Court of Appeal Case No. C077403

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

CALIFORNIA ASSOCIATION OF PROFESSIONAL SCIENTISTS,
Plaintiff and Appellant,

v.

STATE OF CALIFORNIA, DEPARTMENT OF HUMAN RESOURCES,
Defendant and Respondent.

On Appeal from the Superior Court, Sacramento County,
Case No. 34-2014-00165420
The Honorable Raymond Cadei, Department 54

APPELLANT'S REPLY BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENTS

Respondent offers three cases to support judicial intervention to overturn an arbitrator's decision. None apply here. The parties agreed to express contractual language. The Legislature approved the express contractual language. The arbitrator applied the express contractual language. Once the Legislature approved Article 20.4, no separate appropriation of funds was needed.

Case law clearly indicates that California has chosen to embrace me-too or parity clauses, even in public employee collective bargaining agreements. Case law also clearly illustrates the importance California places on the finality of arbitration decisions.

Additionally, this Court must not allow Respondent to game the system after it failed to raise during the arbitration proceeding any of the litany of public policies it now professes to hold in high regard: that the arbitrator's award violates public policy, usurps the Legislature's role, threatens the Dills Act, and goes against an expressed policy preference against bargained pay parity agreements. The State concerned itself with none of these policy ideas when it entered into a collective bargaining agreement with CAPS (and many other units) containing a me-too clause. Nor did it raise these concerns during the grievance process, nor even

before the arbitrator. It did not believe constitutional issues were in play – until it lost.

In this reply, Appellant addresses the State's arguments about the appropriate standard of review, the State's misleading information about costing information provided to the Legislature for Bargaining Unit 9's 2011-2013 agreement, the State's continued misunderstanding of *Moncharsh* and its application to this case, and distinguishes the instant case from the prior decisions to which Respondent points for support.

ARGUMENT

I. THE APPELLATE COURT MUST APPLY A DE NOVO STANDARD OF REVIEW TO THIS CASE.

The questions presented to this Court are questions of law. If the trial court based its ruling on factual conclusions, it only did so because it erroneously allowed Respondent to raise its waived arguments while simultaneously noting that the trial court *could not make* evidentiary findings. (RT 10: 21-22).[1]

[1] The trial court opined that CAPS's position required it to make evidentiary findings, "which I can't do at this hearing" (RT 10: 20-22). Yet the trial court still appeared to base its ruling on evidentiary findings regarding what the Legislature knew and when the Legislature knew it (despite saying at oral argument that it was "purely into the public policy realm"). The decision states that the arbitrator's award violates public policy "*because* the Legislature was not provided" with required costing information. (emphasis in the original; JAII 00569) That is a factual argument the State should not have been permitted to raise for the first time in its cross petition to vacate.

Despite dicta in Court of Appeal decisions suggesting the per se invalidity of arbitration awards violating a "well-defined public policy," the California Supreme Court has never approved such a rule in *Moncharsh* or any other case. This court must review de novo the superior court's decision confirming or vacating an arbitration award, while the arbitrator's award is entitled to deferential review. (*California Statewide Law Enforcement Association (CSLEA) v. Department of Personnel Administration (DPA)* (2011) 192 Cal.App.4th 1, 13; citations omitted)

Even if this Court applies a substantial evidence test, however, Appellant prevails. The substantial evidence rule measures the quantum of proof adduced at hearing (whether there was a "hearing" on Respondent's new evidence presented with its cross petition is questionable) and assesses whether a party has established the issues by a solid, reasonably credible showing. (*Department of Parks and Recreation v. Duarte* (1991) 233 Cal.App.3d 813, 830) Substantial evidence, however, is not synonymous with "any" evidence. (*Ibid*.) The trial court clearly erred in finding a lack of adequate notice provided to the Legislature regarding Article 20.4's existence and impact and thus its conclusions in that regard deserve no deference.

