STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

OPERATING ENGINEERS LOCAL UNION NO. 3, Charging Party, v. CITY AND COUNTY OF SAN FRANCISCO, Respondent.	Case No. SF-CE-1790-M PERB Decision No. 2858-M April 26, 2023

Appearances: Weinberg, Roger & Rosenfeld by Kerianne R. Steele and Zachary D. Angulo, Attorneys, for Operating Engineers Local Union No. 3; Office of the City Attorney by Jonathan C. Rolnick, Chief Labor Attorney, and Jennifer S. Stoughton, Deputy City Attorney, for the City and County of San Francisco.

Before Banks, Chair; Krantz and Paulson, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Charging Party Operating Engineers Local Union No. 3 (OE3) to a proposed decision of an administrative law judge (ALJ). The complaint alleged that Respondent City and County of San Francisco (City) violated the Meyers-Milias-Brown Act (MMBA) and PERB Regulations by: (1) asserting that San Francisco City Charter (Charter) section A8.409-4(k) barred it from considering a retroactive wage increase proposal; and (2) refusing to bargain over retroactivity.[1]

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

The proposed decision noted that in *City and County of San Francisco* (2020) PERB Decision No. 2691-M (*CCSF*), the Board held that Charter section A8.409-4(k) is only lawful to the extent the City interprets it, in harmony with the MMBA, to allow the parties to negotiate over new contract terms that take effect "mid-year or retroactive to any date." (*Id*. at p. 57.) But the proposed decision found that the City did not violate the MMBA by adopting a contrary interpretation in this case, because the City did so while pursuing an extraordinary writ asking the California Court of Appeal to overturn the Board's *CCSF* decision. For that reason, and because the City eventually changed its interpretation and agreed to a retroactive wage increase after PERB's Office of the General Counsel issued a complaint in this case, the ALJ dismissed the complaint and the underlying charge.

Having reviewed the record and considered the parties' arguments, we reverse the proposed decision. As explained below, the City had the right to appeal *CCSF*, *supra*, Decision No. 2691-M, but this case does not turn on any claim that the City was in contempt of our order in that case. Rather, PERB must independently apply the MMBA to the facts of this case. The MMBA requires that Charter section A8.409-4(k) be interpreted to allow good faith negotiations over proposals for retroactive wage adjustments, but here the City unlawfully interpreted its Charter for more than three months of its negotiations with OE3. The fact that the City later changed its mind—and the parties eventually negotiated a retroactive wage increase—affects the proper remedy in this matter but does not shield the City from liability.

FACTUAL AND PROCEDURAL BACKGROUND

Neither party excepted to the ALJ's factual findings. The following summary covers the central undisputed facts.

The City is a public agency under PERB Regulation 32016, subdivision (a). OE3, an "employee organization" within the meaning of MMBA section 3501, subdivision (a), and an "exclusive representative" within the meaning of PERB Regulation 32016, subdivision (b), represents two bargaining units of City employees, including the Supervising Probation Officers Unit.

I. The Charter's Interest Arbitration Provisions[2]

Appendix 8 to the Charter, commonly referred to as "A8," governs City employment. Section A8.409-4 allows binding interest arbitration when the City and a union of City employees reach a collective bargaining impasse. The interest arbitration process unfolds before an arbitration/mediation board (arbitration board) that consists of one member that the City appoints, a second member that the union appoints, and a neutral third member. "[If] no agreement is reached prior to the conclusion of the arbitration hearings," the arbitration board must direct each party to submit "a last offer of settlement on each of the remaining issues in dispute." (Charter, § A8.409-4(d).) The arbitration board then resolves each disputed issue by majority vote, based on factors listed in the Charter. (*Ibid*.)

The arbitration board's neutral third member is typically a labor arbitrator, and the arbitrator's vote usually decides all disputed topics, since the arbitration board

[2] For a more complete discussion of the relevant Charter provisions and their history, see *CCSF*, *supra*, PERB Decision No. 2691-M, pp. 5-11.

members appointed by the parties are not neutral and generally vote in favor of the party that appointed them. For this reason, we often refer to "the arbitrator" as shorthand for the full three-member arbitration board.

