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No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF LOS ANGELES,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,

Respondent.

ENGINEERS AND ARCHITECTS ASSOCIATION,

Petitioner and Real Party in Interest

Court of Appeal of the State of California
Second Appellate District, Division 3
Case No. B228732

Appeal from Superior Court of Los Angeles
Honorable Gregory Alarcon
Civil Case No. BS126192

PETITION FOR REVIEW

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I

ISSUE PRESENTED

This petition raises a question central to the right of all California public employees and their unions to enforce arbitration clauses in their collective bargaining agreements in disputes over the interpretation and application of their contract-bound terms and conditions of employment. Specifically:

Whether a charter city may arbitrate disputes over collectively-bargained wage and hour provisions without unlawfully delegating its discretionary budgeting and salary-setting authority to the arbitrator?

II

INTRODUCTION

In a published decision that will upend the law of public sector labor-management relations, the Second District Court of Appeal held that it was unlawful for the City of Los Angeles ("the City"), acting as an employer governed by the Meyers-Milias-Brown Act[1] ("MMBA"), to agree

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[1] The Meyers-Milias-Brown Act, Government Code § 3500 *et seq.*, governs labor relations between a municipality and a labor union representing its employees. It requires the parties to bargain in good faith in an attempt to reach agreement on wages, hours, and terms and conditions of employment. (Gov. Code § 3505.) It further dictates that, when agreement is reached, it shall be reduced to a written "memorandum of understanding," which becomes binding upon the parties when ratified by the union and the municipality's governing body. (Gov. § 3505.1; *Voters for Responsible Retirement v. Bd. of Supervisors* (1994) 8 Cal.4th 765, 781.)

to arbitrate whether its unilateral imposition of furloughs on Petitioner's members violated the parties' collectively-bargained memorandum of understanding ("MOU" or "contract")[2]. The court reasoned that "any agreement to arbitrate the issue of furloughs would constitute an improper delegation of discretionary policymaking power vested in the City Council." (Slip Op. at pp. 3, 26 [Attachment 1 hereto].) That holding contravenes long-established California law and policy on the enforceability of grievance arbitration provisions, and would *presumably* require public employees to instead file lawsuits to enforce labor agreements. But that begs the following question: If, as the court of appeal found, an arbitrator ruling on the grievance would be unlawfully exercising legislative powers reserved to a charter city, why would the same conclusion not extend to prevent review by a court, thereby precluding any enforcement of the MOU?

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[2] The potentially-disastrous and far-reaching consequences of the court of appeal's decision to public sector collective bargaining in California cannot be overstated. Although this case arises from a dispute between an employer and a union governed by the MMBA, there is nothing in the decision that would limit its application to the MMBA. Thus, the court of appeal's rationale and holding would appear to apply equally to collective bargaining governed by other State labor-relations statutes, such as the Ralph C. Dills Act (Gov. Code § 3512 *et seq.*—governing State labor relations), the Educational Employment Relations Act (Gov. Code § 3540 *et seq.*—governing public school labor relations), the Higher Education Employer–Employee Relations Act (Gov. Code § 3560 *et seq.*—governing public university labor relations), and others. The rights of millions of public employees are at stake.

The court of appeal reached this conclusion by committing a number of fundamental interpretive errors. First, it reached its result in an analytical vacuum, disregarding the long-settled principle that the procedures delineated in the MMBA and collective bargaining agreements reached thereunder are enforceable and preempt contradictory local municipal ordinances.

Second, it conflated "grievance arbitration" with "interest arbitration." But the distinction between these two types of arbitrations is well-established in California law: in *grievance arbitration*, the arbitrator performs a purely quasi-judicial function of interpreting and enforcing the terms of the parties' existing contract; in *interest arbitration*, the arbitrator performs a legislative function by deciding what terms will govern the parties' future relations and conduct. (*County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 341–342.) Submission of a dispute over existing workweek and salary agreements to grievance arbitration in no way involves delegation or application of discretionary legislative power. Rather, it involves the quasi-judicial function of determining whether and how the employer has already exercised its discretionary power by ratifying a labor contract, and then determining whether subsequent actions by the employer have violated that existing labor agreement.

Third, the court of appeal's holding is premised on a deeply flawed view of this particular case. Because the City has *already* exercised

its discretionary policy-making power by entering into MOUs with Petitioner, the narrow question presented by this case is whether the *subsequent* discretionary policy-making act of the City in imposing furloughs may, in accordance with those contracts, be examined by an arbitrator to determine whether it violated the MOUs' wage and hour provisions. The court of appeal found that allowing such arbitral review would unlawfully delegate the City's budgetary and salary-setting authority to an arbitrator. (Slip Op. at pp. 3, 26.) But there was no unlawful delegation because the City "did not delegate [its] discretion but [rather] exercised it" itself. (*Taylor v. Crane* (1979) 24 Cal.3d 442, 452 n.9.) Under established precedent, the grievances Petitioner seeks to arbitrate do not involve any unlawful delegation of "policymaking power."

This Court should grant review. The court of appeal's published decision, if allowed to stand, creates a sweeping and unacknowledged exception to grievance arbitration clauses any time an employee's grievance "impacts policy matters." (Slip Op. at p. 24.) That vague formulation gives trial courts and parties no guidance when an arbitration clause is enforceable because arbitration over terms and conditions of employment will always, however indirectly, impact matters of public policy. The court of appeal's decision encourages public employers to legislate their way out of MOUs and shield themselves from arbitral

review, in contravention of the strong public policy of averting labor strife and favoring resolution of labor disputes through arbitration.

Furthermore, the decision is so broadly written that it calls into question whether an MOU provision that "impacts policy matters" can even be enforced in court. Needless to say, if no enforcement mechanism is available, collective bargaining is likely to become a meaningless endeavor and labor strife far more prevalent.

III

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner Engineers & Architects Association ("EAA") is the recognized representative for approximately 5,246 employees working for the City of Los Angeles in numerous bargaining units. (AA 1:2.) The wages, hours, and terms and conditions of employment of these employees are governed by four MOUs entered into between Petitioner and the City Mayor. (AA 1:86 – 2:338.) These MOUs were all duly ratified by the City Council. (*Id.*) Each of the MOUs contains substantive provisions setting forth a standard 40-hour workweek (Article 5.1) and salary schedules based on the 40-hour work week (Article 6.1). (See, e.g., AA 1:112-114.)

A. The Parties' Agreements Contain Arbitration Provisions Governing Disputes Arising From Interpretation of the MOUs

The MOUs also contain grievance and arbitration procedures designed to resolve disputes involving the interpretation, application, and

scope of the MOUs. The arbitration clause, set forth in Section I of Article 3.1 of the MOUs, defines a "grievance" as follows:

> A grievance is defined as any dispute concerning ***the interpretation or application of this written MOU*** or departmental rules and regulations governing personnel practices or working conditions ***applicable to employees covered by this MOU***. An impasse in meeting and conferring upon the terms of a proposed MOU is not a grievance.

(See, e.g., AA 1:103 [emphases added].)

Each MOU's broad arbitration clause is modeled after the Los Angeles Employee Relations Ordinance ("ERO") as set forth in the Los Angeles Administrative Code. (See ERO Section 4.865, subd. (a)—Attachment 2 hereto.) Critically, the ERO mandates that the City and unions create and abide by a grievance and arbitration procedure through which the parties must resolve "all grievances." (*Id.*) ERO Section 4.801 defines a "grievance" as "[a]ny dispute concerning the interpretation or application of a written memorandum of understanding or of departmental rules and regulations governing personnel practices or working conditions." (See ERO Section 4.801 [Definition of Terms] —Attachment 2 hereto.)

B. The City Unilaterally Furloughed Petitioner's Members By Enacting an Ordinance

On May 18, 2009, the City Council declared a fiscal emergency and adopted an emergency resolution and ordinance proposed by the Mayor, which included "mandatory furloughs for virtually all civilian City

employees." (City's RJN[3], Ex. 14, attachment I of Ex. A [May 12, 2009 letter from Mayor to City Council], attachment II [furloughs resolution], attachment III [furloughs ordinance].) Specifically, the resolution and ordinance included a provision permitting the Mayor to adopt a mandatory furlough of City employees for up to 26 days from July 1, 2009 through June 30, 2010. (*Ibid.*) All City departments (excluding proprietary departments) were to be closed on the second and fourth Friday of each month, with two additional furlough days to be determined later. (*Ibid.*; see also City's Petition for Writ of Mandate ("PWM") ¶ 14.)

The City met and conferred with EAA on two separate occasions, but it would only discuss the impact of the City's furloughs plan, not the decision to furlough employees. (City's RJN Ex. 14 ¶¶ 13-15.) The City had engaged in separate negotiations with a Coalition of City Unions representing other City's employees. (*Id.* at ¶ 11; PWM ¶ 20.) Those negotiations resulted in an agreement to stay the furloughs as to Coalition-represented employees. (*Id.* at ¶¶ 7-10; PWM ¶ 24.) The City did not offer the same terms of the Coalition agreement to EAA; instead it offered only to hold furloughs in abeyance if the union gave up a contractual cost of living adjustment. (*Id.* at ¶ 15; PWM ¶¶ 24-25.)

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[3] References to the "City's RJN" are to the City's request for judicial notice filed with the court of appeal on November 9, 2010.

The City officially implemented its furlough of EAA's members on July 5, 2009. (AA 1:3; PWM ¶ 27.) No other City employees were furloughed.

C. Petitioner's Members Filed Numerous Individual Grievances Seeking Arbitration, All of Which the City Denied and Refused to Arbitrate

The City's implementation of the furloughs as to EAA members contravened the express wage and hour provisions of the parties' MOUs. The MOUs provide for 40-hour workweeks in Article 5.1, and the salary schedules referenced in Article 6.1 are based on 2080 hour work years—the equivalent of 52 weeks of 40 hours. (See, e.g., AA 1:112-114.) Based on the plain language of the MOUs, EAA-represented employees understood their full-time employment was 40 hours a week. Yet, under the City's furlough plan, the workweeks and pay of EAA-represented employees were decreased. Instead of being paid for 80 hours per pay period, their work hours and pay were reduced to 72 hours per pay period. (AA 1919.) Annualized, the furloughs resulted in a 10% reduction in pay. (*Id.*)

Accordingly, approximately 400 EAA-represented employees filed grievances[4] under the MOUs on the grounds that the City's furlough program violated the contractually-obligated salary under Article 6.1 and 40-hour workweek in Article 5.1. (AA 2:340 – 7:1648.) The City denied the grievances at each level of review and refused to arbitrate them, asserting *inter alia* that the City's authorization of the furloughs was not subject to the MOUs' grievance and arbitration procedures, and that the decision to set work schedules was an exclusive management right. (*Id.*; see also PWM ¶ 30.)

