily decided in the former proceeding. That the City's arguments about the home rule doctrine are estopped even under the more arduous standard bolsters our finding that the City is precluded from raising this issue anew.

[22] See *Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Ass'n* (1998)

In any event, even if collateral estoppel did not bar the City's argument, it lacks merit. Home rule powers allow charter cities and counties to act as sovereigns with respect to their own municipal affairs. (Cal Const., art. XI, § 5, subd. (a).) Thus, under the California Constitution's home rule provisions, a city may adopt a charter giving it the power to make and enforce all ordinances and regulations in respect to municipal affairs, subject only to the charter's own restrictions. (*Id*., art. XI, § 3, subd. (a), § 5, subd. (a); *City of San Diego* (2015) PERB Decision No. 2464-M, p. 30, affirmed sub nom. *Boling v. Public Employment Relations Board* (2018) 5 Cal.5th 898 (*Boling*).) Such ordinances may be in "conflict with general state laws, provided the subject of the regulation is a 'municipal affair' rather than one of 'statewide concern.'" (*Traders Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37, 45.) For example, charter ordinances that pertain to municipal operations, including a city's "right to provide 'for the number, compensation, tenure, and appointment of employees' . . . trump conflicting state laws." (*Curcini v. County of Alameda* (2008) 164 Cal.App.4th 629, 640.)

Conversely, where the state law addresses a matter of statewide concern, "'general law prevails over local enactments of a chartered city, even in regard to matters which would otherwise be deemed to be strictly municipal affairs.'" (*Boling*, *supra*, 5 Cal.5th at p. 915, quoting *Seal Beach*, *supra*, 36 Cal.3d at p. 600; *Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d at p. 292.)

---

60 Cal.App.4th 1053, 1069–1070 [privity refers "to a mutual or successive relationship to the same rights of property, or to such an identification in interest of one person with another as to represent the same legal rights . . . and, more recently, to a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is 'sufficiently close' so as to justify application of the doctrine of collateral estoppel"].

The California Supreme Court has articulated an analytical framework for resolving whether or not a matter falls within the home rule authority of charter cities:

> "First, a court must determine whether the city ordinance at issue regulates an activity that can be characterized as a 'municipal affair.' [ ] Second, the court 'must satisfy itself that the case presents an actual conflict between [local and state law].' [ ] Third, the court must decide whether the state law addresses a matter of 'statewide concern.' [ ] Finally, the court must determine whether the law is 'reasonably related to . . . resolution' of that concern [ ] and "narrowly tailored" to avoid unnecessary interference in local governance [ ]. 'If . . . the court is persuaded that the subject of the state statute is one of statewide concern and that the statute is reasonably related to its resolution [and not unduly broad in its sweep], then the conflicting charter city measure ceases to be a "municipal affair" pro tanto and the Legislature is not prohibited by article XI, section 5(a), from addressing the statewide dimension by its own tailored enactments.'"

(*State Building & Construction Trades Council of California, AFL-CIO v. City of Vista* (2012) 54 Cal.4th 547, 556 (*City of Vista*), bracketed text in original, quoting *California Federal Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 16-17, 24 (*California Fed. Savings*).) "In the event of a true conflict between a state statute reasonably tailored to the resolution of a subject of statewide concern and a charter city [ordinance], the latter ceases to be a 'municipal affair' to the extent of the conflict and must yield." (*California Fed. Savings*, *supra*, 54 Cal.3d at p. 7.)

Applying *City of Vista*, we conclude that section A8.346 and the unlawful portions of section A8.409 are not protected by the home rule doctrine. First, the Charter's placing limitations on the conduct that its employees can take in the workplace, specifically prohibiting strike activity under threat of termination, is arguably a municipal affair. And as we discussed above, the Charter's prohibition of strike activity and the MMBA's protection of the right to strike directly conflict.