The arbitrator has discretion to resolve disputes by mediation and/or arbitration, and the arbitrator may hold hearings and receive evidence from the parties. (Charter, § A8.409-4(c).) The arbitrator "may also adopt other procedures designed to encourage an agreement between the parties, expedite the arbitration hearing process, or reduce the cost of the arbitration process." (*Ibid*.)

Charter section A8.409-4(k), states:

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

> overtime, any employer pickup of the employees' retirement contribution, paid time off, and other compensation."

II. The Negotiations Giving Rise to This Dispute

In the first five months of 2019, OE3 and the City bargained for a successor memorandum of understanding (MOU) covering the Supervising Probation Officers Unit. The parties reached a new MOU, which took effect on the first day of the next fiscal year, July 1, 2019. The new MOU required the parties to engage in mid-contract negotiations over one unresolved issue: compensation and related terms for welfare fraud investigators (WFIs) engaged in firearms instruction.

In August 2019, the parties began their mid-contract negotiations over the unresolved firearms instruction issues. Victoria Carson was the City's chief negotiator, while David Tuttle was OE3's chief negotiator. On August 16, 2019, OE3 proposed a six percent premium, retroactive to July 1, 2019, for WFIs performing firearms training.[3]

The parties met four more times in 2019, on September 23, October 22, November 13, and December 5. During the parties' December 2019 bargaining session, the City verbally proposed a five percent premium for the firearms training work. Among other differences between the City's verbal proposal and OE3's prior written proposal, the City's verbal proposal was not retroactive. Carson told Tuttle there was a legal obstacle to a retroactive increase. Then, at the close of that day's negotiating session, Tuttle and Carson spoke with the City's Employee Relations Director, who specified that it was the Charter that barred retroactivity.

[3] While the parties' proposals covered multiple issues relating to WFIs performing firearms instruction, this summary focuses on the amount of the premium and its effective date.

On February 10, 2020, the City e-mailed OE3 a written proposal for a five percent firearms training premium effective July 1, 2020.[4] Later on February 10, Tuttle e-mailed Carson a copy of *CCSF*, *supra*, PERB Decision No. 2691-M. In his cover e-mail attaching the decision, Tuttle explained that PERB held the MMBA requires the City to:

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

Still on February 10, Carson e-mailed Tuttle in response, writing in relevant part: "It is a violation of the Charter and this PERB decision is being appealed so, the beat goes on for now. Status quo."

The parties continued debating the issue over the next month. On March 17, OE3 filed this charge.

In telephone conversations on March 26 and April 20, Carson and Tuttle discussed potential ways to bridge their differences on retroactivity. On April 21, Tuttle e-mailed Carson about a potential means to pay retroactive compensation for firearms instruction occurring at any time during the 2019-2020 fiscal year. Carson responded by e-mail later that day, sending the City's first proposal that included a retroactive payment for firearms training work performed in fiscal year 2019-2020.

[4] All further dates refer to 2020 unless otherwise noted.

Over the ensuing two weeks, the parties reached an agreement on compensation and related provisions on firearms instruction. The agreement provided, among other terms, a prospective five percent firearms instruction premium beginning at the outset of fiscal year 2020-2021, and a one-time lump sum payment on August 18, covering firearms instruction duties performed in fiscal year 2019-2020. One City employee, Frank Lowe, was eligible for the new prospective premium and the lump sum retroactive payment. In July, Lowe began receiving the prospective premium for firearms instruction work performed in fiscal year 2020-2021, and on August 18, he received a lump sum retroactive payment for firearms instruction work performed during fiscal year 2019-2020.