D. The Trial Court Granted EAA's Petition to Compel Arbitration Pursuant to the MOUs' Arbitration Provision

On April 29, 2010, EAA filed the underlying action seeking an order compelling arbitration of the grievances. (AA 1:1-78.) In opposition, the City principally argued that the MOUs' management rights clause contained in Article 1.9 permitted the City to take necessary actions to

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[4] EAA also filed an Unfair Employee Relations Practice ("UERP") Charge on June 15, 2009 with the City's Employment Relations Board ("ERB") contesting the unilateral implementation of furloughs. (PWM ¶ 22.) On April 25, 2011, the ERB tentatively found the City's refusal to bargain the decision to impose furloughs violated the ERO, but it awarded no money on a failure to mitigate theory. Separately, and to preserve the status quo, EAA filed an application for a temporary restraining order with the superior court on July 9, 2009. (PWM ¶ 28 [L.A. Superior Court Case No. BC417398].) The application was denied and EAA subsequently abandoned its appeal from that denial and dismissed the action. (AA 9:1888-1893.)

carry out its mission in emergencies and that its imposition of furloughs was, thus, outside the scope of the parties' arbitration agreement. (AA 9:1831-1835; AA 1:93 [Article 1.9].) EAA responded that the parties' arbitration clause was sufficiently broad to encompass this dispute and, further, that consideration of the City's defenses to arbitration impermissibly required a determination of the underlying merits of the grievances. (AA 9:1933, 1937-1938.)

On September 16, 2010, the trial court issued an order compelling arbitration, agreeing with EAA that the underlying grievances were fully within the scope of the MOUs' arbitration provisions and were, thus, arbitrable. (AA 9:1961-1965.) It also declined to address the City's defenses because they went to the merits of the grievances. (See AA 9:1963-1964.)

E. On the City's Petition for Writ of Mandate, the Court of Appeal Reversed, Finding the City Had No Authority to Agree to Binding Arbitration Over Furloughs Because It Would Constitute an "Unlawful Delegation" of Policy-Making Powers

The City filed a Petition for Writ of Mandate with the Second District Court of Appeal on November 10, 2010, arguing—for the first time—that the MOUs could not require arbitration of the City's non-delegable powers. On March 25, 2011, the court of appeal granted the petition in a published decision, effectively reversing the trial court's arbitration order. (See Slip Op. at p. 3.)

The court examined whether, as the parties argued, sections 1.9 (the management rights clause) and 3.1 (the arbitration clause) of the MOUs permitted arbitration of the City's decision to furlough employees, but found that the MOUs were "ambiguous" on this point.[5] (*Id.* at pp. 6-8, 13-17.) The court noted that although ordinarily it would remand to the trial court for consideration of extrinsic evidence, "it is unnecessary to do so as we will conclude that even *if* the MOU provided that the decision to furlough employees in a fiscal emergency was subject to arbitration, such a provision would be an improper delegation of the City Council's discretionary power."[6] (*Id.* at pp. 18-19 [italics original].)

According to the court of appeal, the City could not lawfully agree to arbitration of the matter because the City's "decision to impose mandatory furloughs due to a fiscal emergency is an exercise of the City Council's discretionary salary setting and budget making authority" and "the City Council cannot delegate this authority to an arbitrator." (*Id.* at p. 23.) In support, it relied principally on *San Francisco Fire Fighters v. City*

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[5] Preliminarily, the court determined the issue of arbitrability was one for the courts because the MOUs "did not clearly and unmistakably assign the issue to the arbitrator." (Slip Op. at pp. 3-5.) EAA does not challenge that determination here.

[6] The court thus assumed, without deciding, that "in the MOUs, which the City Council ratified, the City Council had agreed that its decision to furlough employees due to a lack of funds would be subject to review by an arbitrator." (*Id.* at p. 7.) EAA does not challenge that determination here.

and County of San Francisco (1977) 68 Cal.App.3d 896, a case the court characterized as involving a city's "surrender, via the MOU, [of its] powers and duties to prescribe rules and regulations over the fire department to an arbitrator." (See Slip. Op. at pp. 21-22.)

It dismissed the distinction between "grievance arbitration" and "interest arbitration," which EAA raised because it was purportedly:

> an elevation of terms over substance. The issue is not whether the Union is seeking arbitration of a grievance (and thus "grievance arbitration"), but whether the Union is seeking arbitration of policy matters left to the discretion of the City Council. Interest arbitration is problematic from a delegation point of view because it impacts policy matters, not because it is called interest arbitration.

(*Id.* at p. 24.)

The court discussed the relief sought in the employees' grievances and concluded that "it is clear that the Union is seeking to have an arbitrator determine issues of discretionary policy-making which have been assigned to the City Council" because "[t]he Union wants a determination made that the City *violated* the salary and workweek provisions of the MOU by instituting furloughs . . . ." (*Id.* at p. 25 [italics original].) Hence, the court reasoned, even if the City had agreed to arbitral review of its decision to furlough employees, "such a decision . . . would have been an improper delegation of its salary setting and budget making powers." (*Id.*)

EAA did not seek rehearing as it would have been futile.

IV

REASONS FOR GRANTING THE PETITION

The court of appeal's sweeping decision bars grievance arbitration of disputes arising from the interpretation and/or application of collective bargaining agreements whenever such arbitration relates to a public employer's "discretionary policy-making," which could easily be construed so broadly as to eliminate grievance arbitration altogether. The decision creates a broad and unacknowledged exception to the bedrock principle that a collective bargaining agreement is binding on the parties (*Glendale City Employees' Association v. City of Glendale* (1975) 15 Cal.3d 328, 332) and will have detrimental effects on labor-management relations throughout California, because it creates a path for public employers to legislate their way out of MOUs and to insulate themselves from arbitral review and possibly even judicial review.

The court of appeal's decision deprives public employees of the speedy and cost-effective benefits of grievance arbitration over the meaning of their MOUs. But this Court has long favored arbitration of labor disputes. (*Posner v. Grunwald-Marx, Inc.* (1961) 56 Cal.2d 169, 184.) If left uncorrected, the decision below will strip public employees of important statutory rights guaranteed to them under state law, divest them of a crucial means of resolving labor disputes peacefully, and create

disharmony in public sector labor-management relations at a time of extraordinary pressures on public entities and their employees.

This case presents the ideal vehicle to decide this important issue. There is no dispute the parties have an effective and binding MOU, that it contains a broad arbitration clause conforming to the City's employment resolution ordinance, and that the City already exercised its policymaking discretion to impose furloughs. The narrow question presented is whether, under this Court's precedents, that decision is lawfully subject to review, whether in arbitration or a court of law.

V

REVIEW IS WARRANTED BECAUSE THE COURT OF APPEAL'S DECISION UPENDS EXISTING LAW AND EVISCERATES GRIEVANCE ARBITRATION OF DISPUTES ARISING FROM THE INTERPRETATION OF COLLECTIVE BARGAINING AGREEMENTS

The court of appeal's decision cannot be reconciled with existing California public sector labor relations law, which (1) establishes that state law regulates collective bargaining procedures at the city level, (2) dictates that cities may lawfully agree to arbitrate disputes arising from the interpretation and application of MOUs, and (3) firmly distinguishes "grievance arbitration" (which is at the heart of this case) from "interest arbitration" (which is not). The decision is divorced from necessary context, and eliminates a contracted-for procedural right—grievance arbitration—from the MOUs in this case and throughout the state.

A. Collective Bargaining is a Matter of Statewide Concern Regulated by the MMBA

Under the Meyers-Milias-Brown Act ("MMBA"), Government Code § 3500 *et seq.*, charter cities and counties are required to bargain in good faith with unions representing their public employees over the terms and conditions of employment. (See Gov. Code § 3505.) The express purpose of the MMBA is to "to promote full communication between public employers and their employees" regarding the same. (*Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 780 [quoting Gov. Code § 3500].)

"[I]n an unbroken series of public employee cases," this Court has held that the MMBA "prevails over local enactments of a chartered city, even in regard to matters which would otherwise be strictly municipal affairs." (*People ex rel. Seal Beach Police Officers Association v. City of Seal Beach* ("*City of Seal Beach*") (1984) 36 Cal.3d 591, 600.) Thus, although the "salaries of local employees of a charter city constitute municipal affairs and are not subject to general laws . . . the process by which salaries are fixed is obviously a matter of statewide concern" regulated by the MMBA. (*Id.* at n.11 [quotation omitted].)

Accordingly, this Court has consistently invalidated local charter provisions and ordinances burdening public employee's collective bargaining rights under the MMBA. (E.g., *Professional Fire Fighters, Inc.*

v. City of Los Angeles (1963) 60 Cal.2d 276, 290 [MMBA controls over city's charter, ordinances, and regulations]; *City of Seal Beach, supra,* 36 Cal.3d at p. 602 [invalidating charter amendments]; *International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191 [invalidating resolution]; *Los Angeles County Civil Service Commission v. Superior Court* (1978) 23 Cal.3d 55, 63 [invalidating layoff rules].)