As to the third element, the right to strike is a matter of statewide concern. In *County Sanitation*, the Supreme Court described the important role the ability to strike has in the power balance between parties while bargaining:

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

(*County Sanitation*, *supra*, 38 Cal.3d at p. 583, footnote omitted, italics in original.) PERB has explained that "[b]ecause of its importance to the bargaining process, the right to strike is as much a matter of statewide concern as is the duty to bargain in good faith acknowledged in *Seal Beach.*" (*CCSF III*, *supra*, PERB Decision No. 2536-M, p. 24.)[23] This is because strike activity, including credible strike threats, "equalize the parties' bargaining power" and "render collective bargaining a more efficient method to bring labor peace." (*Ibid*.) Therefore, generally protecting the right to strike "is reasonably related and tailored to the statewide concern for the reasons described in *County Sanitation*, *supra*, 38 Cal.3d 564." (*CCSF III*, *supra*, PERB Decision No. 2536, p. 24; see *County Sanitation*, *supra*, 38 Cal.3d at p. 589 [citing with approval observations that "[o]bviously the right to strike is essential to the viability of a labor

[23] The Supreme Court has recognized that the MMBA's mandate for employers and exclusive representatives to meet and confer in good faith in furtherance of harmonious public sector labor relations is a matter of statewide concern. (*Seal Beach*, *supra*, 36 Cal.3d at pp. 601-602.)

union," and a union lacking a strike threat will "wither away in ineffectiveness"]; see also *San Jose v. Operating Engineers Local Union No. 3*, *supra*, 49 Cal.4th at p. 707 [legality of a public employee strike "goes to the essence of" state labor law, and does not primarily implicate civil order or another local concern].)

Last, the MMBA's protection of the right to strike is narrowly tailored. The MMBA expressly applies to charter cities and counties and guarantees that "public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." (Gov. Code, §§ 3501, subd. (c), 3502.) As explained above, strikes are a form of protected activity, but this is not a blanket protection because certain strikes are unprotected. Moreover, while an employer cannot flatly ban strikes, employers and unions are free to enter into voluntary agreements that prohibit striking, and they commonly do so. So too can the City choose not to enter into interest arbitration with a union if the union chooses to exert economic pressure via a strike, pursuant to Charter section A8.409-4. Therefore, the statutory protection of strikes as set forth in the MMBA is narrowly tailored.

Because the right to strike is of statewide concern, and MMBA's protection of the right to strike is narrowly tailored, the matter ceases to be a municipal concern and state law prevails.

2. The City's home rule exceptions

The City seeks to distinguish the Supreme Court's holding in *Seal Beach* that "'general law prevails over local enactments of a chartered city, even in regard to matters which would otherwise be deemed to be strictly municipal affairs, where the subject matter of the general law is of statewide concern.'" (*Seal Beach*, *supra*,

36 Cal.3d at p. 600.) In order to do so, Respondents characterize the Charter provisions here as substantive rather than procedural, as contemplated by *Seal Beach*. The City provides no support for its contention that the right to strike is a substantive labor issue, as opposed to an important feature in the "procedure for resolving disputes regarding wages, hours and other terms of conditions of employment." (*Seal Beach*, *supra*, 36 Cal.3d 591, 597.) Even if certain employee rights under the MMBA can be characterized as 'substantive,' this does not provide a useful distinction that can support the City's argument. "[T]he distinction between substantive and procedural measures is not determinative, and substantive laws displacing local authority over municipal affairs have been upheld by the courts." (*Marquez v. City of Long Beach* (2019) 32 Cal.App.5th 552, 573, citing *Healy v. Industrial Acc. Commission* (1953) 41 Cal.2d 118, 122; *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 788, 799-801.) For example, in *Huntington Beach Police Officers' Assn. v. City of Huntington Beach*, *supra*, 58 Cal.App.3d 492, a charter city's attempt to exclude working hours from the scope of bargaining was ruled invalid. (*Id*. at p. 500.) In doing so, the appellate court explained that "[l]abor relations in the public sector are matters of statewide concern subject to state legislation in contravention of local regulation by chartered cities." (*Ibid*.) Additionally, in *Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, the Supreme Court upheld the right of firefighters to organize, despite charter provisions to the contrary. (*Id*. at pp. 294-295.)

