NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

CALIFORNIA ASSOCIATION OF PROFESSIONAL SCIENTISTS, Plaintiff, Cross-defendant and Appellant, v. DEPARTMENT OF HUMAN RESOURCES, Defendant, Cross-complainant and Respondent.	C077403 (Super. Ct. No. 34201400165420CUPTGDS)

Plaintiff California Association of Professional Scientists (Scientists) entered into a memorandum of understanding (MOU) with defendant Department of Human Resources (State). Subsequently, the parties arbitrated whether a contract protection clause survived the expiration of the MOU. The arbitrator found in favor of Scientists, who petitioned the trial court to confirm the arbitration award. State cross-petitioned to vacate the award. The trial court denied Scientists' petition and granted State's cross-

petition. Scientists appeals, arguing State waived the issue and the trial court erred in vacating the award. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2011 Scientists and State, following collective bargaining, reached agreement on an MOU, effective April 1, 2011, through July 1, 2013. The MOU contained a contract protection clause, Article 20.4, designed to provide employees with the difference between what another unit's employees receive and what Scientists' employees receive in total compensation package should another unit receive higher compensation.

Article 20.4 states, in pertinent part: "A. If any other State bargaining unit(s) enter into an agreement with the State that does not have Pension Reform or provides a greater value/total compensation package than this agreement does, taking into account all 'takeaways' or enhancement/'sweeteners', than CAPS (Unit 10) [Scientists] members shall receive the difference between the packages/agreements . . . . [¶] B. The term of this article/section shall not apply to successor agreements previously reached with Units 2, 5, 6, 7, 8, 18, and 19."

Although the MOU expired in July 2013, Government Code section 3517.8 requires the parties to continue to give effect to the provisions of an expired MOU if an agreement on a successor MOU has not been reached and the parties are not at an impasse.[1] State and the Service Employees International Union (SEIU) agreed to a new MOU during the subsequent round of bargaining, effective July 2013 through July 2016. In that MOU, State agreed to increased meal and lodging reimbursement rates for SEIU members.

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[1] All further undesignated statutory references are to the Government Code.

The MOU between State and Scientists provides that disputes over the interpretation, application, or enforcement of the MOU's terms are subject to a grievance process. Unresolved disputes are subject to arbitration conducted by a mutually agreed-upon arbitrator. The arbitrator does not have the power to add to, subtract from, or modify the agreement and the award is final and binding upon the parties.

On July 22, 2013, Scientists filed a contractual grievance alleging State was required under Article 20.4 to provide to its members the increased meal and lodging reimbursement rates negotiated by the SEIU during the 2013 negotiations. Scientists claimed that, as a result of the SEIU agreements, Scientists members received less reimbursement for expenses incurred while traveling on state business than did SEIU-represented employees. State argued the contract protection clause was limited in its application to the 2011 round of negotiations. Scientists contended the parties' contract protection clause should be applied more broadly and was not limited to increases bargained during the negotiations that concluded in 2011.

Unable to solve the dispute through the grievance process, the parties went to arbitration. Each party presented a proposed issue statement to the arbitrator.

Scientists proposed: "Issue number one, does Article 20.4 of the 2011-2013 Unit 10 MOU require the State to increase meal and lodging reimbursement rates, because the State reached agreements in 2013 providing increases in meal and lodging reimbursement rates to employees in other bargaining units and; issue number two, if so, what is the appropriate remedy?" State proposed: "Issue number one, did State violate Article 20.4 of the expired Unit 10 MOU effective April 1, 2011 through July 1, 2013, when it refused to provide [Scientists] represented members with the same increases to meal and lodging reimbursements 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?" The arbitrator framed the issue as: "[W]hether the State violated Article 20.4 by refusing to provide Unit 10

members the increases in meal and lodging reimbursement rates that were negotiated by SEIU on behalf of employees in other bargaining units and, if so, what is the appropriate remedy?"