B. Cities Are Authorized to Enter Into Binding MOUs Governing Wages and Hours, and to Arbitrate Any Disputes Arising Therefrom

The MMBA authorizes charter cities to enter into MOUs with unions representing their public employees. (Gov. Code § 3505.1.) "Once the governmental body votes to accept" an MOU "it becomes a binding agreement." (*Glendale City Employees' Association v. City of Glendale* (1975) 15 Cal.3d 328, 334-335.) That includes wage and hour agreements, and agreements to submit to grievance arbitration disputes arising from interpretation and application of an MOU's terms. (*Ibid.*; *Taylor v. Crane, supra,* 24 Cal.3d at p. 451 ["It has long been recognized that a city may

agree to arbitrate any matter which could be the subject of a civil lawsuit," citing *Cary v. Long* (1919) 181 Cal. 443, 448].)[7]

Because cities freely consent to arbitration provisions contained in MOUs, our courts "do not perceive arbitration as being an *imposition* on 'unwilling' public entities." (*United Trans. Union v. So. Cal. Rapid Transit Dist.* (1992) 7 Cal.App.4th 804, 814.) Rather, "state policy in California favors arbitration provisions in collective bargaining agreements." (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 980 [citation and quotations omitted]; *Posner v. Grunwald-Marx, Inc.* (1961) 56 Cal.2d 169, 184 ["all disputes as to the meaning, interpretation and application of any clause of the collective bargaining agreement, even those that prima facie appear to be without merit, are the subject of arbitration"].) Such grievance arbitration is favored because it "quickly and inexpensively resolves employment controversies and eases the burdens on the judiciary." (*United Firefighters of Los Angeles v. City of Los Angeles* (1991) 231 Cal.App.3d 1576, 1583.)

The court of appeal cites this Court's decision in *Taylor v.*

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[7] The *Taylor* court noted an exception where a city's charter "expressly prohibits the city from agreeing to arbitrate." (*Id.* at p. 451.) The City has at no time argued the L.A. City Charter expressly prohibits it from entering into binding arbitration agreements. On the contrary, its own Employee Relations Ordinance *mandates* that the City's MOUs contain a grievance and arbitration provision (see ERO Section 4.865, subd. (a)), and the City has never challenged the lawfulness of its ERO.

Crane, but, if it had meaningfully applied it, the court would have found for Petitioners. In *Taylor*, this Court upheld the City of Berkeley's agreement in an MOU, enacted pursuant to the MMBA, to submit to "final and binding" arbitral review the city manager's imposition of disciplinary action. (*Taylor, supra,* 24 Cal.3d at p. 449, 451-452.) The arbitration clause was valid even though the city manager had plenary discretion under the city charter to discipline employees. *Taylor* found the city was authorized to agree to arbitration unless "the charter expressly prohibits" it. (*Id.* at p. 451.) Finding no such prohibition, *Taylor* upheld the arbitration clause. It found no unlawful delegation because the city manager "retains the significant power to initially impose discipline" (and he did so in that case) and because "even if some portion of the city manager's powers is viewed as having been delegated . . . [it] is subject to adequate judicial safeguards" including vacatur of the award. (*Id.* at p. 452.)

C. Instead of Applying *Taylor v. Crane*, the Court of Appeal Erroneously Applied An "Interest Arbitration" Analysis to this "Grievance Arbitration" Case

The court of appeal did not apply the analysis in *Taylor*. Instead, adopting the City's argument, it applied a wholly different body of law on "interest arbitration." Petitioner distinguished this body of law (see EAA's Opp. to PWM at pp. 30-36), but the court dismissed that argument as "an elevation of terms over substance." (Slip Op. at p. 24.) The court thus profoundly erred by failing to recognize the qualitative differences

between "interest arbitration" and "grievance arbitration," their respective functions, and the limiting principles applicable to each.

As the court summarized:

> ***Interest arbitration*** concerns the resolution of labor disputes over the formation of a collective bargaining agreement. It differs from the more commonly understood practice of ***grievance arbitration*** because, unlike grievance arbitration, it focuses on what the terms of a new agreement should be, rather than the meaning of the terms of the old agreement . . . . Put another way, ***interest arbitration is concerned with the acquisition of future rights, while grievance arbitration involves rights already accrued***, usually under an existing collective bargaining agreement. An interest arbitrator thus does not function as a judicial officer, construing the terms of an existing contract and applying them to a particular set of facts. Instead, the interest arbitrator's function is effectively legislative, because the arbitrator is fashioning new contractual obligations.

(Slip Op. at pp. 24-25, quoting *County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 341–342 [internal quotations and citations omitted] [emphases added].)

Although the court of appeal recited the standard articulated in *County of Sonoma*, it failed to apply it correctly to the facts of this case. As that case demonstrated, interest arbitration cases are animated by a concern that arbitrators determining the substantive content of a binding MOU are improperly engaged in "social planning and fiscal policy" that is the province of government. (*County of Sonoma, supra,* 173 Cal.App.4th at p. 342 [mandatory arbitration statute impermissibly infringed on county's

home rule powers and powers to set compensation of county employees].) For this reason, among others, this Court has struck down mandatory interest arbitration requirements as to cities and counties in the context of MOU negotiations. (See *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 27 [general law city could not delegate duty to fix compensation to arbitrator after bargaining impasse]; *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278 [Code of Civ. Proc. § 1299 *et seq.* unlawfully delegated compensation of county employees to arbitrator].)[8] Thus, "[i]nterest arbitration is problematic from a delegation point of view" (Slip Op. at p. 9) because it involves "the submission to arbitration of a general policymaking power to determine the terms and conditions of employment." (*Taylor, supra,* 24 Cal.3d at p. 453.)

But that has nothing to do with the case at bar, which involves *grievance arbitration* and is far *less* intrusive on the City's prerogatives. As this Court explained in *Taylor*: "The power to set the terms and conditions of public employment [through interest arbitration] is *broader and more intrusive* upon the functions of city government than the arbitrator's authority in this case to resolve an individual grievance.

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[8] A charter city willing to submit itself to interest arbitration may, however, do so as long as it is authorized by its own charter. (See, e.g., *City of San Jose v. International Assn. of Firefighters* (2009) 178 Cal.App.4th 408; see also *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

Grievance arbitration does not involve the making of general public policy. Instead, the arbitrator's role is confined to interpreting and applying terms which the employer itself has created or agreed to and which it is capable of making more or less precise." (*Id.* [italics added].)

Accordingly, arbitration of EAA members' grievances would not bind the City to new terms because the arbitrator is only authorized to interpret *existing contractual terms to which the City has already bound itself.* (*County of Sonoma, supra,* 173 Cal.App.4th at p. 342 [only interest arbitration "fashion[s] new contractual obligations"].) The MOUs specifically *exclude* interest arbitration from the grievance process. (See, e.g., AA 1:103 ["An impasse in meeting and conferring upon the terms of a proposed MOU is not a grievance"].) And the court of appeal's own formulation of Petitioner's case squarely falls within grievance arbitration: "The Union wants a determination made that the City *violated* the salary and workweek provisions of the MOU by instituting furloughs, and that the furloughs were therefore improper." (See Slip Op. at p. 25.) Thus, the arbitrator would not indulge in any policy making, salary setting, or budget making and, if he or she did, the City would have grounds to petition to vacate any ensuing arbitration award. (Code Civ. Proc. § 1286.2; *Taylor, supra,* 24 Cal.3d at p. 452.)

The court of appeal's decision was driven by its misplaced concern that the grievance arbitration EAA seeks would have the same

effect as interest arbitration (and it cannot for the reasons explained above), but neither it nor the City, whose argument the court adopted as its own, ever explain how such arbitration over the substantive meaning of the MOUs would itself impose new terms and conditions on the City or otherwise constitute an exercise of the City's residual authority over salary setting and budget making.[9] What is more, the decision provides only vague formulations and no guidance to trial courts or other courts of appeal assessing when grievance arbitration impermissibly intrudes into policymaking. (See, e.g., Slip Op. at pp. 24, 25 [finding grievances improper when they "impact[] policy matters" and "issues of discretionary policymaking"].) There is no limiting principle.

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[9] The court's holding also reflects its belief that the grievances impermissibly challenged a "management decision protected from arbitration." (See *id.* at pp. 16, 25-26 ["This is not a case where a single employee, or a single class of employees, is questioning a departmental decision to change their schedules or cut their pay."] But, absent remand, the court's presumption that furloughs were arbitrable under sections 1.9 and 3.1 of the MOUs (*id.* at pp. 18-19) precludes such a limited interpretation of the permissible scope of the grievances. (See *United Public Employees v. City and County of San Francisco* (1997) 53 Cal.App.4th 1021, 1025-1026 ["Doubts as to whether or not an arbitration clause applies to a particular dispute are to be resolved in favor of . . . arbitration"].)

D. Arbitration of the Grievances Cannot Delegate the City's Discretionary Powers to an Arbitrator Because The City Already Exercised Those Powers By Deciding to Agree to the MOUs and By Later Deciding to Impose Furloughs

Separately, the court of appeal's unlawful delegation holding also cannot stand because it ignores the fact that the City *already exercised its discretion* by (a) deciding to enter into and ratify MOUs containing specific salary and work-hours requirements and a grievance arbitration clause, and (b) subsequently deciding to enact the furloughs ordinance. The first is fully authorized by the MMBA, binding, and enforceable. (See Part V.B, *supra*.) The second would normally fall within the City's prerogatives, but under *Taylor* the effect of the ordinance vis-à-vis the salary and wage requirements in the MOUs is properly the subject of arbitral review. (24 Cal.3d at pp. 451-452.)

The court of appeal failed to acknowledge these distinctions and instead heavily relied on *San Francisco Fire Fighters v. City and County of San Francisco, supra,* 68 Cal.App.3d 896, which has little bearing on the issues presented here. *San Francisco Fire Fighters* involved a dispute over a contract provision that the union argued required interest arbitration over "unresolved issues between the parties relating to employment conditions." (*Id.* at p. 900.) The union argued that an arbitrator should formulate terms not covered by the parties' contract, including the right to strike, disciplinary rules, fitness requirements, and conditions of assignment and

transfer. (*Id.* at p. 898.) As characterized by the court of appeal in that matter, the issue was "whether the City ... was legally permitted to delegate to an arbitrator, the 'rules and regulation' making power entrusted to the fire commission by the Charter." (*Id.* at p. 901.) The court held that no such delegation was permitted. (*Id.* at pp. 902-904.)