In support of its position, the City cites to cases where courts found the home rule doctrine invalidated certain statewide statutes, *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296 and *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278 (*Riverside*). Respondents claim that these

cases stand for the broad proposition that "delegation of authority to charter cities and charter counties cannot be contravened by the Legislature." But these two cases concerned laws that violated the counties' sovereign authority to set wages for employees, which is distinguishable from our inquiry here. First, a municipality's power to set wages is explicitly enumerated by the Constitution. (Cal. Const., art. XI, § 5, subd. (b).) Second, longstanding precedent has recognized that the authority to set wages is largely reserved to charter counties. (See *Riverside*, *supra*, 30 Cal.4th at p. 289 ["there is no question that 'salaries of local employees of a charter city constitute municipal affairs and are not subject to general laws'"].) Invalidating the City's outright ban on strikes in no way supplants the City's authority to set wages. Therefore, our application of the above test for determining whether a matter is a purely municipal affair versus a matter of statewide concern is consistent with these decisions, as well as with the principle that the right to strike is "the essence of labor law." (*San Jose v. Operating Engineers Local Union No. 3*, *supra*, 49 Cal.4th at p. 707.) The City's reference to broad principles alone fails to account for the larger body of law determining when a matter of statewide concern trumps municipal affairs.

Respondents also argue that, to the extent the MMBA does not allow for a system of binding interest arbitration that includes a no-strike clause, it violates the home rule doctrine. However, the portion of the Charter that we find unlawful is its blanket strike prohibition. The City is not prohibited from enforcing the portion of section A8.409-4(a) that conditions the availability of interest arbitration on a union's forbearance from striking during that round of negotiations. We therefore need not address the remainder of this exception as it is inapplicable.

For the foregoing reasons, we conclude that Respondents cannot take shelter under the home rule doctrine.

B. Waiver and laches

Respondents raise the defense of waiver regarding multiple issues in this case. Because waiver is an affirmative defense, a party asserting waiver bears the burden of proof. (*City of Culver City* (2020) PERB Decision No. 2731-M, p. 13 (*Culver City*).) A party seeking to establish waiver of a statutory right may allege contractual waiver, waiver by inaction, or waiver by negotiations history, but any of the three types of waivers must be clear and unmistakable. (*San Francisco County Superior Court and Region 2 Court Interpreter Employment Relations Committee* (2018) PERB Decision No. 2609-I, p. 10; *County of Merced* (2020) PERB Decision No. 2740-M, pp. 10 & 19.) PERB therefore resolves any doubts against finding waiver of the right to bargain. (*County of Merced*, *supra*, pp. 9-10.)

First, Respondents argue that "any right to strike is not so absolute that it cannot be waived, whether as part of a collective bargaining agreement or a system of dispute resolution such as binding interest arbitration." While a union may waive its right to strike, contractual waiver will only be found based upon a bilateral agreement rather than a unilaterally implemented policy. (*City of Culver*, *supra*, PERB Decision No. 2731-M, pp. 18 & 20.) Here, the Charter's prohibition of strikes is what is at issue, and the record does not contain evidence demonstrating that the parties bilaterally agreed to implementing a permanent strike prohibition in the Charter. Because PERB requires a showing of volition to find any type of waiver, the implementation of Proposition B and its prohibition of protected conduct cannot be construed as waiver.

Furthermore, a union's conduct in negotiations does not constitute a waiver of its right to bargain unless the parties "fully discussed" or "consciously explored" a subject, and the union thereafter intentionally yielded its interest in the matter. (*Fresno IHSS*, *supra*, PERB Decision No. 2418-M, p. 41; see also *Placentia Unified School District* (1986) PERB Decision No. 595, p. 4 [evidence must reflect "a conscious abandonment of the right to bargain over a particular subject"].) Again, the record does not contain evidence to support a finding that the Charging Parties intentionally yielded the right to strike via a permanent ban in the Charter. The only evidence the City points to in its attempt to establish waiver is the *Seal Beach* negotiations in the 1990's that resulted in the addition of a binding interest arbitration provision to the Charter. Because those negotiations occurred decades after the Charter's strike prohibition, we do not find section A.8409's reference to section A8.346 constitutes waiver.[24] Furthermore, Holtzman recalled that during the negotiation sessions in the 1990's, some unions took the position that the strike prohibition was unlawful and could not be enforced. While Holtzman's testimony understandably lacked detail on this issue due to the passage of time, he could recollect no facts to demonstrate that a blanket strike prohibition was fully discussed and consciously abandoned by the Charging Parties. Therefore, the *Seal Beach* negotiations do not support a waiver defense.[25]