The Arbitrator's Opinion and Award

The arbitrator issued an award granting Scientists' grievance. The arbitrator thought the language of Article 20.4 was subject to two plausible interpretations. State plausibly insisted that use of the term "Pension Reform" operated to "limit the temporal reach of the provision, i.e., such that only those successor MOUs that were negotiated during the Pension Reform round of bargaining [could] trigger the application of the provision in favor of [Scientists] members." The arbitrator also found plausible Scientists' argument that the change from "and" to "or" in the opening sentence of Article 20.4 in the period immediately preceding the signing of the tentative agreement operated "to expand the reach of the provision to successor agreements negotiated at any time during the life of the contract, including periods when an expired contract remains in effect pursuant to the Dills Act."

In an effort to resolve the ambiguity, the arbitrator turned to extrinsic evidence. After reviewing the bargaining history of Article 20.4, the arbitrator found it was "the mutual intent of the parties at the time they negotiated the disputed language to preclude application of the contract protection clause only to successor agreements previously reached with Units 2, 5, 7, 8, 18, and 19." The arbitrator found the contract protection clause was a pay parity clause entitling Scientists members to automatically enjoy the benefit of any other exclusive representative's subsequently negotiated increase to any term or condition of employment.

In addition, the arbitrator rejected State's argument that the contract protection clause applied only during the 2011 negotiations and determined the clause lacked any expiration date, potentially operating in perpetuity. The arbitrator refused to write into the MOU a time limit where none existed, especially since State wrote such restrictive

language into other, similar agreements. Therefore, Scientists met its burden of establishing a contract violation.

The arbitrator ordered State to provide the increased meal and travel reimbursement rates retroactive to the effective date of the increases in the SEIU-represented bargaining units and retained jurisdiction over implementation of the award.

Subsequently, Scientists filed a petition to confirm the arbitration award. State filed a cross-petition to vacate the award.

Trial Court's Order

Realizing, no doubt, that the scope of review of an arbitration award is extremely narrow, State does not assert that the arbitrator's interpretation of the MOU is incorrect. Rather, State's cross-petition sought to vacate the arbitration award on the grounds that, as construed, the MOU impinges on the Legislature's authority to approve terms and conditions of employment and to set compensation levels for state employees, in violation of the Ralph C. Dills Act (Dills Act) (Gov. Code, § 3512 et seq.). In response, Scientists insisted that State had waived its right to raise the argument before the trial court by failing to assert it during the arbitration and that, in any event, the argument was spurious; the Legislature need not specifically approve the expenditures required to cover the MOU's cost.

The trial court rejected the waiver argument and entered an order denying Scientists' petition to confirm and granting State's cross-petition to vacate. The trial court concluded the arbitration award violated public policy because the Legislature was not provided with a cost analysis of the expenditures for the increased meal and lodging reimbursement rates for Scientists members, either at the time the Scientists or SEIU MOU's were confirmed. Finally, the trial court rejected Scientists' argument that the Legislature need not specifically approve such expenditures. The court concluded the arbitrator's award violated public policy and granted State's cross-petition to vacate the award.

Scientists filed a timely notice of appeal.

DISCUSSION

Standard of Review

As the parties recognize, our review of arbitration awards is extremely narrow. We may not review the merits of the controversy, the sufficiency of the evidence, or the validity of the arbitrator's reasoning. (*Department of Personnel Administration v. California Correctional Peace Officers Assn.* (2007) 152 Cal.App.4th 1193, 1200 (*Dept. of Personnel*).) With limited exceptions an arbitrator's decision is not generally reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice to the parties. (*Ibid.*)

A court may vacate an arbitration award interpreting a contract if and only if it rests on a completely irrational construction of the contract or amounts to an arbitrary remaking of a contract. (*California Dept. of Human Resources v. Service Employees International Union Local 1000* (2012) 209 Cal.App.4th 1420, 1430 (*Dept. of Human Resources*).) However, we must vacate an arbitrator's award when it "violates a party's statutory rights or otherwise violates a well-defined public policy." (*Dept. of Personnel, supra*, 152 Cal.App.4th at p. 1200.)

Determining whether an award was made in excess of an arbitrator's contractual powers is a question of law which we review de novo where no extrinsic evidence was presented or where there is no conflict in the evidence. (*Reed v. Mutual Service Corp.* (2003) 106 Cal.App.4th 1359, 1364-1365.) However, where the trial court's decision is based upon an analysis of extrinsic evidence, we apply the substantial evidence test to those issues. (*Malek v. Blue Cross of California* (2004) 121 Cal.App.4th 44, 55.)