From the foregoing, the court of appeal in the present case determined that the grievance arbitration provisions in the EAA MOUs were unlawful as applied to the City's decision to furlough employees. According to the court, "[a]s the decision to impose mandatory furloughs due to a fiscal emergency is an exercise of the City Council's [charter-based] discretionary salary setting and budget making authority, the City Council cannot delegate this authority to an arbitrator." (*Ibid.*)

San Francisco Fire Fighters was correctly decided on its facts because it involved submission to an arbitrator of "rules and regulation making power" in the first instance. (68 Cal.App.3d at p. 901.) This Court has understood *San Francisco Fire Fighters* involved an unlawful delegation because it would have required delegation of the city's "*power to make rules*" governing the union's members. (See *Taylor, supra,* 24 Cal.3d at p. 453 [italics added].) But here, the Los Angeles City Council has already exercised its discretionary authority by ratifying an MOU that EAA contends mandates full workweeks and, later, deciding to impose furloughs. (AA 1:86 - 2:338; City RJN, Ex. 14 and attachments I-III

thereto.) The only question left for arbitration is whether that second discretionary act conflicted with the first, which became binding and enforceable upon ratification by the City Council pursuant to the MMBA. (See AA 9:1965.) That is, ***the City did not delegate its authority to decide whether to furlough employees to the arbitrator; it already made that decision itself.*** (*Taylor, supra,* 24 Cal.3d at p. 451 n.9 [no unlawful delegation where city manager "did not delegate that discretion but exercised it himself"].) Therefore, subsequent arbitration over whether that discretionary act violated the parties' MOUs is not an unlawful delegation.

The court of appeal's analysis makes plain it erroneously conflated *post hoc* arbitral review of furloughs with the City's already-accomplished exercise of discretion in the first instance:

> The issue is not whether the Union is seeking arbitration of a grievance (and thus "grievance arbitration"), but whether the Union is seeking arbitration of policy matters left to the discretion of the City Council. (Slip Op. p. 24.)
>
> When considering the claims made in the employee grievances, and the relief sought by the Union, it is clear that the Union is seeking to have an arbitrator determine issues of discretionary policymaking which have been assigned to the City Council. (*Id.* at p. 25.)
>
> This is a challenge to a City Council's decision to impose furloughs as a response to the City's dire financial condition. If the City Council had agreed to arbitral review of such a decision, it would have been an improper delegation of its salary setting and budget making powers. (*Id.* at pp. 25-26.)

Nevertheless, as this Court noted in *Taylor*, "[t]he agreements at issue here [did] not remove that initial discretion. Instead they subject it to binding review by an impartial arbitrator." (24 Cal.3d at p. 451.) Thus, "[i]n view of the . . . restricted role of arbitration in this case . . . [there is] no unlawful delegation of municipal powers . . . ." (*Id.* at p. 453.)

VI

THE COURT OF APPEAL'S DECISION INCENTIVIZES PUBLIC EMPLOYERS TO LEGISLATE THEIR WAY OUT OF COLLECTIVE BARGAINING AGREEMENTS

If allowed to stand, the court of appeal's broadly-written decision will give an incentive to cities desiring to undo certain provisions of pre-existing and duly-ratified MOUs to enact conflicting legislation or simply disregard their terms. Under the court of appeal's reasoning, so long as that legislation "impacts policy matters," "issues of discretionary policy making," or a city's residual "salary setting and budget making power" (Slip Op. at pp. 24-26), a city can isolate itself from arbitral and possibly judicial review—*even if* the city specifically agreed in an MOU to grievance arbitration of such matters. Even assuming judicial enforcement remains available, employees would be compelled to file costly lawsuits in the superior courts to enforce their contractual rights. Worse still, if the court of appeal's holding (or its necessary extension) effectively precludes even judicial enforcement, meaningful bilateral labor relations in California's public sector will cease to exist. Under those circumstances,

collective bargaining—the alternative to labor strife long supported by the Courts—will become a meaningless endeavor.

As this Court recognized over three decades ago in *Glendale City Employees' Assn., supra,* 15 Cal.3d at p. 336, when affirming the mutually-binding nature of an MOU:

> Why negotiate an agreement if either party can disregard its provisions? What point would there be in reducing it to writing, if the terms of the contract were of no legal consequence? Why submit the agreement to the governing body for determination, if its approval were without significance? What integrity would be left in government if government itself could attack the integrity of its own agreement? The procedure established by the [MMBA] would be meaningless if the end-product, a labor-management agreement ratified by the governing body of the agency, were a document that was itself meaningless . . . .
>
> . . . Any concession by a party from a previously held position would be disastrous to that party if the mutual agreement thereby achieved could be repudiated by the opposing party. Successful bargaining rests upon the sanctity and legal viability of the given word.

This received wisdom holds true today and supports review of the decision below because it allows cities and counties to break their negotiated and approved contracts with their employees and then to shield themselves from any review.

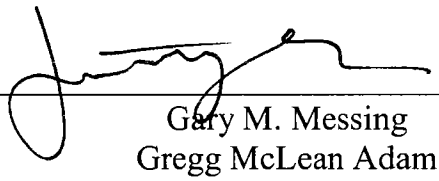
VII

CONCLUSION

For all these reasons, this Court should grant the Petition for Review. If allowed to stand, the decision below will cripple or eliminate a public sector union's ability to enforce a labor agreement with a public employer any time the employer claims a dispute somehow "impacts policy matters." (Slip Op. at p. 24.) That result would contravene existing well-established labor-relations law and the strong state policy favoring enforcement of collectively-bargained contracts and arbitration of labor disputes. This Court's review is necessary.

Dated: May 4, 2011

CARROLL, BURDICK & McDONOUGH LLP

By 

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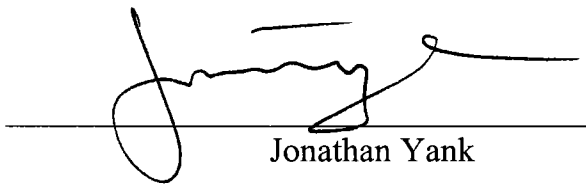
WORD COUNT CERTIFICATION

Pursuant to Rule 8.504(d) of the California Rules of Court, I certify that the attached brief contains 6,363 words, as determined by the computer program used to prepare the brief.

Dated: May 4, 2011



Jonathan Yank

ATTACHMENT 1

City of Los Angeles, et al. v. Superior Court of Los Angeles County
(Engineers & Architects Association, Real Party in Interest)
Court of Appeal of the State of California, Second Appellate District,
Division Three, No. B228732
March 25, 2011

Slip op.

Filed 3/25/11

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CITY OF LOS ANGELES and DOES 1 through 50, inclusive, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondents, ENGINEERS & ARCHITECTS ASSOCIATION, Petitioner and Real Party in Interest.	B228732 (Los Angeles County Super. Ct. No. BS126192)

ORIGINAL PROCEEDINGS in mandate. Gregory W. Alarcon, Judge. Petition for writ of mandate is granted and remanded to the trial court for further proceedings.

Carmen A. Trutanich, City Attorney, Zna Portlock Houston, Assistant City Attorney, Janis Levart Barquist and Jennifer Maria Handzlik, Deputy City Attorney, for Petitioner, City of Los Angeles.

Kronick, Moskovitz, Tiedemann & Girard, David W. Tyra and Meredith H. Packer for League of California Cities as Amicus Curiae on behalf of City of Los Angeles.

Levy, Stern, Ford & Wallach, Adam N. Stern and Lewis N. Levy for Real Party in Interest, Engineers & Architects Association.

Rothner, Segall & Greenstone, Ellen Greenstone and Jonathan Cohen for American Federation of State, County and Municipal Employees, District Council 36, as Amicus Curiae on behalf of Real Party in Interest, Engineers & Architects Association.

Faced with a deficit exceeding $500 million and an impending cash flow crisis, the Mayor and City Council of Los Angeles (City) approved an ordinance directing the Mayor to adopt a plan to furlough City civilian employees for up to 26 days per fiscal year. The Mayor adopted such a plan, and many employees filed grievances challenging the furloughs to which they were subjected. The grievances were denied and the employees, supported by their union, the Engineers and Architects Association (Union), requested arbitration of the grievances. When the City refused to arbitrate, the Union filed a petition to compel arbitration of over 400 such grievances. Concluding that the grievances were arbitrable, the trial court granted the petition to compel. The City challenged the order compelling arbitration by petition for writ of mandate. We issued an order to show cause and now grant the petition. While there are questions as to whether the issue of furloughs is grievable under the terms of the controlling Memoranda of Understanding (MOUs),[1] we conclude that any agreement to arbitrate the issue of furloughs would constitute an improper delegation of discretionary policymaking power vested in the City Council.

FACTUAL AND PROCEDURAL BACKGROUND

On May 12, 2009, Mayor Villaraigosa sent a letter to the City Council requesting the City Council to declare a fiscal emergency and adopt an urgency ordinance permitting reduced workweeks of less than 40 hours. The Mayor indicated his intent to propose and implement a plan of mandatory work furloughs for virtually all civilian

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[1] The relevant terms are the same in each of the four controlling MOUs. References to MOU in the singular refer to all of the MOUs at issue in the case.

employees of the City. In response to the Mayor's request, the City Council passed a resolution declaring an emergency and directing the Mayor to adopt a furlough plan. The resolution was approved by the Mayor on May 22, 2009, and thus became an ordinance.[2]

The resolution set forth the fiscal circumstances which justified the declaration of emergency. These included: (1) a $529 million general fund deficit for the 2009-2010 fiscal year; (2) ongoing revenue sources had plunged nearly $300 million; (3) continued declines in property tax revenues were expected; (4) taxes could not be raised; (5) the deficit was expected to grow to over $1 billion by the end of the 2010-2011 fiscal year if no changes were made; (6) 80% of the City's expenses were linked to salaries and benefits; (7) if no changes were made, the City would face a cash flow crisis; and (8) if the City could not borrow funds, it would be out of cash by the end of August 2009. As a result of these and other circumstances, the City declared a fiscal emergency.