---

[24] Because the strike prohibition already existed in Charter section A8.346, we do not find that its reiteration in section A8.409 constitutes a waiver.

[25] It also bears noting that the City is party to approximately 30 MOUs covering approximately 59 bargaining units. (*CCSF V*, *supra*, PERB Decision No. 2691-M, p. 11.) Even had the City succeeded in showing waiver by one or more unions during prior *Seal Beach* negotiations, such a waiver would be ineffective as to a union that was absent from such negotiations, including but not limited to any union certified or recognized thereafter. (See, e.g., *Presbyterian University Hospital* (1998) 325 NLRB 443, 447 [bargaining unit that selects new exclusive representative not bound by prior

Respondents also argue that Charging Parties' claims are barred by the equitable defense of laches.[26] Like waiver, "the party asserting and seeking to benefit from the laches bar bears the burden of proof on these factors." (*Mt. San Antonio Community College Dist. v. Public Employment Relations Bd.* (1989) 210 Cal.App.3d 178, 188.) In unfair practice proceedings, laches requires a respondent to show: (1) the charging party has unreasonably delayed in prosecuting its case, and (2) either the charging party has acquiesced in the acts about which it complains, or the respondent has suffered prejudice as a result of the charging party's unreasonable delay. (*Santa Ana Unified School District* (2017) PERB Decision No. 2514, p. 22, citing *Mt. San Antonio Community College Dist. v. Public Employment Relations Bd.*, *supra*, 210 Cal.App.3d at p. 188; *Vernon Fire Fighters Assn. v. City of Vernon* (1986) 178 Cal.App.3d 710, 719; *Santa Monica Mun. Employees Assn. v. City of Santa Monica* (1987) 191 Cal.App.3d 1538, 1546-1547.)

Respondents argue that Charging Parties are barred by laches from challenging the Charter's strike prohibition because it has been in place since 1976, in 1991 Charging Parties participated in *Seal Beach* negotiations over Proposition B that resulted in adding interest arbitration to the Charter, and SEIU publicly supported Proposition B. We need not decide whether Charging Parties unreasonably delayed in bringing this action, because we do not find the second element has been met.

---

representative's waiver].)

[26] Respondents also assert in passing that the equitable defense of unclean hands applies. However, Respondents have not included any evidence or argument in support of this assertion, so we deem the argument waived. (PERB Reg. 32300, subd. (a)(3) [exceptions shall "cite to relevant legal authority to support legal arguments"]; PERB Regulations are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

To prove the second element, Respondents appear to argue that because SEIU supported section A8.409, which reiterates the strike prohibition contained in section A8.346, they either acquiesced to the strike prohibition or prejudiced the Respondents. However, we do not interpret SEIU's support for binding interest arbitration as acquiescence to a strike prohibition, even if the same Proposition added the Declaration of Policy referring to an existing charter section that prohibits striking.[27] Further, we also do not find that Respondents were prejudiced. As explained above, section A8.409-4(a) still conditions the availability of interest arbitration upon the union's not striking. Therefore, we find that voiding the strike prohibition in section A8.346 and any references to it does not prejudice the City, since arbitration would remain unavailable to a union which has engaged in a strike, unless Respondents agree otherwise.[28]

V. Remedy

The MMBA authorizes PERB to order "the appropriate remedy necessary to effectuate the purposes of this chapter." (Gov. Code, § 3509, subd. (b); see also *Omnitrans* (2010) PERB Decision No. 2143-M, p. 8.) This includes the authority to order an offending party to take affirmative actions designed to effectuate the purposes of the MMBA. (*Omnitrans*, *supra*, PERB Decision No. 2143-M, p. 10.) "A 'properly designed remedial order seeks a restoration of the situation as nearly as possible to that which

[27] Even if SEIU's support for Proposition B was found to satisfy the laches defense, such a defense would not apply to bar other unions representing City employees from challenging the strike prohibition.