II. THE LEGISLATURE APPROVED ARTICLE 20.4 WHEN IT APPROVED THE UNIT 10 MOU. NO FURTHER LEGISLATIVE ACTION WAS REQUIRED TO PROVIDE UNIT 10 WITH INCREASED TRAVEL REIMBURSEMENT RATES.

Arbitrators frequently rule on economic provisions of MOUs – from awarding wrongly denied overtime to uniform reimbursement payments. The arbitrator's award and order in this case is no different. While it may be unambiguous that setting compensation for public employees is a legislative function, at issue in this case is the rate of reimbursement for travel expenses, not employee compensation. (*Lowe v. California Resources Agency* (1991) 1 Cal.App.4th 1140, 1151). The money sought in this case is not a raise. While the contractual language providing for increased reimbursement rates needed to be – *and was* – approved by the Legislature, its operation did not require the appropriation of additional funds.

It remains unclear why Respondent insists the Legislature was not informed about Article 20.4 when, on page 8 of the required Legislative Analyst's Office (LAO) analysis of the 2011-2013 Unit 10 MOU, the LAO includes a boldface-titled bullet point that says "**Contract Protection Clause**" and tells the legislature:

> If any other bargaining unit were to enter into an agreement with the state that did not include pension reform or provided a greater value/total compensation package than the proposed MOUs, then Units 9 and 10 would (with some exceptions) receive the difference between the agreements.

(JAII 00469)

To find otherwise would remove from the Legislature the appropriate assumption that it knows what it is doing when passing legislation. The Legislature passed at least nine MOUs containing contract protection language. (JAII 0047) Then it passed an MOU that gave SEIU-represented employees greater value through increased travel reimbursement rates. (JAI 00039) Under the language of the Unit 9 and 10 MOUs it owed increased travel reimbursement rates to Units 9 and 10, as clearly described by the LAO. (JAII 00033; 00485) The State only gave those increased rates to Unit 9 (JAII 00478; see also Section V below). It still owes them to Unit 10.

The LAO also notes in its 2013 analysis of the SEIU MOUs providing increased travel reimbursement rates that the rate increases were presumed *by the administration* (that is to say, by CalHR, the Respondent here) to be absorbed within existing departmental resources. (JAII 00442) This Court cannot read the meaning out of those words. The Legislature does not make separate line-item appropriations for non-add items. That is why they are "non-add"-ed to the budget. (JAII 00428) The chart provided as the SEIU MOU Budgetary Summary lists "Travel" under the heading "Non-adds." (JAI 00062; JAII 00342)

A. **The Three Cases Offered by Respondent Provide Them No Quarter**.

Respondent cites three cases as directly supporting their position in the current controversy. *Department of Personnel Administration (DPA) v. California Correctional Peace Officers Association (CCPOA)* (2007) 152 Cal.App.4th 1193 addressed an arbitrator's impermissible deletion of legislatively-approved MOU language. *CSLEA v. DPA* (2011) 192 Cal.App.4th 1 addressed an arbitrator's impermissible correction of legislatively-approved MOU language. *California Department of Human Resources (CalHR) v. Service Employees International Union, Local 1000 (SEIU)* (2012) 209 Cal.App.4th 1420 addressed an arbitrator's impermissible addition to legislatively-approved MOU language.

Here, we are presented with an arbitrator's enforcement of legislatively-approved language. Enforcement of bargaining contractual language is the entire point of the grievance and arbitration process. The arbitrator's order enforcing the contract language for which the parties bargained and of which the Legislature approved must remain undisturbed.

III. **THE STATE CONFUSES POTENTIALLY HAVING RAISED *A* PUBLIC POLICY ARGUMENT WITH RAISING *ALL* PUBLIC POLICY ARGUMENTS**.

Respondent failed to raise during the arbitration proceeding the triumvirate of public policy violations it brought before the trial court. By failing to raise these issues at any point during either the grievance process

leading to arbitration, or during the arbitration proceeding itself, the State waived its ability to raise them later. Accordingly, this Court must reverse the superior court's decision and confirm the arbitrator's award as no grounds exist to vacate it.