The fiscal emergency was declared pursuant to Government Code section 3504.5 and Los Angeles Administrative Code section 4.850. These sections relate to the City's obligation to consult with employee unions prior to the adoption of ordinances relating to matters within the scope of the unions' representation, with an exception allowing for consultation after the adoption of such an ordinance, in cases of "emergency." The timing and extent of the City's attempts to meet and confer with the Union, as well as

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[2] The Mayor and City Council also approved an ordinance providing that when an employee is required to work 72 hours in a pay period, rather than the usual 80, as a result of a fiscal emergency, the employee will still receive all rights and benefits the employee would have received had the full 80 hours been worked.

the legal sufficiency of those attempts, is beyond the scope of this opinion. Indeed, the Union brought an unlawful employee relations practice claim raising the issue before the Employee Relations Board (ERB); that matter is currently proceeding. Suffice it to say, however, that, according to the Union, the City indicated a willingness to negotiate only the impact of the furloughs, not the furloughs themselves.[3]

Furloughs of one day per 80-hour pay period were implemented. Numerous employees filed grievances regarding the furloughs, arguing that furloughs violated the wage and workweek provisions in their MOUs.[4] The grievances were denied, generally on the basis that the furloughs were implemented in accordance with City Council action and were therefore not grievable.[5]

Under the MOUs, the final step of the six-step grievance process is submission to binding arbitration before the ERB; the request is to be jointly filed by the grievant and

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[3] According to the July 12, 2010 report of the hearing officer in the ERB matter, although the City indicated that it would not negotiate the furlough decision itself, the City *was* willing to consider alternatives to furloughing employees if the same cost savings could be achieved without furloughs.

[4] Interpreting the MOUs in this regard goes to the merits of the dispute, not its arbitrability. We therefore do not discuss these provisions. Indeed, the salary provisions of the MOUs are apparently set forth in appendices to those documents, which are not part of the record.

[5] The grievances were also denied on the basis that the Union's unlawful employee relations practice claim constituted an election of remedies, precluding pursuit of grievances challenging the same furlough decision. The City pursues this argument in this writ proceeding. We do not address it, although we note that it appears that the issue of whether furloughs could be imposed without prior consultation with the Union is different from the issue of whether furloughs could be imposed at all.

the Union. In this case, the employees and the Union requested arbitration of the denied grievances; the City refused arbitration.

On April 29, 2010, the Union filed its petition to compel arbitration of over 400 grievances.[6] The Union subsequently filed points and authorities in support of its petition, arguing that furloughs violated the salary and workweek provisions of the applicable MOUs and were grievable (and therefore arbitrable) under the terms of the MOUs. Specifically, the Union relied on the language of section 3.1 of the MOUs, which states, "A grievance is defined as any dispute concerning the interpretation or application of this written MOU or departmental rules and regulations governing personnel practices or working conditions applicable to employees covered by this MOU. An impasse in meeting and conferring upon the terms of a proposed MOU is not a grievance." The Union took the position that determining whether furloughs violated

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[6] The parties seem to agree that 408 grievances are at issue in this case; we are not so certain. Each grievance is identified in a separate paragraph of the complaint and has its own exhibit. There appear to be 409 paragraphs but 410 exhibits. It is unclear where the error lies. Moreover, several of the grievances attached to the petition to compel arbitration appear to have been included erroneously, as they have nothing to do with furloughs. For example, Exhibit 12 is the grievance of Kevin Walton, who challenges a reassignment from night shift to day shift and asserts an issue under the Americans with Disabilities Act; he does not contest furloughs. Exhibit 235 is the grievance of Juliet Daniels. (The exhibit is an appeal to the third level of grievance review; it is not yet ripe for an arbitration demand.) Ms. Daniels alleges that she was retaliated against for filing a discrimination complaint based on a hostile work environment; she does not contest furloughs. Exhibit 271 is the grievance of Keyvan Shahrouz, who alleged that he was working "out of class" and sought a promotion to the higher pay grade; he does not contest furloughs. Exhibit 272 is the grievance of Leon Agravante who grieves a failure to consult with the Union relative to his displacement from one position to another; he does not contest furloughs. In addition, at least two employees, Jack Scott and Gina Robles, grieved changes to their schedule, without specifically indicating that the schedule changes were related to furloughs.

the workweek and salary provisions of the MOUs would involve the "interpretation or application" of the MOUs, thus rendering furloughs grievable.

The City opposed the petition, arguing that furloughs implemented pursuant to a declaration of emergency are not grievable. The City relied on language in section 1.9 of the MOUs, which it argued granted the City the absolute management right to furlough employees. As section 1.9 of the MOUs will play a significant part in our analysis, we set it forth in detail: "As the responsibility for the management of the City and direction of its work force is vested exclusively in its City officials and department heads whose powers and duties are specified by law, it is mutually understood that except as specifically set forth herein no provisions in this MOU shall be deemed to limit or curtail the City officials and department heads in any way in the exercise of the rights, powers and authority which they had prior to the effective date of this MOU. The Association recognizes that these rights, powers, and authority include but are not limited to, *the right to . . . relieve City employees from duty because of lack of work, lack of funds* or other legitimate reasons . . . take all necessary actions to maintain uninterrupted service to the community and carry out its mission in emergencies; *provided, however, that the exercise of these rights does not preclude employees and their representatives from consulting or raising grievances about the practical consequences that decisions on these matters may have on wages, hours, and other terms and conditions of employment.*" (Italics added.)

In its opposition to the petition to compel arbitration, the City relied on the language first italicized. That is, the City argued that the language retaining to the City

the right to relieve employees from duty because of lack funds permitted it to implement mandatory furloughs. However, the City did not call the trial court's attention to the second phrase we have italicized, the language indicating that employees retained the right to grieve "the practical consequences" that such decisions may have on wages, hours, and other terms and conditions of employment.

The trial court rejected the City's arguments and granted the petition to compel arbitration, concluding that the issue of furloughs fit within the broad definition of a grievance found in section 3.1 of the MOUs. The court also concluded that any conflict between (1) the language in section 1.9 permitting the City to reduce work hours and (2) the workweek and salary provisions in other sections of the MOU would involve issues of interpretation and application of the MOU, which were left to the grievance procedure under section 3.1.

The City filed a petition for writ of mandate, challenging the trial court's order compelling arbitration of the approximately 400 grievances. In the City's brief, it relied on section 1.9 of the MOU, but focused on the language permitting the City to take necessary actions to carry out its mission in emergencies, not the language allowing the City to relieve employees from duty due to lack of funds. Again, the City did not discuss the language reserving the employees' right to grieve the practical consequences of such decisions.

We issued an order to show cause and set the matter for hearing.[7] After our initial review of the matter, we requested additional briefing on what appeared to be the relevant language of section 1.9 of the MOU: (1) the provision allowing the City to relieve employees from duty due to lack of funds; and (2) the provision reserving to employees and the Union their right to grieve the practical consequences of such actions.

ISSUES PRESENTED

The first issue presented by this writ proceeding[8] is whether the courts or the arbitrator should determine the issue of arbitrability. We conclude the MOUs did not

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[7] Amicus briefs were submitted by a coalition of City unions, in support of Union, and the League of California Cities, in support of City.

[8] "By issuing our order to show cause, we necessarily determined the propriety of writ review." (*County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 336, fn. 6.) In any event, writ review of an order granting arbitration is proper if matters ordered arbitrated fall clearly outside the scope of the arbitration agreement or if the arbitration would appear to be unduly time consuming or expensive. (*Zembsch v. Superior Court* (2006) 146 Cal.App.4th 153, 160.) The latter situation, if not the former, clearly applies. The Union would have 400 separate arbitrations, before the ERB, of the propriety of the City's decision to furlough employees – the time consumption and expense would be extraordinary. The Union responds that "there is nothing in the MOUs which prevents the parties from consolidating the grievances." Indeed, there is – the "parties" to this writ are the City and the Union; a grievance cannot be pursued on a consolidated basis without the agreement of every employee. A grievance may be pursued by the Union on behalf of the employees only if all employees waive their rights to file individual grievances. Clearly, as the 400 grievances in this case attest, the Union and/or its employees did not choose to pursue this alternative. (We do note that some of the attached exhibits indicate that some employees pursued their grievances in small groups.) In any event, the City submitted an e-mail exchange with the Union, in which the City transmitted to the Union a "group grievance and individual waiver form," which the Union rejected as it might not be acceptable to all City departments and bureaus. The Union ended its e-mail with, "I guess what we will do is handle each grievance [as] a separate issue

clearly and unmistakably assign the issue to the arbitrator, thus, arbitrability remains an issue for the courts. Second, we turn to the language of the MOUs and consider whether, under sections 1.9 and 3.1, the MOUs provide for arbitration of the decision to furlough employees. We conclude the relevant contractual language is ambiguous and, as the issue was not properly presented to the trial court, we decline to resolve it in the first instance, as extrinsic evidence may be available and thus necessary to any determination of the issue. Third, we consider whether, even if the MOUs *did* provide for the arbitration of the decision to furlough employees, the agreement to arbitrate such a decision would be valid under the law. We conclude that such an agreement would constitute an improper delegation of discretionary policymaking power vested in the City Council. We will therefore hold that the issue is not arbitrable and will grant the petition.

DISCUSSION

1. *Standard of Review*

"Code of Civil Procedure section 1281.2 specifically states that [a court] must order an arbitration of a dispute 'if it determines that an agreement to arbitrate the controversy exists . . . ' It goes on to provide, '[i]f the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may

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which will require separate responses from management on each grievance, separate step meetings for each grievance, separate arbitrations for each grievance, etc." As it appears that the City sought group resolution of the grievances, and the Union rejected the attempt, specifically indicating that "separate arbitrations for each grievance" would be necessary, the Union cannot now assert that arbitrating the grievances would not be unduly time consuming or expensive, on the basis that such arbitration would proceed on a consolidated basis.

not be refused on the ground that the petitioner's contentions lack substantive merit.' In determining whether there is an obligation to arbitrate this particular dispute, we must examine and, to a limited extent, construe the underlying agreement." (*United Public Employees v. City and County of San Francisco* (1997) 53 Cal.App.4th 1021, 1025-1026.)