DISCUSSION

Under the MMBA, a local agency may adopt reasonable rules and regulations about resolution of collective bargaining disputes. (MMBA, § 3507, subd. (a)(5).) To be lawful, such rules and regulations may not undercut or frustrate the MMBA's policies and purposes. (*International Federation of Prof. & Technical Engineers v. City & County of San Francisco* (2000) 79 Cal.App.4th 1300, 1306 (*IFPTE*); *Huntington Beach Police Officers' Assn. v. City of Huntington Beach* (1976) 58 Cal.App.3d 492, 500-502 (*Huntington Beach*).) Therefore, whether a local agency has adopted its rules, regulations, or charter provisions via a vote of its electorate, a vote of its governing board, or through any other means, the resulting policies must be consistent with the MMBA. (*International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, 202; *Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 781 [MMBA restricts the local electorate's power to

legislate through the initiative or referendum process]; *IFPTE*, *supra*, 79 Cal.App.4th at p. 1306, citing *Los Angeles County Civil Service Com. v. Superior Court* (1978) 23 Cal.3d 55, 63 ["Local regulation is permitted only if 'consistent with the purposes of the MMBA'"].) The burden of proof is on the party challenging such a rule. (*CCSF*, *supra*, PERB Decision No. 2691-M, pp. 20-21.)

The home rule doctrine does not alter the fact that a city's charter must be consistent with the MMBA. (*Boling v. Public Employment Relations Board* (2018) 5 Cal.5th 898, 913, citing *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 600 ["[G]eneral law prevails over local enactments of a chartered city, even in regard to matters which would otherwise be deemed to be strictly municipal affairs, where the subject matter of the general law is of statewide concern"]; *Huntington Beach*, *supra*, 58 Cal.App.3d at p. 500 ["With respect to matters of statewide concern, charter cities are subject to and controlled by applicable general state law if the Legislature has manifested an intent to occupy the field . . . Labor relations in the public sector are matters of statewide concern"]; *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553, 557 ["[L]ocal legislation may not conflict with statutes such as the [MMBA] which are intended to regulate the entire field of labor relations of affected public employees throughout the state"]; *City of San Diego* (2015) PERB Decision No. 2464-M, pp. 28-35 [discussing interplay between the home rule doctrine and the MMBA]; accord *United Public Employees v. City and County of San Francisco* (1987) 190 Cal.App.3d 419, 423 [while salary structures are strictly local affairs and not preempted by general law, "the procedure by which such compensation is determined is subject to the provisions of

the MMBA"]; *Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, 289-295 [a city's charter must comply with provisions in the Labor Code].)

A facial challenge is based only on the text of the rule. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.) There are two primary standards for evaluating a facial challenge. (*Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1126.) Under the stricter standard, a facial challenge fails unless the rule is totally and fatally unlawful. (*Ibid*.) Courts often follow a more lenient standard, however. Under the more lenient standard, a facial challenge succeeds if the rule is unlawful "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 Board 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. (*CCSF*, *supra*, PERB Decision No. 2691-M, p. 22.) 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. (*Ibid*.; see, e.g., *Los Angeles County Federation of Labor v. County of Los Angeles* (1984) 160 Cal.App.3d 905, 908 [overbroad rule against striking has chilling effect, making facial challenge appropriate]; *Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, pp. 42-50 [analyzing the language of

employer directive, as it would reasonably be understood by employees, without regard to how or whether it was enforced].)

I. The *CCSF* Decision

In *CCSF*, *supra*, PERB Decision No. 2691-M, a charging party union asserted both a facial challenge and an as-applied challenge to Charter section A8.409-4(k). The City interpreted Charter section A8.409-4(k) to cut off negotiations by May 15 of a negotiation cycle (the "submission deadline"), and the Board considered whether, facially or as applied, this interpretation violated the MMBA's requirement that parties afford sufficient time for good faith negotiations and good faith participation in impasse procedures. (*CCSF*, *supra*, PERB Decision No. 2691-M, pp. 23-31.) The Board also considered whether the City imposed an unlawful "one way ratchet" tilting labor relations toward management's priorities when it interpreted Charter section A8.409-4(k) to permit cost savings to take effect any time while limiting the extent to which mid-contract negotiations or interest arbitration may lead to economic terms that add to the City's cost in an immediate or retroactive manner. (*Id*. at pp. 35-36.)