Even if this Court finds that Respondent raised *a* public policy concern during the arbitration proceeding, that leaves at least two of the ills unaddressed: that the decision usurps the Legislature's role and threatens the Dills Act (Cal. Gov. Code § 3512, et seq.).

A. **Respondent's Assertion that Arbitration Proceedings Between Public Employees and Public Employers are not a Private Arbitration Proceeding is Mistaken**.

Respondent seems to assert that *Moncharsh*'s clear explanation of the dangers of procedural gamesmanship are inapplicable here because that case "involved a matter of *private* arbitration" (emphasis in the original) while Respondent's arguments involve "public policy implications." (Respondent's Brief, page 24) This framing falsely implies that the arbitration proceeding at issue here was not a private arbitration or that the policy preferences the Court elucidates in *Moncharsh* are somehow not public policy preferences. It is and they are.

Moncharsh clearly presents a strong public policy preference for upholding the finality of arbitration decisions and preventing the procedural gamesmanship that would render private arbitration an undesirable and

ineffective choice for dispute resolution between would-be litigants. (See *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1)

B. **Respondent's Assertion That It Could Not Have Predicted the Arbitrator's Order Strains the Bounds of Credulity**.

Respondent asserts that it would have been premature to raise any of its concerns at arbitration because it could not predict the arbitrator's award and order.

At arbitration, the State presented the following issue statement:

> Issue number one, did the State violate Article 20.4 of the expired Unit 10 MOU effective April 1, 2011 through July 1, 2013 when it refused to provide CAPS represented members with the same increases to meal and lodging reimbursement rates that SEIU members received upon negotiation of its bargaining unit MOUs effective July 2, 2013 through July 1, 2016 and; issue number two, if so, what shall be the remedy pursuant to the expired Unit 10 MOU?

(JAI 00039) While the arbitrator adopted a somewhat modified version of that issue statement in her decision, it seems that the State never considered that, even if the arbitrator adopted its proposed issue statement whole cloth, the arbitrator could answer the first question in the affirmative. And the State now argues that it never considered what the remedy would be in such a situation. The only demand CAPS ever made during this ongoing controversy, from the initial grievance through the arbitration and to today, is that Unit 10 employees are owed reimbursement at the higher, SEIU rates for travel expenses incurred because SEIU Units received higher reimbursement rates. (JAI 00040)

If Respondent prevails, then no arbitrator in the future can remedy a State violation of a bargaining unit's contract with an order requiring the payment of any funds by the State-as-employer without specific legislative action. This result would render meaningless the employee protections and benefits contained in collective bargaining agreements.

C. *Moncharsh*'s Requirement That Respondent Raise its Claims Before the Arbitrator Applies because Respondent's Position Is That Article 20.4 is Thrice Illegal.

The State in its opposition brief argues that *Moncharsh* is irrelevant because the State is not challenging the legality of the MOU. The State misunderstands what both CAPS and *Moncharsh* say.

Under *Moncharsh*, a party must raise a claim that a discrete provision is illegal at arbitration to preserve the issue for possible later appeal. Failure to raise the claim waives the claim for any future judicial review. The only exceptions to that requirement are (i) claiming the entire MOU is illegal or (ii) that the MOU provision prescribing arbitration is illegal. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 30-31, citations omitted)

Neither exception applies here because neither party has argued that the entire MOU is illegal nor that the arbitrability provisions of Article 9 Grievance and Arbitration Procedure are illegal.

The State based its cross petition to vacate on three claims: that the award violates public policy by usurping the Legislature's role, threatening the Dills Act, and violating an expressed policy preference against bargained me-too or parity agreements. No matter which of these three claims you scrutinize, each, at its base, asserts that Article 20.4 is an illegal provision.

1. The State's original objection to Article 20.4 was that it died on July 1, 2013.

From the start of the grievance process and through the arbitration, the State argued that Article 20.4's lifespan was limited to the "Pension Reform" round of bargaining. (See JAII Tab 11, Exhibit M, 00511-00526) That was the State's grounds for denying the grievance.