[28] Moreover, as noted above, the Board has repeatedly stated that the legality of the City's strike prohibition was an unresolved question, and that the City would act at its peril if it chose to maintain the prohibition. (*CCSF V*, *supra*, PERB Decision No. 2691-M, p. 32, fn. 21; *CCSF III*, *supra*, PERB Decision No. 2536-M, p. 26, fn. 24; *CCSF II*, *supra*, PERB Decision No. 2041-M, adopting proposed decision at p. 33, fn. 19.) These circumstances further undercut Respondents' laches defense.

would have obtained but for the unfair labor practice.'" (*County of Sonoma* (2023) PERB Decision No. 2772a-M, p. 29, quoting *Modesto City Schools* (1983) PERB Decision No. 291, pp. 67-68.)

Because PERB is a quasi-judicial agency, the separation of powers doctrine prevents PERB from compelling legislative action by a city or county. (*City of Palo Alto v. Public Employment Relations Bd.* (2016) 5 Cal.App.5th 1271, 1310 (*Palo Alto*).) Therefore, PERB lacks the authority to order the City to rescind charter provisions. However, it is "appropriate and within PERB's authority to declare void and unenforceable portions of the Charter that conflict with the MMBA. Unlike ordering the language 'rescinded,' such an order does not amount to 'rewriting' the Charter, but merely enjoins enforcement of the illegal regulation." (*CCSF III*, *supra*, PERB Decision No. 2536-M, p. 39.)[29] In *CCSF III*, we explained that this remedy is "precisely how courts have treated local provisions, including charter provisions, that conflict with superior state law." (*Ibid*., citing *Palo Alto*, *supra*, 5 Cal.App.5th 1271; *Gridley*, *supra*, 34 Cal.3d 191; *Younger v. Board of Supervisors* (1979) 93 Cal.App.3d 864, 870; *LA County*, *supra*, 160 Cal.App.3d 905; *International Assn. of Fire Fighters Union v. City of Pleasanton* (1976) 56 Cal.App.3d 959, 964, 977; *Independent Union of Public Services Employees v. County of Sacramento* (1983) 147 Cal.App.3d 482, 490; *Cerini v. City of Cloverdale* (1987) 191 Cal.App.3d 1471, 1481; *Jauregui v. City of Palmdale*, *supra*, 226 Cal.App.4th 781, 807-808.)

[29] It bears noting that the issue of whether an unlawful charter provision may be deemed void and unenforceable has been previously litigated by the City and decided in *CCSF III*. (*CCSF III*, *supra*, PERB Decision No. 2536-M, pp. 37-44.) For the reasons we discuss above at pages 42-43, collateral estoppel applies and precludes relitigating the issue. We nonetheless explain our reasoning behind this remedial order.

In circumstances where a voter-approved charter provision conflicts with the MMBA, courts have enjoined the enforcement of such provisions and declared them unenforceable. Specifically, in *LA County*, *supra*, 160 Cal.App.3d 905, the court held that a voter-adopted charter amendment prohibiting the charter county from granting improvements in wages or working conditions to employees represented by a striking union was invalid and enjoined the enforcement of those provisions. (*Id*. at pp.907-908.)