To help analyze these questions, the Board noted California Supreme Court precedent directing that the Charter must be read in harmony with the MMBA if possible. (*CCSF*, *supra*, PERB Decision No. 2691-M, p. 31, citing *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 665). Following this principle, the Board found that the Charter is facially valid if, and only if, the City interprets it to avoid tilting the playing field in the City's favor and to allow adequate time for good faith negotiations and impasse resolution. (*Id*. at p. 23). To the extent the

City strayed from such a lawful interpretation, it violated the MMBA as applied. (*Id*. at p. 42).

Thus, to avoid striking Charter section A8.409-4(k) as facially invalid, the Board directed the City to interpret it to conform with the MMBA, as follows: (1) the section's submission deadline must be interpreted as the time by which the City and its union negotiating partners should submit those substantive terms of their next MOU that are fully agreed-upon or which an arbitrator has ordered by that date, together with any agreed-upon or ordered contract provisions requiring the parties to engage in further, mid-contract negotiation and/or interest arbitration on any issues meriting such further processes (*CCSF*, *supra*, PERB Decision No. 2691-M, pp. 3, 42-47);[5] and (2) the section must be interpreted as allowing such mid-contract negotiation or interest arbitration procedures to establish enhancements that take effect mid-year or retroactive to any date (*id*. at pp. 3, 31, 36, 42-47).

CCSF explains why this interpretation is both a necessary and reasonable reading of section A8.409-4(k) that saves it from facial invalidity. (*CCSF*, *supra*, PERB Decision No. 2691-M, pp. 35-51.) One critical reason is that when the City and a union submit an MOU by the submission deadline, and the MOU they submit includes substantive provisions on certain employment terms together with provisions requiring mid-contract negotiation and/or interest arbitration as to other terms, the parties have satisfied the deadline and there is therefore no "penalty" restriction on the effective

[5] *CCSF* notes that the parties or the arbitrator may decide that such further, mid-contract negotiations and/or arbitration proceedings are proper because there was insufficient time prior to the submission deadline, or because other factors make it proper to address one or more specified terms and conditions of employment in the months to follow. (*CCSF*, *supra*, PERB Decision No. 2691-M, p. 46.)

date of any further enhancements subsequently agreed upon or ordered. (*Id*. at p. 47.) The Board noted that the City had, at times, interpreted the provision that way. (*Id*. at pp. 44-45, 47-48.) Thus, because section A8.409-4(k) can be interpreted lawfully and is not facially invalid, the Board held that any future cases involving the provision should be litigated on an as-applied basis. (*Id*. at p. 50, fn. 31.)

The City filed a petition for writ of extraordinary relief, asking the Court of Appeal to reverse *CCSF*, *supra*, PERB Decision No. 2691-M. On October 28, 2021, the Court of Appeal summarily denied the City's writ petition. The City then sought review in the California Supreme Court, but on December 15, 2021, the Court denied review. The City sought no further review, and PERB's decision therefore became final.

II. The City's Conduct During Mid-Contract Negotiations in Winter 2019-2020

As noted above, on December 5, 2019, the City asserted that Charter section A8.409-4(k) barred OE3's proposal for a firearms instruction premium retroactive to July 1, 2019. The City reiterated its position in writing on February 10, 2020, in response to OE3 sending the City the *CCSF* decision.

The City's interpretation violated the MMBA for the reasons explained in *CCSF*, *supra*, PERB Decision No. 2691-M. Moreover, this unlawful interpretation caused the City to refuse for more than three months to consider, much less bargain about, OE3's retroactive pay proposal, a per se failure to bargain in good faith. (*City of Glendale* (2020) PERB Decision No. 2694-M, pp. 64-65; *County of Sacramento* (2020) PERB Decision No. 2745-M, pp. 24-25.)