"In reviewing the superior court's order [granting] the petition to compel arbitration, we apply basic rules for interpreting contracts, to analyze both the agreement and the arbitration clause within it. [Citation.] An 'arbitration agreement is subject to the same rules of construction as any other contract, including the applicability of any contract defenses.' [Citation.] '[U]nder both federal and California law, arbitration agreements are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. [Citations.] In other words, . . . an arbitration agreement may only be invalidated for the same reasons as other contracts.' [Citation.] [¶] 'A motion to compel arbitration is, in essence, a request for specific performance of a contractual agreement. The trial court is therefore called upon to determine whether there is a duty to arbitrate the matter; necessarily, the court must examine and construe the agreement, at least to a limited extent. Determining the validity of the arbitration agreement, as with any other contract, " 'is solely a judicial function unless it turns upon the credibility of extrinsic evidence; accordingly, an appellate court is not bound by a trial court's construction of a contract based solely upon the terms of the instrument without the aid of evidence.' [Citation.]" ' [Citation.]" (*Duffens v. Valenti* (2008) 161 Cal.App.4th 434, 443.)

2. *The Courts Resolve the Issue of Arbitrability*

"The question of whether a collective bargaining agreement creates a duty for the parties to arbitrate a particular grievance is an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator. The court also determines what issues are subject to arbitration. [Citation.]" (*United Public Employees v. City and County of San Francisco, supra,* 53 Cal.App.4th at p. 1026.)

"The issue of who should decide arbitrability turns on what the parties agreed in their contract." (*Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547, 551.) "California courts use the same principles of contract interpretation whether the arbitration clause is in a collective bargaining agreement or a commercial contract. 'Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.' " (*Id.* at p. 553.)

The trial court may consider evidence on factual issues relating to the issue of arbitrability, i.e., "whether, under the facts before the court, the contract excludes the dispute from its arbitration clause or includes the issue within that clause." (*Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 653.) In this case, however, no such evidence was submitted to the trial court.

We thus turn to the language of the MOUs to determine whether the contractual language "clearly and unmistakably" provides that the arbitrator is to determine whether an issue is arbitrable. We find no such language. The only language which discusses

the scope of an arbitrator's jurisdiction is the language of section 3.1 defining a grievance "as any dispute concerning the interpretation or application of this written MOU or departmental rules and regulations governing personnel practices or working conditions applicable to employees covered by this MOU." While the Union argues that "interpretation . . . of this written MOU" encompasses interpretation of the definition of an arbitrable grievance itself, the quoted language does not clearly and unmistakably lead to that conclusion.[9] Instead, it may simply mean that issues of interpretation of the MOU are among the issues subject to the grievance procedure, but it is up to the courts to determine whether any particular issue is, in fact, subject to that procedure. With no clear and unmistakable provision that the arbitrator determines arbitrability, the issue is one for the courts. (See *Engineers & Architects Assn. v. Community Development Dept., supra,* 30 Cal.App.4th at pp. 651-652 [court determined whether the right to lay off an employee for lack of funds was within the scope of the grievance and arbitration procedure].)

3. *The MOU Is Ambiguous as to Whether Furloughs are Arbitrable*

Turning to the language of the MOU itself, the issue of whether the decision to furlough employees is arbitrable appears to be one requiring the interpretation of sections 1.9 and 3.1 of the MOUs. As discussed above, section 3.1 provides a broad definition of "grievance," encompassing, "any dispute concerning the interpretation or application of this written MOU or departmental rules and regulations governing

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[9] Strictly speaking, the clause in question does not discuss the scope of the arbitrator's jurisdiction at all; it simply defines a grievance which is subject to the six-step grievance procedure, ending in arbitration.

personnel practices or working conditions applicable to employees covered by this MOU." The Union argues that furloughs, as they affect working conditions, are within the scope of this provision.[10] Similarly, the Union argues that whether the City has the right to unilaterally furlough employees under the MOU involves interpretation and application of the MOU.[11]

Section 1.9 of the MOU, however, provides, "it is mutually understood that except as specifically set forth herein[12] no provisions in this MOU shall be deemed to

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[10] Although the City does not make the argument, we note that the definition of grievance applies to "*departmental rules and regulations* governing personnel practices or working conditions." The Mayor's implementation of the furlough program was not a department rule or regulation, but the citywide application of an ordinance.

[11] Strictly speaking, we question whether the issue is one of MOU interpretation. The Union takes the position that unilaterally-imposed furloughs violate the MOU, and that is the end of the matter. While the City argues that section 1.9 of the MOU permits it to unilaterally furlough employees, the City also argues that, even if the MOU does not permit the imposition of furloughs, the City nonetheless may implicitly suspend operation of the MOU by emergency ordinance properly enacted. This raises an issue of interpretation of law, not interpretation of contract. Indeed, the Union argues that while the State may furlough its employees (despite contrary MOU terms) by properly enacted Legislation, the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.) forbids local government entities from doing so. This appears to raise a legal issue, which would not be amenable to labor arbitration.

[12] The Union suggests that the "except as specifically set forth herein" language should be interpreted to mean, "except as otherwise set forth in the MOU," thus creating a conflict between section 1.9 and section 3.1. We disagree. The language reads, "except as specifically set forth herein no provisions in this MOU shall be deemed to [limit the City's enumerated rights]." Accepting the Union's interpretation, the clause would mean, "except as otherwise set forth in the MOU, no provisions in this MOU shall be deemed to [limit the City's enumerated rights]," a nonsensical interpretation which reads the entire section out of existence. The "except as specifically set forth herein" can only be read to mean "except as specifically set forth in this section." Thus, section 1.9 of the MOU provides a limitation on the remainder of the MOU. Under it,

limit or curtail the City officials and department heads in any way in the exercise of the rights, powers and authority which they had prior to the effective date of this MOU. The Association recognizes that these rights, powers, and authority include but are not limited to, the right to . . . relieve City employees from duty because of lack of work, lack of funds or other legitimate reasons . . . provided, however, that the exercise of these rights does not preclude employees and their representatives from . . . raising grievances about the practical consequences that decisions on these matters may have on wages, hours, and other terms and conditions of employment." The "provided, however" clause appears to limit the employees' rights to raise grievances regarding the exercise of the City's reserved rights to those grievances which pertain only to the practical consequences of the City's decisions. That is, the City retains the right to relieve employees from duty because of lack of funds, while the employees retain the right to grieve the practical consequences of such relief from duty – *not* the decision to relieve employees from duty itself. Indeed, no other construction of section 1.9 makes sense. If the employees retained the right to grieve the management decisions themselves, section 1.9 would have so provided, rather than indicating only that they retained the right to grieve the practical consequences.

This court addressed this issue in *Engineers & Architects Assn. v. Community Development Dept., supra*, 30 Cal.App.4th 644. In that case, an employee was laid off from work due to lack of work and lack of funds. The employee filed a grievance,

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"no provisions in th[e] MOU shall be deemed to" limit the City's enumerated rights, except as specifically provided in section 1.9 itself.

asserting that sufficient work and funds existed. The City denied the employee's request for arbitration, and the Union filed a petition to compel arbitration. The trial court concluded that substantial evidence existed that there was a lack of funds prompting the layoff, thus triggering section 1.9's exclusion from arbitration. We affirmed. (*Id.* at p. 655.) Once the layoff was established to be the result of lack of work and/or lack of funds, the decision was a management decision under section 1.9, which excluded it from the grievance and arbitration process. (*Ibid.*) We also rejected the argument that the "practical consequences" exception applied; the employee was challenging his layoff itself, not the consequences thereof. (*Ibid.*)

The issue thus becomes whether a decision to *furlough* employees due to a fiscal emergency is a management decision protected from arbitration under section 1.9 of the MOU.[13] Certainly, the language of section 1.9 is capable of this construction.

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[13] The issue sought to be arbitrated by the Union is whether the furloughs themselves were permissible, not the practical consequences of the furloughs. We note, however, that the 400 grievances at issue in this case did not always draw such a clear distinction. Prior to the furloughs, many employees were on a schedule in which, for each two-week pay period, rather than working 8 hours per day, they worked 9 hours per day for 9 days, and took the tenth day off. In giving effect to the furloughs, some departments apparently put all employees on an 8-hour workday, with every other Friday off. The result was that employees on the non-traditional work schedule did not get an additional day off due to furloughs, but simply reduced their workdays by one hour per day. Additionally, employees who had their scheduled day off as a day other than Friday were rescheduled to take every other Friday off. Grievances challenging these schedule changes appear to be challenges to the practical consequences of the furloughs, not the furloughs themselves. The responses to grievances raising these issues varied. In some cases, the relevant City department responded by saying, "the [d]epartment will reevaluate work schedules of furloughed staff." In others, the grievant withdrew the claim, saying that schedule changes were no longer an issue. In others, the department responded by saying scheduling necessitated by the furloughs was a management responsibility which was not grievable. In still others, the

Section 1.9 applies to a decision to "relieve City employees from duty because of . . . lack of funds." Surely, a furlough imposed due to fiscal emergency is a decision to relieve an employee from duty because of lack of funds. However, the Union argues that the "relieve City employees from duty because of . . . lack of funds" language was meant to apply *only* to layoffs, not to furloughs.[14] There is language in the recent Supreme Court decision of *Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989, 1041-1042, fn. 35, which states that similar language "reasonably can be interpreted" to refer only to layoff authority. Thus, it appears that the clause may be ambiguous.

As this precise issue was not raised before the trial court,[15] there was no extrinsic evidence presented to the court as to the meaning of "relieve City employees from duty because of . . . lack of funds." There is some reason to believe such extrinsic evidence may exist. We note that the language of section 1.9 of the MOU is nearly identical to

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scheduling grievances were addressed on the merits, with a decision being made that the scheduling changes were not arbitrary, capricious or discriminatory. The Union made no effort in its petition to compel arbitration to identify grievances which challenged scheduling as a practical consequence of the furlough decision, or to argue that these grievances should proceed to arbitration of that issue alone.

[14] There may be a judicial estoppel issue, at least with respect to some employees. In the grievance proceedings pursued by four employees, Angel Calvo, the Union's representative, argued that layoff protections should have been triggered by the furloughs "since furloughs are in essence layoffs."

