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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

SERVICE EMPLOYEES INTERNATIONAL UNION 1021, **Plaintiff and Appellant,** **v.** **CITY AND COUNTY OF SAN FRANCISCO,** **Defendant and Respondent.**	**A128046** **(San Francisco County Super. Ct. No. CPF 09 509993)**

Respondent the City and County of San Francisco (City) laid off over 500 employees due to a severe budget shortfall. Appellant Service Employees International Union 1021 (Union) challenged this decision by filing a grievance alleging that the layoffs of Union members were not, in fact, necessitated by a lack of funds. After that grievance was rejected, Union filed a petition to compel arbitration, which the City opposed. (Code of Civ. Proc., § 1281.2.) The trial court denied the petition, concluding that the layoffs were based on a lack of funds and consequently, were the result of a management decision that is not subject to arbitration under the relevant collective bargaining agreement. We affirm.

I. FACTS AND PROCEDURAL HISTORY

Union is an employee organization within the meaning of Government Code section 3500 et seq., known as the Meyers-Milias-Brown Act. It represents several classifications of City employees under the auspices of a collective bargaining agreement

(Agreement) effective July 1, 2006 through June 30, 2011. The Agreement establishes a grievance procedure applicable to "any dispute which involves the interpretation or application of, or compliance with this Agreement, discipline or discharge." The fourth and final step of this grievance procedure is binding arbitration.

A "Management Rights" clause contained in paragraph 12 of the Agreement provides, "Except to the extent there is contained in this Agreement an express and specific provision to the contrary, nothing herein shall be construed to restrict any legal city rights concerning direction of its work force, or consideration of the merits, necessity or organization of any service or activity provided by the City. The City shall also have the right to determine the mission of its constituent departments, officers, boards and commissions; set standards of services to be offered to the public; and exercise control and discretion over the city's organization and operations. The City may also relieve employees from duty due to lack of work or funds, and may determine the methods, means and personnel by which the City's operations are to be conducted." This provision is consistent with section A8.409 of the San Francisco City Charter: "In accordance with applicable state law, nothing herein shall be construed to restrict any legal City rights concerning direction of its work force, or consideration of the merits, necessity, or organization of any service or activity provided by the City. The City shall also have the right to determine the mission of its constituent departments, officers, boards and commissions; set standards of services to be offered to the public; and exercise control and discretion over the City's organization and operations. The City may also relieve City employees from duty due to lack of work or funds, and may determine the methods, means and personnel by which the City's operations are to be conducted."

Beginning in 2009, the City decided to lay off large numbers of its employees due to the nationwide recession and resulting budget shortfalls. In the early spring, Union agreed to forego holiday pay on ten legal holidays and the City agreed to postpone further layoffs until after November 15, 2009. On June 23, 2009, the City Board of Supervisors approved an amended version of the Agreement that included paragraph 137: "Between the date of ratification of this agreement through November 15, 2009, the City shall not

effectuate any additional new layoffs of any represented employees." It did not prohibit layoffs after that date.

In mid-September 2009, the City notified over 500 employees represented by Union that they were being laid off effective November 16 or November 30, 2009. As acknowledged in a declaration signed by Andre Spearman, a Field Team Supervisor of Union, representatives from the City and Union met "numerous times" between October 6 and November 5, 2009.

On October 26, 2009, Union submitted a grievance alleging that "[n]o 'lack of funds' justifies the layoffs." The grievance also alleged that the layoffs were improper because the Mayor had not responded to Union's proposals, that the layoffs violated provisions in the Agreement prohibiting retaliation and discrimination, and that the City had not provided sufficient notice of the layoffs. The remedy requested by the grievance was the immediate rescission of layoff notices and the reinstatement of employees with compensation for lost pay, benefits and interest. The City responded to the grievance by sending a letter to Union asserting that it (the City) had an unrestricted right to lay off employees due to lack of work or funds and noting that Union had failed to make any factual allegations supporting the claims of lack of notice and discrimination.

On November 12, 2009, Union filed a petition to compel arbitration. The petition alleged, "Since on or about October 26, 2009 and continuing to date, a dispute has existed over the interpretation or application of provisions of the Agreement." A copy of the grievance was attached as an exhibit and incorporated by reference. The City filed opposition, asserting that the layoffs were due to a lack of funds and were not arbitrable. It relied primarily on the decision in *Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644 (*Engineers*).)

In support of its opposition, the City presented the declaration of Kerry Ko, the Client Services Director from the San Francisco Department of Human Resources who managed the layoff process. According to Ko, "Like most municipalities around the state and around the country, the City faced an enormous budget shortfall for the 2009-10

fiscal year, and is currently facing another crisis as its revenues decline. As a result, the City has had to lay off a significant number of employees. . . . ."