The City had a statutory right to file an extraordinary writ asking the Court of Appeal to review *CCSF*, *supra*, Decision No. 2691-M. The City's unlawful conduct in this case was *not* its conduct in appealing that decision.[6] Nor is the City's liability based on contempt of the order in *CCSF*.[7] Rather, the City violated the MMBA by unlawfully interpreting section A8.409-4(k) and thereby refusing to bargain over retroactivity for more than three months. The City is not immune from liability for new unlawful conduct vis-à-vis OE3 merely because it had interpreted its Charter unlawfully in an earlier instance involving a different union and had a pending appeal regarding PERB's decision in that case. Indeed, if anything, the *CCSF* decision against the City in January 2020 put it on notice that it was acting at its peril if it continued to engage in the same conduct in negotiations with OE3.

The City eventually stopped unlawfully interpreting its Charter and bargained over OE3's proposal for a retroactive payment. But retraction is not available as a defense to having applied a local rule unlawfully and engaged in per se bad faith bargaining, and even when a retraction defense is available against a bad faith bargaining claim, retraction after three months of bad faith conduct does not immunize a party against liability. (*Muroc Unified School District* (1978) PERB Decision No. 80,

[6] We therefore express no opinion on the ALJ's assertion that a party accused of bad faith bargaining and enforcing an unlawful local rule can raise a defense based on the principles in *Operating Engineers Local Union No. 3, AFL-CIO (Wagner et al.)* (2021) PERB Decision No. 2782-M [discussing qualified litigation privilege in interference cases] (*Operating Engineers Local Union No. 3*).

[7] For that reason, there is no reason to analyze the parties' claims about any duty the City may have allegedly had, during its appeal of *CCSF*, *supra*, PERB Decision No. 2691-M, to follow the decision's remedial order.

p. 19; *Amador Valley Joint Union High School District* (1978) PERB Decision No. 74, pp. 3-9.) The City's change in interpretation does, however, affect our remedy as explained below.

Finally, while OE3 asserts that Charter section A8.409-4(k) is facially invalid given that the City has twice interpreted the provision in an unlawful manner, we reject that argument because we have already explained that the City must interpret the provision in harmony with the MMBA. (*CCSF*, *supra*, PERB Decision No. 2691-M, p. 23.) As discussed *post*, we will direct the City to do so in the future, as well as to make OE3 whole for the extra bargaining costs it incurred when the City unlawfully interpreted its Charter and bargained in bad faith for several months in 2019-2020.

For the foregoing reasons, the City failed and refused to bargain in good faith and unlawfully interpreted and applied Charter section A8.409-4(k).[8]

III. Remedy

The Legislature has vested PERB with broad authority to decide what remedies are necessary to effectuate the purposes and policies of the MMBA and the other acts we enforce. (MMBA, § 3509, subd. (b); *Mt. San Antonio Community College Dist. v. Public Employment Relations Bd.* (1989) 210 Cal.App.3d 178, 189.) PERB remedies must serve the dual purposes of compensating for the harm a violation causes and deterring further violations. (*County of San Joaquin v. Public Employment Relations Bd.* (2022) 82 Cal.App.5th 1053, 1068; *Bellflower Unified School District* (2022) PERB Decision No. 2544a, p. 26.) While remedial orders must rely to a degree

[8] The same conduct also derivatively interfered with union and employee rights that the MMBA protects. (*Oxnard Union High School District* (2022) PERB Decision No. 2803, p. 2; *CCSF*, *supra*, PERB Decision No. 2691-M, p. 56.)

on estimates, that is preferable to allowing uncertainty caused by unlawful conduct to leave an unfair practice without any effective remedy. (*Bellflower Unified School District* (2021) PERB Decision No. 2796, p. 20; *Lodi Unified School District* (2020) PERB Decision No. 2723, p. 21, fn. 13; *City of Pasadena* (2014) PERB Order No. Ad-406-M, pp. 8, 13-14, 26-27.) Here, the record does not support make-whole relief for any bargaining unit employee, nor does OE3 seek such relief. Instead, the primary remedy issues involve relief to OE3 as an organization.