Waiver

Scientists renews its contention that State waived any public policy violation allegations by failing to raise them before the arbitrator. In support, Scientists cites *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1 (*Moncharsh*).

Moncharsh involved a private arbitration regarding a fee-splitting provision in an employment agreement. The Supreme Court held that "unless a party is claiming (i) the entire contract is illegal, or (ii) the arbitration agreement itself is illegal, he or she need not raise the illegality question prior to participating in the arbitration process, so long as the issue is raised before the arbitrator. Failure to raise the claim before the arbitrator, however, waives the claim for any future judicial review." (*Moncharsh, supra*, 3 Cal.4th at p. 31.)

It is fair to say that State did not articulate a public policy argument in the precise terms discussed here. However, State did assert during the arbitration that Article 20.4 violated public policy because it constituted a most favored nations clause encompassing all negotiated terms and conditions of employment without exception and in perpetuity. According to State: "The evidence is simply insufficient to meet [Scientists'] burden to demonstrate it is entitled not only to the travel and meal reimbursement increases SEIU negotiated in a subsequent MOU in June 2013, but any other economic benefits SEIU, or any other union achieves in any future MOU, until the end of time, without ever having to bargain with the state again." While not set forth in fulsome detail, the argument was essentially that an MOU providing for escalating benefits over time without further negotiation or review cannot stand. Perhaps it could have been stated with greater precision, detail, and elegance, but the essential point was made.

In a similar vein, State asserted: "[Scientists'] grievance alleges Article 20.4 operates as a most favored nations clause that [State] violated when it refused to grant [Scientists'] request to provide its members with enhancements SEIU negotiated to lodging and meal reimbursements rates in a successor agreement in June 2013. For the first time at arbitration [Scientists] appeared to have expanded its interpretation of Article 20.4 to cover any enhanced benefits negotiated by any union at any time in the future, without limitation."

We agree with the trial court that State did not waive its public policy claims.

The Dills Act

State's public policy argument is premised on the Dills Act (§ 3512 et seq.) and the principle that an MOU cannot impinge upon the role of the Legislature. The trial court agreed.

Under the California Constitution the Legislature generally possesses the ultimate authority to establish or revise the terms and conditions of employment through legislative enactments. (*Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989, 1015.) The Legislature exercises this authority regarding represented state employees through its approval and ratification of MOU's collectively bargained under the Dills Act. (§ 3512 et seq.)

Under the Dills Act, the Department of Human Resources is the Governor's representative for purposes of collective bargaining with representatives of recognized employee organizations concerning wages, hours, and other conditions of employment. (§§ 3517, 19815.4, subd. (g).) If the Governor and the union reach an agreement, the parties prepare an MOU which is presented to the Legislature for determination. (§ 3517.5) "If any provision of the memorandum of understanding requires the expenditure of funds, those provisions of the memorandum of understanding may not become effective unless approved by the Legislature in the annual Budget Act." (§ 3517.6, subd. (b).)

Article 20.4 and Legislative Authority

The trial court and the parties focus on a trio of our decisions to determine whether the arbitrator's decision impinged upon the Legislature's authority. Although Scientists argued the Legislature need not specifically approve the expenditure, the trial court found these cases rebutted the argument.

In *Dept. of Personnel*, *supra*, 152 Cal.App.4th 1193, an MOU contained a drafting error and the arbitrator reformed the MOU to correct the error. The trial court vacated the award, finding the arbitrator had exceeded her powers because the drafting error was

unknown to the Legislature and Governor when they approved the MOU. (*Id.* at pp. 1199-1200.)

In affirming the trial court we stated: "In changing the terms of the MOU after it was approved by the Legislature, the arbitrator exceeded her powers by violating the Dills Act and the important public policy of legislative oversight of state employee contracts." (*Dept. of Personnel, supra*, 152 Cal.App.4th at p. 1195.) In addition, we determined that reformation due to mutual mistake is not a proper remedy if it prejudices the rights of a third party. The MOU procedure precluded the arbitrator from altering the agreement, to assure "the Legislature the MOU it approves is the parties' actual contract, that there are no off-the-record agreements to which it is not privy, and that the MOU will not be altered subsequently." (*Id.* at p. 1202.)