2. If the Arbitrator's award violates the Dills Act, then it is because Article 20.4 is illegal.

If the award violates the Dills Act, as the State argues, that violation would stem not from the award applying Article 20.4, but rather from Article 20.4 itself acting as a me-too clause that removes CAPS's incentive to bargain in good faith as required by the Dills Act. Since the award merely ruled on the issue at hand, whether Article 20.4 survived beyond July 1, 2013, the award is not really the issue. Rather, it is the underlying legality of the provision which Respondent could have raised as an issue, but did not. (This Court is also apparently supposed to ignore that the parties bargained for and reached agreement on the provision's inclusion in

the MOU and that CalHR reached agreements on similar provisions with many other state bargaining units.)

3. If an express policy against me-too or parity clauses exists in California, then Article 20.4 is illegal.

Appellant clearly showed in its opening brief and reiterates below that me-too or pay parity clauses are embraced in California. If, for argument's sake, we adopt CalHR's view that there is an expressed disapproval for such provisions, then their issue again would be with the legality of Article 20.4 rather than the arbitrator's award and order. Respondent was required to raise that issue prior to its cross petition. It did not.

4. If the Arbitrator's award violates the separation of powers doctrine, then it is because Article 20.4 is illegal.

Once again, it is not the order itself to pay money with which the State takes issue. Any invocation of Article 20.4 (and the many similar provisions in state bargaining unit contracts) would necessarily violate the doctrine since Article 20.4 could have operated to provide many forms of economic benefit to a unit in the same fashion at any time between April 1, 2011 and the date a successor agreement became effective.

In sum, each of the State's public policy arguments supporting its petition to vacate do not focus on the order to pay increased reimbursement rates to Unit 10 employees. The petition to vacate relies on Article 20.4's

illegality. Accordingly, Respondent was required under *Moncharsh* to raise each basis for the claimed illegality before the arbitrator. Because they failed to do so, their claims here must fail.

D. California Values Alternative Dispute Resolution and the Finality of Arbitration Decisions.

Though dicta in cases such as *CSLEA* suggest that arbitration awards violating "well-defined public policy" are invalid, those suggestions uniformly cite authority other than the California Supreme Court which has, to date, never approved such a rule or acknowledged such a public policy exception. The Supreme Court *has*, however, affirmed California's commitment to the efficiencies afforded by alternative dispute resolution and to the finality of arbitration decisions. (See: *Moncharsh v. Heily & Blase*) Nothing in the instant case warrants a departure from this well-known public policy preference.

As discussed in Appellant's Opening Brief, the California Legislature has expressed a strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution. (*Moncharsh* at 8, citations omitted) The scope of judicial review of arbitration is extremely narrow and courts may not review the merits of the controversy, the sufficiency of the evidence supporting the award, or the validity of the arbitrator's reasoning. (*CSLEA v. DPA* (2011) 192 Cal.App.4th at 12-13, citing *Moncharsh* at 10-11) Here, the Legislature was fully informed of

CAPS's, and many other units', agreement with the State regarding its Contract Protection Clause. It made an informed decision while in possession of required fiscal analysis on the impact of the 2011 CAPS MOU.

IV. **EVEN IF RESPONDENT ADEQUATELY RAISED ITS CONCERNS ABOUT PAY PARITY CLAUSES, THE LAW IS NOT ON RESPONDENT'S SIDE**.

If Respondent adequately raised a concern that the arbitrator's decision goes against an expressed policy preference against bargained me-too or parity agreements, then it remains as wrong on that point today as it was at the time of the arbitration and before the trial court.