OE3 first seeks an award of attorney fees and other litigation expenses based on legal work performed in this case. A party seeking such relief normally must meet a standard akin to that under Rule 11 of the Federal Rules of Civil Procedure, showing that its opponent pursued a frivolous argument in bad faith. (*Sacramento City Unified School District* (2020) PERB Decision No. 2749, p. 11.) Because the City raised non-frivolous arguments in this case, OE3 cannot meet this standard.

In contrast, for a charging party to obtain an award based on some or all of the cost of bargaining or otherwise representing employees, it need only show by a preponderance of the evidence that the offending party's conduct caused a harm and that it is reasonably feasible to estimate the financial impact. (*Alliance Judy Ivie Burton Technology Academy High et al.* (2022) PERB Decision No. 2809, pp. 14, 31-32 [judicial appeal pending]; *Oxnard Union High School District*, *supra*, PERB Decision No. 2803, p. 3; *County of Santa Clara* (2021) PERB Decision No. 2799-M, p. 28, fn. 14; *Regents of the University of California* (2021) PERB Decision No. 2755-H, p. 56; *Sacramento City Unified School District*, *supra*, PERB Decision No. 2749, p. 15; *CCSF*,

supra, PERB Decision No. 2691-M, p. 51, fn. 32; *City of Palo Alto* (2019) PERB Decision No. 2664-M, p. 8, fn. 6 (*Palo Alto*).)[9]

Furthermore, just as an award of attorney fees and costs should not lose significant value because of extended litigation over the precise amount owed under the award (*Bellflower Unified School District*, *supra*, PERB Decision No. 2544a, pp. 56-57), the same is true for an award of bargaining costs. Therefore, after PERB awards bargaining costs, if subsequent disputes over the award's value extend to such a degree that counsel for the prevailing party must perform work beyond drafting a first set of declarations and supporting briefing, then any further, reasonable time spent effectuating the award of fees and costs may be compensable irrespective of whether

[9] *Palo Alto*, *supra*, PERB Decision No. 2664-M noted federal private sector labor law precedent that distinguishes between recovery of litigation costs and bargaining costs. (*Id*. at p. 8, fn. 6 [the "American Rule"—under which parties bear their own litigation costs absent egregious litigation conduct by the opposing party—is inapplicable to bargaining costs].) Significantly, however, California public sector labor relations precedent protects employee and union rights to a greater degree than does federal precedent governing private sector labor relations, and PERB considers federal precedent only for its potential persuasive value. (*Operating Engineers Local Union No. 3, supra*, PERB Decision No. 2782-M, p. 9, fn. 10.) To the extent federal precedent requires a prevailing party seeking negotiation costs to show that its counterpart's violations were particularly egregious, such a rule improvidently imposes a version of the American Rule for recovering negotiation costs. Adopting this approach would contravene the dual make-whole and deterrent functions of PERB remedies. Instead, under the statutes we administer, the severity of a respondent's bargaining violations is relevant in assessing causation and the extent of damages. For instance, an egregious violation is more likely than a minor one to make bargaining unproductive for a longer time, thereby increasing the amount of bargaining costs attributable to the violation. (Cf. *Regents of the University of California*, *supra*, PERB Decision No. 2775-H, pp. 55-56 [union seeking reimbursement of dues and staff time could not prove reasonable estimate by preponderance of the evidence, because factor other than the employer's violation was the predominant cause of the damages at issue].)

the opposing party acts frivolously in litigating the award's value. (See *Sacramento City Unified School District*, *supra*, PERB Decision No. 2749, pp. 19-20.)

Bargaining costs are proper make-whole relief in this case because a preponderance of the evidence shows that the City's MMBA violations illegally frustrated negotiations from December 5, 2019, to March 26, 2020, thereby imposing extra bargaining costs on OE3. For instance, while we leave to compliance proceedings to resolve what percent of Tuttle's time in this period he spent on the Supervising Probation Officers Unit, there is no question that he spent material time on the negotiations and therefore a part of his salary may be compensable.