[15] The City *had* argued that a furlough is a decision to relieve an employee from duty because of lack of funds. However, the City had argued that this interpretation of section 1.9 resulted in its furlough decision being *permissible under the MOU*, not that it resulted in the furlough decision being *inarbitrable* under the MOU. The trial court, thus believing that the issue went to the merits rather than arbitrability, declined to resolve it.

section 4.859 of the Los Angeles Administrative Code, which provides, in pertinent part, "It is . . . the *exclusive* right of City management to take disciplinary action for proper cause, *relieve City employees from duty because of lack of work or other legitimate reasons* . . . and to take any necessary actions to maintain uninterrupted service to the community and carry out its mission in emergencies; provided, however, that the exercise of these rights does not preclude employees or their representatives from consulting or raising grievances about the practical consequences that decisions on these matters may have on wages, hours, and other terms and conditions of employment." (Emphasis added.) In other words, the Administrative Code provides that management retained the right to relieve City employees from duty because of lack of work or other legitimate reasons, but when this language was incorporated into the MOUs, the right to relieve employees from duty because of *lack of funds* was added to the list. Presumably, there was some reason that this language was added to the MOUs – although whether it was intended to refer to layoffs only, or layoffs and furloughs, is not clear.[16]

If these were the only circumstances, we would remand for a trial court determination of whether the language in section 1.9, exempting certain management decisions from the grievance procedure, applies to furloughs.[17] However, it is

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[16] We note that when the City Charter refers to layoffs, it does not use the term "relieve from duty." Instead, the charter refers to "suspension and restoration," when discussing layoffs. (L.A. City Charter, § 1015.)

[17] The City also relies on the language in section 1.9, protecting from the grievance procedure management's decision to "take all necessary actions to maintain

unnecessary to do so as we will conclude that even *if* the MOU provided that the decision to furlough employees in a fiscal emergency was subject to arbitration, such a provision would be an improper delegation of the City Council's discretionary power. We now turn to that issue.

4. *An Agreement to Arbitrate Furloughs Resulting from Fiscal Emergencies Would be an Improper Delegation of the City Council's Discretionary Policymaking Power*

We assume, arguendo, that in the MOUs, which the City Council approved, the City Council had agreed that its decision to furlough employees due to a lack of funds would be subject to review by an arbitrator. The City contends that such an agreement would be an improper delegation of power. We agree.

Preliminarily, we note that cases discuss at least three different types of improper delegations. While language used in each of these types of cases may be relevant to our analysis, only one type of improper delegation is at issue in this case. We discuss the other two types of improper delegations briefly.

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uninterrupted service to the community and carry out its mission in emergencies," arguing that it applies to furloughs resulting from declarations of fiscal emergency. The Union responds that this language was not intended to apply to *fiscal* emergencies. Again, the MOU is reasonably capable of both interpretations; but the parties presented no extrinsic evidence, choosing to rely instead on legal interpretations of the term "emergency" in the context of whether the employer is relieved from a meet and confer obligation prior to acting. (E.g., *Sonoma County Organization etc. Employees v. County of Sonoma* (1991) 1 Cal.App.4th 267, 275-276.) That these are two different types of emergencies should be apparent – an emergency relieving the City from its obligation to consult with unions prior to adoption of an ordinance does not exempt the City from consulting at the earliest practical time thereafter (L.A. Admin. Code, § 4.850), while an exercise of the City's power to take necessary actions to carry out its mission in emergencies relieves the City from consulting on anything but the practical consequences thereof (L.A. Admin. Code, § 4.859).

First, the City discusses improper delegations of municipal power to private individuals under California Constitution, article XI, section 11. Subdivision (a) of this section provides, "The Legislature may not delegate to a private person or body power to make, control, appropriate, supervise, or interfere with county or municipal corporation improvements, money, or property, or to levy taxes or assessments, or perform municipal functions." This provision is inapplicable to the instant dispute as it deals with *State* delegations of municipal power to private individuals, not a City's delegation of its own power. (*California Assn. of Retail Tobacconists v. State of California* (2003) 109 Cal.App.4th 792, 828.) We are concerned with the City Council's purported delegation of its authority to an arbitrator; article XI, section 11 does not apply.

A second type of improper delegation is when a legislative body improperly delegates its own lawmaking power to another actor, such as an administrator (e.g. *Hess Collection Winery v. Agricultural Labor Relations Bd.* (2006) 140 Cal.App.4th 1584, 1604) or arbitrator (e.g., *Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 455). The purpose of the doctrine "is to ensure that the Legislature resolves the truly fundamental policy issues and that a grant of authority is accompanied by sufficient safeguards to prevent abuses." (*Id.* at p. 455.) "That a third party performs some role in the application and implementation of an established legislative scheme does not render the legislation invalid as an unlawful delegation of legislative authority." (*Ibid.*) While we are concerned with the legislative power of the

City Council, that is, its power to pass the ordinance authorizing furloughs, this is not the type of improper delegation that is properly applicable to this case.

The third type of improper delegation, and the one which controls the result in this case, is the improper delegation by a public agency or officer of its *discretionary* power. "As a general rule, powers conferred upon public agencies and officers which involve the exercise of judgment or discretion are in the nature of public trusts and cannot be surrendered or delegated to subordinates in the absence of statutory authorization." (*California Sch. Employees Assn. v. Personnel Commission* (1970) 3 Cal.3d 139, 144; *San Francisco Fire Fighters v. City and County of San Francisco* (1977) 68 Cal.App.3d 896, 901 (*San Francisco Fire Fighters*).) The *San Francisco Fire Fighters* case is instructive. In that case, the city charter gave authority over the city's fire department to the fire commission, and granted the fire commission the powers and duties to provide reasonable rules and regulations for the conduct of its affairs. (*San Francisco Fire Fighters, supra,* 68 Cal.App.3d at p. 899.) An MOU, approved by the fire commission itself, as well as the city's mayor and board of supervisors, provided for arbitration of grievances regarding the terms and conditions of employment. (*Id.* at p. 900.) The union argued that this provision was an agreement to arbitrate matters such as the right to strike, disciplinary matters, fitness requirements, and conditions of assignment and transfer. (*Id.* at p. 898.) The issue presented in the *San Francisco Fire Fighters* case was whether the fire commission (and/or the mayor and board of supervisors) had the authority to surrender, via the MOU, the fire commission's powers and duties to prescribe rules and regulations over the fire

department to an arbitrator. The court concluded that it did not. The court relied on the fundamental principle that powers conferred upon a municipal corporation and its officers and agents cannot be delegated to others unless so authorized by the legislature or charter. (*Id.* at p. 901.) Where the law imposes a personal duty upon an officer relating to a matter of public interest, that officer *cannot* delegate its duty to others, as by submitting it to arbitration. (*Ibid.*) In the absence of an appropriate amendment to the city's charter, the discretionary authority vested by the charter in the fire commission could not be delegated to an arbitrator, even by the fire commission itself. (*Id.* at p. 904.)

In this case, it is undisputed that the City's Charter vests budgeting discretion in the City Council and the Mayor. (L.A. Charter, §§ 310-315.) It is also undisputed that the City's Charter provides that the City Council "shall set salaries for all officers and employees of the City."[18] (L.A. Charter, § 219.) Clearly, a mandatory furlough is encompassed within salary setting (see *Professional Engineers in California Government v. Schwarzenegger, supra,* 50 Cal.4th at p. 1036) and a furlough imposed in a fiscal emergency is encompassed within budget making. Moreover, it cannot legitimately be disputed that setting salaries is a *discretionary* function. In a case involving the authority of a county board of supervisors to set wages, the court stated,

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[18] That section goes on to provide, "Salaries shall be set by ordinance, unless otherwise set through collective bargaining agreements approved by the Council and entered into in accordance with the provisions of state law." The Union does not suggest that the reference to collective bargaining agreements in this Charter provision somehow constitutes implicit permission for the City Council to delegate its salary-setting authority to an arbitrator by means of an MOU.

"It is . . . clear that '[t]he fixing of the number of employees, the salaries and employee benefits is an integral part of the statutory procedure for the adoption of the county budget . . . . ' [Citation.] The exercise of the board's legislative power in budgetary matters 'entails a complex balancing of public needs in many and varied areas with the finite financial resources available for distribution among those demands. . . . [I]t is, and indeed must be, the responsibility of the legislative body to weigh those needs and set priorities for the utilization of the limited revenues available.' [Citation.] In so doing, the board must weigh 'a number of other factors besides the level of the union members' salaries.' " (*County of Sonoma v. Superior Court, supra,* 173 Cal.App.4th at p. 343.) The court concluded that setting employee wages is a "creative legislative function." (*Ibid.*)

As the decision to impose mandatory furloughs due to a fiscal emergency is an exercise of the City Council's discretionary salary setting and budget making authority, the City Council cannot delegate this authority to an arbitrator. The Union argues against this conclusion by raising the difference between "grievance" arbitration and "interest" arbitration. " 'Interest arbitration concerns the resolution of labor disputes over the formation of a collective bargaining agreement.' [Citation.] It differs from the more commonly understood practice of grievance arbitration because, ' "unlike grievance arbitration, [it] focuses on what the terms of a new agreement should be, rather than the meaning of the terms of the old agreement. . . . " [Citation.]' [Citation.] Put another way, interest arbitration is concerned with the acquisition of future rights, while grievance arbitration involves rights already accrued, usually under an existing

collective bargaining agreement. [Citation.] An interest arbitrator thus does not function as a judicial officer, construing the terms of an existing contract and applying them to a particular set of facts. [Citation.] Instead, the interest arbitrator's function is effectively legislative, because the arbitrator is fashioning new contractual obligations. [Citation.]" (*County of Sonoma v. Superior Court, supra,* 173 Cal.App.4th 322, 341-342.) The Union argues that only interest arbitration can constitute an improper delegation of discretionary authority and that, in contrast, it is seeking here only to arbitrate a grievance. The Union argues, "No fiscal policymaking functions will be performed by the arbitrator who merely interprets and applies the wage and hour provisions of [an] existing labor contract. Here, the Petitioner has already agreed to and ratified the wage and hour provisions contained in the MOUs and, therefore, the arbitrator will not be creating new obligations by adjudicating the subject grievances. The arbitrator will merely engage in a *quasi-judicial* inquiry as to whether the Petitioner has complied with its obligations under pre-existing terms of the MOUs." (Italics in original.)