While several states may view pay parity provisions as illegal per se, California is not one of them. (*Banning Teachers Association v. Public Employment Relations Board* (1988) 44 Cal.3d 799, 808-809) The Supreme Court in *Banning* held that "a parity agreement, which is a contractual budgetary restriction, is no more a disincentive to bargain than is a finite budget absent such an agreement" and noted that it is joined by at least three states and the National Labor Relations Board in holding parity agreements lawful. (*Id.* at 808-809)

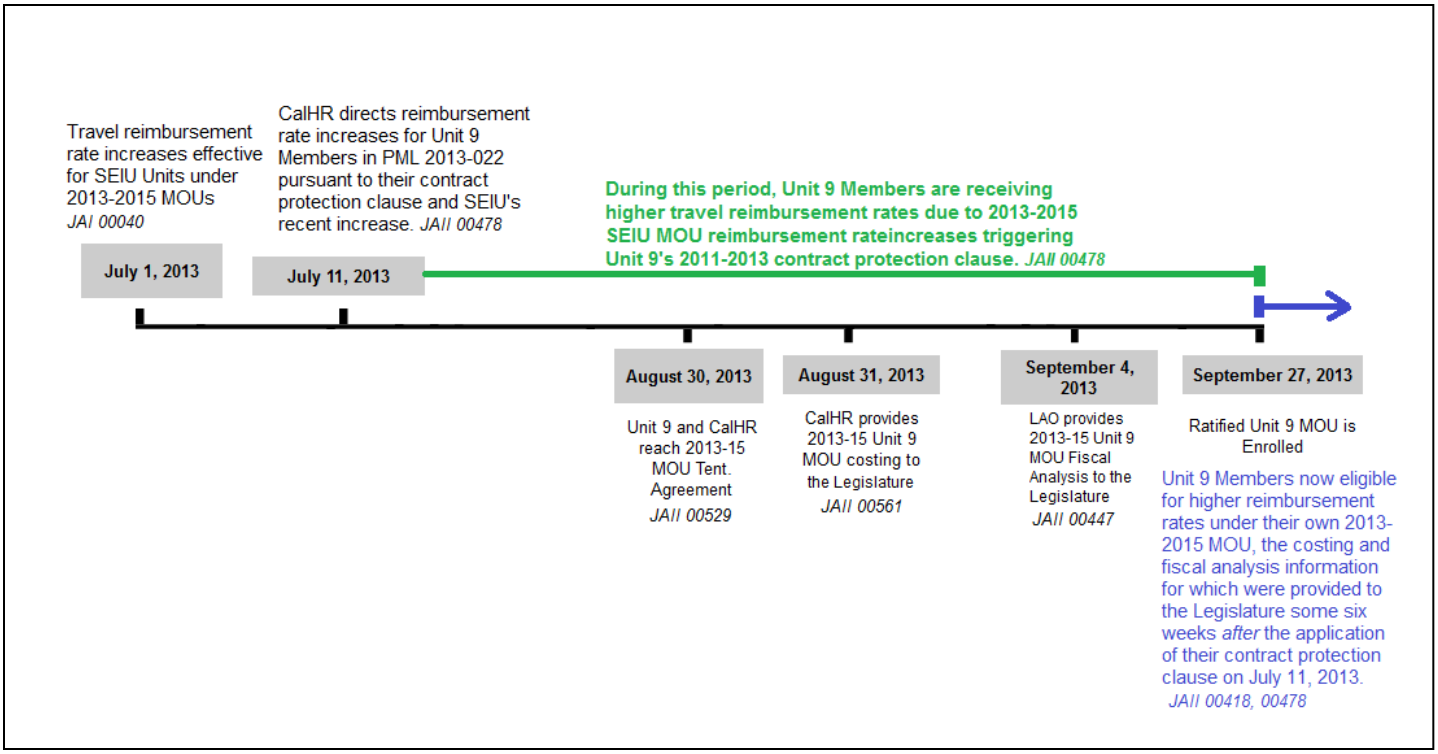
The Supreme Court has said fears of pay parity clauses obstructing bargaining in that case were "unfounded," recognizing the practical reality of multi-unit bargaining: "each unit necessarily has an impact on the negotiations of every other unit, regardless of the order in which the

contracts are negotiated or whether [employers] enter into parity agreements." (*Id.* at 807)

V. THE STATE CONTINUES TO IGNORE THE JULY 11, 2013 CALHR MEMORANDUM PROVIDING INCREASED TRAVEL REIMBURSEMENT RATES TO UNIT 9 EMPLOYEES FOR WHICH NO SPECIFIC LEGISLATIVE AUTHORIZATION WAS OBTAINED NOR COSTING INFORMATION PROVIDED.