Subsequently, in *California Statewide Law Enforcement Assn. v. Department of Personnel Administration* (2011) 192 Cal.App.4th 1 (*Law Enforcement*) an MOU reclassified certain union members from "miscellaneous" to "safety status," the latter conferring additional retirement benefits. The Legislature approved the MOU. However, the MOU did not state whether or not the reclassification would apply to prior service. An arbitrator concluded the reclassification applied retroactively; the trial court affirmed the award. (*Id.* at pp. 4-12.)

We found the arbitrator exceeded her powers. We noted the bill presented to the Legislature was silent as to retroactivity, but the arbitrator and the trial court believed it was sufficient the Legislature was aware the benefit could be conferred retroactively in light of certain statutes and bill reports. (*Law Enforcement, supra*, 192 Cal.App.4th at pp. 16-17.) "However, the mere fact the Legislature was aware the DPA [Department of Personnel Administration] might determine to credit the miscellaneous service as safety service does not mean that the Legislature was aware the parties' negotiated MOU actually included an unwritten agreement for retroactivity." (*Id.* at p. 17.)

We summarized our holding: "Simply stated, it is not sufficient that the Legislature was aware DPA could agree with CSLEA [California Statewide Law Enforcement Association] to make the safety member retirement credit retroactive. The Legislature had to (1) be informed explicitly that DPA and CSLEA did enter into such an agreement, (2) be provided with a fiscal analysis of the cost of retroactive application of the agreement, and (3) with said knowledge, vote to approve or disapprove the agreement and expenditure." (*Law Enforcement, supra*, 192 Cal.App.4th at p. 19.) Accordingly, we vacated the portion of the arbitration award finding the reclassification to be retroactive as violating the public policy embodied in the Dills Act. (*Ibid.*)

Most recently in *Dept. of Human Resources, supra*, 209 Cal.App.4th 1420, the parties agreed to increased salary ranges for some union members. The Legislature approved the MOU's. Subsequently, a federal court ordered an increase in those salary ranges by a larger amount than the MOU's. The arbitrator interpreted the MOU's to allow the MOU's salary increases to be calculated in addition to the federally ordered salary increases. The trial court confirmed the arbitration award. (*Id.* at pp. 1422, 1426-1428.)

We found the arbitrator's interpretation neither irrational nor arbitrary. However, we concluded the arbitration award violated policy because "it mandates a fiscal result that was not explicitly approved by the Legislature." (*Dept. of Human Resources, supra*, 209 Cal.App.4th at p. 1434.) We reviewed our prior decisions in *Dept. of Personnel* and *Law Enforcement* and reiterated that "Legislative awareness of an ambiguity does not equate to approval of benefits (in [*Law Enforcement*], enhanced pensions, here, increased salaries) in excess of those *explicitly presented to and approved by the Legislature.*" (*Department of Human Resources*, at p. 1434.) We rejected the claim that the Legislature, by approving the MOU grievance procedures, explicitly approved the use of an arbitrator to resolve any disputes involving the interpretation, application, or enforcement of the statutory language. (*Id.* at p. 1435.) Accordingly, we reversed the

award to the extent it ordered relief and purported to retain jurisdiction over the dispute. (*Ibid.*)

In the present case, Scientists argues the Legislature need not specifically approve the questioned expenditure; that an award ordering expenditures from reasonably available, existing funds is appropriate. In support, Scientists cites *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521 (*Carmel*) and *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155 (*Long Beach*).

Scientists acknowledges that, as a general rule, a court cannot compel the Legislature either to appropriate funds or to pay funds not yet appropriated, but insists there is no violation of the separation of powers where the appropriated funds were reasonably available for the expenditures in question. Funds are reasonably available for reimbursement when the purposes for which the funds were appropriated are generally related to the nature of the costs incurred. There is no requirement that the appropriation specifically refer to the particular expenditure. (*Carmel, supra*, 190 Cal.App.3d at pp. 538-539; *Long Beach, supra*, 225 Cal.App.3d at pp. 180-181.)