Indeed, in *CCSF*, *supra*, PERB Decision No. 2691-M, when the Board rejected the charging party's claim that Charter section A8.409-4(k) is facially invalid, the Board noted that if the City did not interpret its Charter lawfully in the future, a charging party could obtain "reimbursement of costs, including but not limited to costs of bargaining, mediation, or interest arbitration." (*Id*. at p. 51, fn. 32.) We therefore include such an order here, in addition to directing the City to notify employees of this decision and interpret the Charter lawfully.

After this decision is no longer subject to appeal, a compliance officer shall undertake a compliance process to: (1) ascertain the nature and amount of recoverable bargaining costs; and (2) ensure that the City fully complies with this decision. During the compliance process, the parties typically supplement the record through one or more means, subject to the compliance officer's direction. (*Bellflower Unified School District*, *supra*, PERB Decision No. 2544a, pp. 7-15; *Bellflower Unified School District*, *supra*, PERB Decision No. 2796, pp. 20-22.)

ORDER

Based upon the foregoing findings, the Public Employment Relations Board (PERB) finds that the City and County of San Francisco (City): (1) interpreted and applied San Francisco City Charter (Charter) section A8.409-4(k) in violation of Meyers-Milias-Brown Act (MMBA) section 3507, subdivisions (a) and (d) and PERB Regulation 32603, subdivision (f); (2) failed and refused to bargain in good faith with Operating Engineers Local Union No. 3 (OE3) in violation of MMBA sections 3505 and 3506.5, subdivision (c) and PERB Regulation 32603, subdivision (c); (3) interfered with employees' right to participate in employee organizations, in violation of MMBA sections 3506 and 3506.5, subdivision (a) and PERB Regulation 32603, subdivision (a); and (4) interfered with OE3's right to represent employees, in violation of MMBA sections 3503 and 3506.5, subdivision (b) and PERB Regulation 32603, subdivision (b).

Pursuant to MMBA section 3509, we hereby ORDER that the City, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to bargain in good faith with OE3.

2. Interfering with protected union and employee rights.

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

1. Interpret the Charter to allow parties to agree, or a mediation/arbitration board to order: (a) that the parties' successor agreement or contract should include reopener language providing for mid-contract negotiations and mid-contract interest arbitration concerning certain specified unresolved economic or

non-economic issues; and (b) that any economic or non-economic MOU adjustments resulting from such mid-contract negotiations and/or mid-contract interest arbitration proceedings may commence mid-year or retroactive to any date.

2 Make OE3 whole for extra bargaining costs that the City's MMBA violations caused in substantial part, plus interest at an annual rate of seven percent.

3. Within 10 workdays after this decision is no longer subject to appeal, post at all work locations where notices to City 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 postings 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 City employees.[10]

4. 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 OE3.

Chair Banks and Member Paulson joined in this Decision.

[10] 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 No. SF-CE-1790-M, *Operating Engineers Local Union No. 3 v. City and County of San Francisco*, in which the parties had the right to participate, the Public Employment Relations Board (PERB) has found that the City and County of San Francisco (City) unlawfully interpreted and applied San Francisco City Charter (Charter) section A8.409-4(k), failed and refused to bargain in good faith with Operating Engineers Local Union No. 3 (OE3), and interfered with protected union and employee rights. PERB concluded that this conduct violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3506, 3506.5, subdivisions (a), (b), and (c), and 3507, subdivisions (a) and (d), as well as PERB Regulation 32603, subdivisions (a), (b), (c), and (f).

As a result of this conduct, PERB has ordered us to post this Notice, and we will:

A. CEASE AND DESIST FROM:

1. Failing and refusing to bargain in good faith with OE3.

2. Interfering with protected union and employee rights.

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

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

2. Make OE3 whole for extra bargaining costs that our MMBA violations caused in substantial part, plus interest at an annual rate of seven percent.

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.