The State's continued reliance on the trial court's erroneous interpretation of the evidence is troubling. At no point in its brief does it acknowledge the July 11, 2013 CalHR memorandum that proves conclusively by virtue of its date that Unit 9 received reimbursement rate increases pursuant to its own me-too clause. This Court must not ignore this evidence nor allow the State to prevail based on the trial court's mistake.

Despite not yet having reached a successor agreement to their 2011-2013 MOU, Unit 9 employees were afforded the same travel reimbursement rate increases as SEIU received with the ratification of its 2013-2015 MOU due to the operation of Article 2.1(c), the me-too clause in the Unit 9 expired MOU. (Travel/Relocation Program – Lodging/Per Diem Increase for [PECG], July 11, 2013, JAII 00478; §7, 8, JAII 00529-00530) Their increase was implemented via a Personnel Management Liaisons Memorandum (PML) issued on July 11, 2013. (*Ibid*.) We again return to the graphical representation of the timeline:



Please note the green line above. No separate legislative action was required to affect this rate increase. (§9, JAII 00530) From July 11, 2013 through approximately September 27, 2013, Unit 9 personnel benefited from a bargain struck by a different bargaining unit because the State also negotiated with Unit 9 a me-too provision that required they be extended the same benefit.

Respondent offers a letter regarding Unit 9's Tentative Agreement sent to the Legislature on August 31, 2013 as evidence that the Legislature was apprised of the July 11, 2013 increase in Unit 9 travel reimbursement rates. July 11 comes before August 31 on the Gregorian calendar.

Likewise, a declaration from a CalHR official claims that when the Legislature was informed of SEIU's travel reimbursement rate increases, it was also informed of the parallel reimbursement rate increase for Unit 9 members. (JAII00561) But Respondent provides no evidence of that. In fact, the declarant goes on to say, "*[s]pecifically,* on August 31, 2013, CalHR submitted a letter to the Legislature…requesting approval of the 2013-2015 MOU" between CalHR and Unit 9. (*Id*. at paragraph 5) This proves CAPS's description of the timeline of events, not Respondent's.

Notably, neither CalHR nor the Legislature objected to the operation of Unit 9's Article 2.1(c) as a transgression by the executive branch (represented by CalHR) against the Legislature and its appropriation function. The LAO analysis for the 2011 Unit 9 MOU had combined with Unit 10 and, as discussed above, informed the Legislature that each unit would be owed the difference between what they received under their 2011-13 MOUs and later MOUs for other units that afforded greater value. (JAII 00469)

No additional costing information was provided to the Legislature on Unit 9's Contract Protection Clause in 2003, 2011, or 2013. (§7-10, JAII 00529-00530) No additional costing information was provided to the Legislature regarding the implementation of the travel reimbursement rate increases under the 2011 Unit 9 MOU Article 2.1. (*Ibid.*) It simply did not

happen, despite the State's false statement that it did. Moreover, as discussed above, no further Legislative action would have been needed.

CONCLUSION

Because the arbitrator's award does not violate California law or public policy and because public policy favors leaving arbitration awards undisturbed, the Court must reverse the trial court's decision, deny Respondent's cross petition and grant Appellant's petition and enter final judgment.

Respectfully Submitted,

CALIFORNIA ASSOCIATION OF PROFESSIONAL SCIENTISTS

DATED: November 3, 2016

CHRISTIANA DOMINGUEZ
Attorney for CAPS

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c) of the California Rules of Court, I certify that the foregoing Appellant's Reply Brief is proportionately spaced, uses a 13-point typeface, and, according to Microsoft Word, the word processing program used to generate this brief, contains 3,469 words, excluding the cover, any tables, and this certificate.

Dated: November 3, 2016 By: _____
Christiana Dominguez