We do not find Scientists' argument that the Legislature need not specifically approve the expenditures in the present case persuasive. Neither *Carmel* nor *Long Beach* involved an MOU approved by the Legislature. In these cases the court ordered the state to reimburse a local district for costs incurred pursuant to a state mandate. The rationale underpinning these decisions does not provide an exception for the rule that the Legislature must be provided with a fiscal analysis of the cost of increased travel reimbursement rates under the MOU.

The trial court agreed with State that the arbitrator's award violated public policy because the Legislature was not provided with a cost analysis of the expenditures when the Scientists MOU or SEIU MOU's were confirmed. In support, the trial court considered evidence that when State submitted the Scientists MOU to the Legislature the

materials did not include costs related to Article 20.4. The trial court noted State provided evidence that when the SEIU MOU was submitted to the Legislature, the reciprocal costs for enhanced meals and lodging reimbursement rates for Scientists were not included. Scientists labels the trial court's findings "erroneous" and contends the evidence the trial court relied upon was "accurate yet misleading." Instead, Scientists argues, the Legislature was provided with the statutorily required fiscal analysis sufficient to enable it to make a fully informed decision about the fiscal impacts of Article 20.4.

Scientists focuses on the 2011 MOU Fiscal Analysis of Bargaining Units 9 and 10 (Legis. Analyst, MOU Fiscal Analysis of Bargaining Units 9 & 10 (Apr. 1, 2011) p. 8), which discussed "Proposed MOUs—Health Care and Other Financial Provisions." The fiscal analysis states, in part: "Contract Protection Clause. The proposed MOUs include a contract protection provision. 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." (*Ibid.*) Therefore, according to Scientists, "Article 20.4 presents no potential, probable, or possible future: it presents a basic if/then consideration for the Legislature. If the Legislature approves this (the 2011-2013 Unit 10 MOU) and then gives better stuff to someone, then it will be on the hook for providing that same better stuff to Unit 10."

We agree with the trial court that the cited MOU fiscal analysis for Units 9 and 10 does not satisfy the requirement of providing the Legislature with a fiscal analysis of Article 20.4. Although the Legislature approved the Scientists MOU in its entirety, the fiscal analysis does not provide any cost analysis related to potential increased expenditures under Article 20.4. The passage cited by Scientists merely summarizes the operative language of Article 20.4. The Legislature never explicitly approved any meal and lodging rate increases for Scientists. "Legislative awareness of an ambiguity does not equate to approval of benefits . . . in excess of those *explicitly presented to and*

approved by the Legislature." (*Dept. of Human Resources, supra*, 209 Cal.App.4th at p. 1435.)

Scientists also argues "[l]ooking to the State's practice with other bargaining units is highly instructive." Scientists contends that Unit 9, another bargaining unit, received the increased travel reimbursements without legislative action or costing information provided to the Legislature.

The trial court disagreed, finding the Legislature did explicitly approve the increase in meal and lodging rates for Unit 9 members after reviewing cost information. The court found Scientists' evidence to the contrary unconvincing.

Substantial evidence supports the trial court's factual findings. State offered evidence that Unit 9's meal and lodging expenses increased in 2013 while the MOU was being negotiated. In opposition, Scientists cited a declaration by a Scientists lobbyist who was "aware of no legislative action required to implement the increase in the Unit 9 travel reimbursement rates triggered by the invocation of the [Unit 9] Contract Protection Clause." The trial court found the lobbyist's "awareness" not sufficient to show the Legislature did not approve the Unit 9 increases or receive additional costing information.

In a series of opinions we carefully considered arbitration vis-à-vis the Legislature's authority to approve terms and conditions of employment. We concluded that the Legislature's merely being aware of a possible expense is insufficient. Instead, the Legislature must be explicitly informed that the parties entered into an agreement; be provided with a fiscal analysis of the cost of retroactive application of the agreement; and with said knowledge, vote to approve or disapprove the agreement or expenditure. (*Law Enforcement, supra*, 192 Cal.App.4th at p. 19.) The increase in food and travel reimbursements does not meet this test and we agree with the trial court that the arbitrator's award to the contrary violates public policy.

DISPOSITION

The judgment is affirmed. State shall recover costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2)

RAYE, P. J.

We concur:

HULL, J.

HOCH, J.

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: California Association of Professional Scientists v. Department of Human Resources
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