The City contends that PERB lacks jurisdiction to declare portions of the Charter void and unenforceable, citing *County of Sonoma v. Public Employment Relations Bd.* (2022) 80 Cal.App.5th 167 (*Sonoma*). *Sonoma*, like *Palo Alto*, concluded that an action in quo warranto pursuant to Code of Civil Procedure section 803 was the exclusive remedy to challenge irregularities in the legislative process. (*Sonoma*, *supra*, 80 Cal.App.5th at pp. 190-191; *Palo Alto*, *supra*, 5 Cal.App.5th at p. 1320.) Courts have thus held that an action in quo warranto is the exclusive means to invalidate a ballot initiative that was passed in violation of the MMBA's meet-and-confer requirement. (*Ibid.;* see also *Boling v. Public Employment Relations Bd.* (2019) 33 Cal.App.5th 376, 384-386.) But in this case, we do not remedy a procedural irregularity in the legislative process that resulted in the enactment of any portions of the Charter. Thus, quo warranto would not be available to remedy the violations alleged in this case. Where a local ordinance conflicts with the MMBA, it is void or invalid. (See *LA County*, *supra*, 160 Cal.App.3d at p. 908; see also *Huntington Beach Police Officers' Assn. v. City of Huntington Beach*, *supra*, 58 Cal.App.3d at p. 503.)

Because we find the Charter provisions prohibiting all strike activity unlawful, it is appropriate to enjoin the enforcement of section A8.346 and declare section A8.346 and any references to it in the Charter void and unenforceable. It is also appropriate to order

the City to cease and desist from distributing section A8.346 acknowledgement forms, requiring employees to sign such forms, or referencing section A8.346's strike prohibition in the employee handbook. Further, we find it appropriate to deem void and unenforceable the first and third sentence in the Declaration of Policy provision in Charter section A8.409.

We also find it appropriate to order a notice posting. Because the void and unenforceable Charter provisions impacted City employees beyond the bargaining units represented by Charging Parties, it is appropriate to order a City-wide notice posting.

Respondents request the parties be "provided a reasonable period of time to negotiate a remedy that effectuates the purposes of the MMBA." Charging Parties oppose this request. The Board has a longstanding policy favoring voluntary settlement of disputes. (*Dry Creek Joint Elementary School District* (1980) PERB Order No. Ad-81a.) Because the unlawful provisions affect City employees beyond the Charging Parties' bargaining units, the number of interested parties makes a potential alternative resolution ill-suited for negotiation by only two of the many unions representing City employees. We do not find it appropriate to provide the parties with additional time to negotiate, but to the extent the parties are now able to reach mutually agreeable terms that substantially comply with the Board's remedial order, they may present the settlement agreement to the OGC, to be considered during compliance.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it has been found that the City and County of San Francisco (City) violated the Meyers Milias-Brown Act (MMBA). The City maintained and enforced unlawful rules in violation of Government Code section 3507 and Public Employment Relations Board

(PERB or Board) Regulation 32603, subdivision (f). (Cal. Code of Regs., tit. 8, § 31001 et seq.) By this conduct, the City also interfered with the right of City employees to participate in the activities of an employee organization of their own choosing, in violation of Government Code section 3506 and PERB Regulation 32603, subdivision (a), and denied International Federation of Professional & Technical Engineers, Local 21 (IFPTE) and Service Employees International Union, Local 1021 (SEIU) their right to represent employees in their employment relations with a public agency, in violation of Government Code section 3503 and PERB Regulation 32603, subdivision (b).

Pursuant to section 3509, subdivision (a) of the Government Code, it hereby is ORDERED that Charter section A8.346 and the first and third sentences of the Declaration of Policy portion of Charter section A8.409 are void and unenforceable. The City, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Maintaining and enforcing Charter section A8.346 “DISCIPLINARY ACTION AGAINST STRIKING EMPLOYEES OTHER THAN MEMBERS OF POLICE AND FIRE DEPARTMENT” and any references to section A8.346 within the Charter.

2. Maintaining and enforcing the first and third sentences of the Declaration of Policy portion of Charter section A8.409.