The Union's argument is an elevation of terms over substance. The issue is not whether the Union is seeking arbitration of a grievance (and thus "grievance arbitration"), but whether the Union is seeking arbitration of policy matters left to the discretion of the City Council. Interest arbitration is problematic from a delegation point of view because it impacts policy matters, not because it is called interest arbitration. "[W]hen binding interest arbitration is applied in the public sector, it may result in the arbitrator's involvement in matters that extend beyond those over which

labor and management customarily bargain in private sector disputes; binding interest arbitration may push the arbitrator into the realm of social planning and fiscal policy. [Citation.] The obvious reason for this is that costs arising from the terms of a binding interest arbitration award must be paid out of governmental funds. For example, if an interest arbitrator were to accept the demand by a firefighters' union that a local government add an engine company, this might require 'the building of a new fire house or the purchase of new equipment, . . . [and] could very well intrude upon management's role of formulating policy.' [Citation.] A decision in a binding public sector interest arbitration proceeding might therefore require the governmental employer either to cut other items from its budget or to increase taxes. [Citation.]" (*County of Sonoma v. Superior Court, supra,* 173 Cal.App.4th at p. 342.) Interest arbitration may constitute an improper delegation because it involves the submission to arbitration of a general policymaking power to determine the terms and conditions of employment, a matter of public policy. (*Taylor v. Crane* (1979) 24 Cal.3d 442, 453.)

When considering the claims made in the employee grievances, and the relief sought by the Union, it is clear that the Union is seeking to have an arbitrator determine issues of discretionary policymaking which have been assigned to the City Council. The Union wants a determination made that the City *violated* the salary and workweek provisions of the MOU by instituting furloughs, and that the furloughs were therefore improper. Grievance after grievance argued that the furloughs were improper and that the employees should be returned to full-time work and repaid for the days on which they were furloughed. This is not a case where a single employee, or a single class of

employees, is questioning a departmental decision[19] to change their schedules or cut their pay. This is a challenge to a City Council's decision to impose furloughs as a response to the City's dire financial condition. If the City Council had agreed to arbitral review of such a decision, it would have been an improper delegation of its salary setting and budget making powers.

Finally, amici curiae on behalf of the Union rely on *Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, for the proposition that once a City executes an MOU setting salaries, it cannot set lower salaries by ordinance. The case is inapplicable. That case involved only the issue of whether a ratified MOU is binding on the parties; it is. (*Id.* at p. 332.) It did not consider whether a public employer could, within the MOU, delegate its discretionary salary setting and budget making authority to an arbitrator. It thus has no bearing on this case.

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[19] We note that the arbitration step of the grievance process requires service of the request for arbitration on "the head of the department, office or bureau." This supports the conclusion that arbitration was never intended to address discretionary policy decisions of the *City Council*.

DISPOSITION

The petition for writ of mandate is granted. The matter is remanded to the trial court for further proceedings consistent with this opinion. The City shall recover its costs in this proceeding.

CERTIFIED FOR PUBLICATION

CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

ALDRICH, J.

ATTACHMENT 2

Los Angeles Administrative Code, Sections 4.801 and 4.865

Sec. 4.801. Definition of Terms.

The words and terms defined in this section shall have the following meanings in this chapter. Any term not defined herein which is defined in the Meyers-Milias-Brown Act shall have the meaning set forth therein.

Board – The Employee Relations Board established by this chapter.

City – The City of Los Angeles.

Confidential Employee – An employee who is privy to information leading to decisions of City management affecting employee relations.

Consult or Consultation – To communicate orally or in writing for the purpose of presenting or obtaining views or advising of intended actions.

Day – A calendar day.

Determining Body or Official – The body or official who has final authority to make a decision on matters under discussion within the scope of representation.

Employee Relations – The relationship between the City and its employees and their organizations, or when used in a general sense the relationship between management and employees or employee organizations.

Employee Representation Unit – A group of employees constituting an appropriate unit as provided by this chapter.

Fact-Finding – Identification of the major issues in a particular dispute; reviewing the positions of the parties; and the investigation and reporting of the facts by one or more impartial fact-finders; and, when directed by the Board, the making of recommendations for settlement.

Grievance – Any dispute concerning the interpretation or application of a written memorandum of understanding or of departmental rules and regulations governing personnel practices or working conditions. An impasse in meeting and conferring upon the terms of a proposed memorandum of understanding is not a grievance.

For employees in the representation unit Police Officers, Lieutenant and below, excluded from the definition of grievance set forth above and excluded from the scope of the grievance process are disputes concerning discipline and disputes concerning transfers, promotions, promotional examinations, or probationary employee terminations – whether or not such matters involve discipline.

Impasse – A deadlock, after a reasonable period of time, in the meet and confer process between the City's management representatives and representatives of recognized employee organizations on matters concerning which they are required to meet and confer in good faith or over the scope of matters upon which they are required to meet and confer.

Joint Council – Two or more qualified employee organizations which have joined together for the purpose of seeking certification as a recognized employee organization for an employee representation unit.

Management Employees – An employee having significant responsibilities for formulating or administering City or Departmental policies and programs.

Management Representative – A person designated by a determining body or official, to carry out the responsibilities specified for a management representative under this chapter.

Mediation – Efforts by an impartial party or parties to assist as intermediaries through interpretation, suggestion and advice, in reconciling disputes regarding wages, hours and other terms and conditions of employment between the City's management representatives and representatives of recognized employee organizations.

Meet and Confer in Good Faith (or Meet and Confer) – The mutual obligation of the city's management representatives and representatives of recognized employee organizations personally to meet and confer within a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation.

Memorandum of Understanding – A written memorandum, jointly prepared by the parties incorporating matters on which agreement is reached through meeting and conferring between the City's management representatives and representatives of a recognized employee organization. The memorandum shall be presented to the appropriate determining body or official of the City for determination and implementation.

Professional Employee – An employee engaged in work requiring specialized knowledge and skills attained through completion of a recognized course of instruction, including, but not limited to attorneys, physicians, registered nurses, engineers, architects, teachers, and various types of physical, chemical and biological scientists.

Qualified Employee Organization – An organization which includes employees of the City, which has as one of its primary purposes representing such employees in their relations with the City, and which has complied with the conditions specified in Section 4.820 of this Code.

Recognized Employee Organization – A qualified employee organization or joint council of qualified organizations which has been certified by the Board as the majority representative of employees in an appropriate employee representation unit in accordance with the provisions of Section 4.822 of this Code.

Such certified majority representative shall be the exclusive representative of the employees in the unit, subject to the right of an employee to represent himself as provided in Section 4.857 of this Code.

Regular Employee – An employee who is appointed to a full-time or part-time permanent position.

SECTION HISTORY

Added by Ord. No. 141,527, Eff. 3-5-71.

Amended by: Ord. No. 144,210, Eff. 2-10-73; Ord. No. 151,272, Eff. 9-2-78. Second para. added to Grievance definition, Ord. No. 161,882, Eff. 3-17-87.

Sec. 4.865. Grievance Procedure for Recognized Employee Organizations.

a. The management representative principally responsible for meeting and conferring with a recognized employee organization shall meet and confer with the representatives of such employee organization to develop a grievance procedure for employees in the representation unit, to be incorporated into any memorandum of understanding reached by the parties. Such grievance procedure shall apply to all grievances, as defined in Section 4.801 of this Code, shall provide for arbitration of all grievances not resolved in the grievance procedure, and shall conform to the following standards:

(1) Provision shall be made for discussion of the grievance first with the employee's immediate supervisor on an informal basis;

(2) Provision shall be made for the filing of a formal grievance in writing, and for the processing of the unresolved grievance through not more than four, nor less than two, levels of review with written notice of the results of each such review to the employee and to his representative, if any;

(3) An employee may be represented by a representative of the employee's choice in the informal discussion with the employee's immediate supervisor, in all formal review levels, and in arbitration; provided, however, that such representative may not be an employee or officer of another qualified organization except with the written consent of the organization granted exclusive representation.

(4) If the grievance is not resolved in the grievance procedure either party may submit the grievance to arbitration by written notice to the other party of its desire to arbitrate. Following such notice the parties shall meet for the purpose of selecting an arbitrator from a list of seven arbitrators to be furnished to the parties by the Board. In selecting the arbitrator from said list, the parties shall alternately strike names from the list until one name remains. The arbitrator remaining shall hear the case. In the event he is unable to hear the case, the parties shall obtain a new list of seven arbitrators and shall select a new arbitrator in the manner set forth above. With respect to grievances involving the Departments of Airports, Harbor, Water and Power, Library, Recreation and Parks, Pensions and City Employees' Retirement System the decision of the arbitrator shall be advisory only.

With respect to grievances involving all other City departments, the decision of the arbitrator shall be final and binding on the parties;

(5) All expenses of arbitration, including the arbitrator's fee shall be shared equally by the parties.

b. The Board shall maintain a list of neutral professional arbitrators and shall, upon request of any party, furnish to the parties to the dispute a list of seven arbitrators for selection of an arbitrator to arbitrate an unresolved grievance, as set forth above.

SECTION HISTORY

Added by Ord. No. 141,527, Eff. 3-5-71.

Amended by: Subsec. (a), Ord. No. 144,462, Eff. 3-1-73; Subsec. a(3), Ord. No. 151,272, Eff. 9-2-78.

City of Los Angeles v. Superior Court of Los Angeles (Engineers & Architects Association, Real Party in Interest), California Supreme Court, No. _____

PROOF OF SERVICE BY UNITED PARCEL SERVICE (UPS) – NEXT DAY

I declare that I am employed in the County of San Francisco, California. I am over the age of eighteen years and not a party to the within cause; my business address is 44 Montgomery Street, Suite 400, San Francisco, CA 94104. On May 4, 2011, I served the enclosed:

PETITION FOR REVIEW

on the parties in said cause (listed below) by enclosing a true copy thereof in a prepaid sealed package, addressed with appropriate United Parcel Service shipment label and, following ordinary business practices, said package was placed for collection (in the offices of Carroll, Burdick & McDonough LLP) in the appropriate place for items to be collected and delivered to a facility regularly maintained by United Parcel Service. I am readily familiar with the Firm's practice for collection and processing of items for overnight delivery with United Parcel Service and that said package was delivered to United Parcel Service in the ordinary course of business on the same day.

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Trial Judge

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California Court of Appeal
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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on May 4, 2011, at San Francisco, California.

Janine Oliker

CBM-SF\SF509276.7