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

4. Denying IFPTE and SEIU their right to represent employees in their employment relations with the City.

5. Requiring employees to sign an acknowledgment document that includes any reference to Charter section A8.346.

6. Including any reference to Charter section A8.346 in the City's employee handbook.

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

1. Within 10 workdays after this decision is no longer subject to appeal, post at all City work locations where notices to employees are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the City, indicating that the City will comply with the terms of this Order. Such posting shall remain in place for a period of 30 consecutive workdays. The City shall take reasonable steps to ensure that the Notice is not altered, defaced, or covered with any other material. In addition to physically posting this Notice, the City shall post it by electronic message, intranet, internet site, and other electronic means the City uses to communicate with employees.[30]

2. Notify OGC of the actions the City has taken to follow this Order by providing written reports as directed by OGC and concurrently serving such reports on IFPTE and SEIU.

Members Krantz and Paulson joined in this Decision.

[30] Either party may ask PERB's Office of the General Counsel (OGC) to alter or extend the posting period, require further notice methods, or otherwise supplement or adjust this Order to ensure adequate notice. Upon receipt of such a request, OGC shall solicit input from all parties and, if warranted, provide amended instructions to ensure adequate notice.

APPENDIX

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

After a hearing in Unfair Practice Case Nos. SF-CE-1663-M, *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. City and County of San Francisco*; SF-CE-1675-M, *Service Employees International Union Local 1021 v. City and County of San Francisco*; and SF-CE-1676-M, *Service Employees International Union Local 1021 v. City and County of San Francisco (San Francisco Municipal Transportation Agency)*, in which all parties had the right to participate, the Public Employment Relations Board (PERB) has found that the City and County of San Francisco (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq.

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

A. CEASE AND DESIST FROM:

1. Maintaining and enforcing Charter section A8.346 "DISCIPLINARY ACTION AGAINST STRIKING EMPLOYEES OTHER THAN MEMBERS OF POLICE AND FIRE DEPARTMENT" and any references to section A8.346 within the Charter.

2. Maintaining and enforcing the first and third sentences of the Declaration of Policy portion of Charter section A8.409.

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

4. Denying International Federation of Professional & Technical Engineers, Local 21 and Service Employees International Union, Local 1021 their right to represent employees in their employment relations with the City.

5. Requiring employees to sign an acknowledgment document that includes any reference to Charter section A8.346.

6. Including any reference to Charter section A8.346 in the City's employee handbook.

Dated: _____ City and County of San Francisco

By: _____
Authorized Agent

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

PROOF OF SERVICE

I declare that I am a resident of or employed in the County of Sacramento, California. I am over the age of 18 years and not a party to the within entitled cause. The name and address of my residence or business is Public Employment Relations Board, Appeals Office, 1031 18th Street, Suite 207, Sacramento, CA, 95811-4124.

On July 24, 2023, I served PERB Decision No. 2867-M regarding *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. City and County of San Francisco; Service Employees International Union Local 1021 v. City and County of San Francisco; Service Employees International Union Local 1021 v. City and County of San Francisco (San Francisco Municipal Transportation Agency)*, Case Nos. SF-CE-1663-M, SF-CE-1675-M, and LA-CE-1676-M on the parties listed below by

____ I am personally and readily familiar with the business practice of the Public Employment Relations Board for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Sacramento, California.

____Personal delivery.

_X_Electronic service (e-mail).

Arthur Liou, Attorney
Peter Saltzman, Attorney
Mollie Simons, Attorney
Leonard Carder LLP
1999 Harrison St., Ste. 2700
Oakland, CA 94612
Email: aliou@leonardcarder.com
psaltzman@leonardcarder.com
msimons@leonardcarder.com

Kerianne Steele, Attorney
Weinberg, Roger & Rosenfeld
1375 55th Street
Emeryville, CA 94608
Email: ksteele@unioncounsel.net

Carmen Leon, Deputy City Attorney
San Francisco City Attorney's Office
1390 Market Street Fifth Floor
San Francisco, CA 94102
Email: carmen.leon@sfcityatty.org

Timothy Yeung, Attorney
Sloan Sakai Yeung & Wong LLP
555 Capitol Mall, Suite 600
Sacramento, CA 95814
Email: tyeung@sloansakai.com

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on July 24, 2023, at Sacramento, California.

Joseph Seisa
(Type or print name)

J. Seisa
(Signature)