The City also presented the declaration of Greg Wagner, the Director of the Mayor's Office of Public Policy and Finance: "The California Constitution, City Charter and Administrative Code require the Mayor to submit a *balanced* budget to the Board of Supervisors each year by June 1. [¶] [¶] . . . . The weak economy and delayed economic recovery in California, and the Bay Area in particular have dramatically and adversely impacted the City's fiscal condition over the past year. Anticipated tax and other revenues have decreased significantly. Revenues from the State of California to the City have also been considerably reduced. Given the State and local economy, the City has faced considerable challenges in balancing the current year's budget. The City eliminated a $575.6 million projected General Fund budget shortfall in preparing its 2009-2010 budget. [¶] . . . The City worked to eliminate service cuts to the greatest extent possible, although service cuts and the reduction of some programs was necessary to balance the budget, along with the elimination of City positions. [¶] Balancing the FY 2009-2010 budget as required by the City Charter necessitated position eliminations. Of the City's $3.05 billion General Fund budget for FY 2009-10, 49.5% is used to pay for salaries and benefits of City employees. Because salaries and benefits are such a large share of City expenditures, the City found it necessary to eliminate certain positions to balance its budget. The City's final 2009-10 budget included a reduction of 1,080.17 full-time equivalent positions compared to the prior fiscal year."

Wagner's declaration went on to explain that his office was currently working with the Controller to project the fiscal year 2010-2011 budget deficit; that they predicted a reduction of $62.2 million in revenue as compared to 2009-2010; that if the City did not proceed with the scheduled layoffs it would not be able to balance the budget without reducing other expenditures; and that the shortfall could not be met by the General Fund Reserve if losses or expenditures exceeded the amount of those funds.

The trial court denied the motion to compel arbitration. Citing *Engineers, supra*, 30 Cal.App.4th 644, it concluded, "A severe budget shortfall resulted in the employee

layoffs that are the subject of this Petition. The layoffs are an exclusive management decision which does not properly come before an arbitrator."

II. DISCUSSION

The Agreement and the city charter give the City the right to lay off employees based on the lack of funds. Union appears to concede as much, but argues that it was entitled to arbitrate the issue of whether the layoffs by the City were, in fact, due to a lack of funds. Union argues that in denying its motion to compel arbitration, the court improperly decided the merits of its claims, rather than limiting its decision to whether the claims were arbitrable.

Code of Civil Procedure section 1281.2 provides, "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: [¶] (a) The right to compel arbitration has been waived by the petitioner; or [¶] (b) Grounds exist for the revocation of the agreement. [¶] . . . [¶] If the court determines that a written agreement to arbitrate the controversy exists, an order to arbitrate a controversy may not be refused on the ground that the petitioner's contentions lack substantive merit." The question of arbitrability and the scope of the issues to be arbitrated is determined by the trial court, not the arbitrator. (*Engineers, supra*, 30 Cal.App.4th 652-653.)

The right to compel arbitration depends upon an agreement to arbitrate. (*Engineers, supra,* 30 Cal.App.4th at p. 653.) While doubts as to whether an arbitration clause covers a particular controversy should be resolved in favor of arbitration, there is no public policy favoring arbitration when the parties have not agreed to resolve a dispute in this manner. (*Id*. at pp. 652-653.) In ruling on a petition to compel arbitration, the trial court may not rule on the ultimate merits of the controversy, but it may take evidence and consider factual issues to determine whether the controversy falls within the arbitration clause. (*Id*. at p. 653.) When the trial court's decision on arbitrability is based on the

resolution of disputed facts, we review the decision for substantial evidence, presuming the trial court found every fact and drew every inference to support its ruling. (*Ibid*.)

The evidence presented by the City in its opposition papers included the declaration of Greg Wagner, which outlined in some detail the drop in revenues that accounted for the budget shortfall. Also presented was the declaration of Kerry Ko, explaining the financial motivation of the layoffs. Though Union alleged in its grievance that the City could save money in other areas without the layoffs, the trial court was entitled to credit the City's evidence to the contrary. Substantial evidence supports the trial court's conclusion that the layoffs were based on a lack of funds. (See *Engineers*, *supra*, 30 Cal.App.4th at pp. 654-655.)

Having made the factual determination that the layoffs were based on a lack of funds, the trial court correctly determined that Union's grievance regarding those layoffs was not arbitrable. In *Engineers*, *supra*, 30 Cal.App.4th 644, the court considered the arbitrability of a grievance brought by a public employees' organization under similar circumstances. As in this case, the city charter and collective bargaining agreement at issue in *Engineers* granted the city the exclusive right to relieve city employees for lack of work or lack of funds. (*Id*. at pp. 650-651.) The organization filed a grievance on behalf of an employee who was laid off on this basis, alleging that the financial reasons for the layoff were pretextual. (*Id*. at pp. 648-649.) The trial court rejected the organization's petition to compel arbitration of the issue, resolving the conflicting evidence regarding the reason for the layoff in favor of the city. (*Id*. at p. 649.) The appellate court affirmed, deferring to this factual determination and concluding that because the layoff was based on a lack of work/lack of funds, it was a management decision within the city's prerogative and was not subject to arbitration in light of the city charter and collective bargaining agreement. (*Id*. at pp. 650, 654-655.) We find the reasoning in *Engineers* to be persuasive and to apply fully to the case before us.

Union argues that *Engineers* is distinguishable because the grievance in that case alleged no specific violation of the collective bargaining agreement, but merely asserted that the layoff at issue was unnecessary. Union notes that its own grievance alleges

violations of the Agreement in addition to the decision to lay off workers. The City responds that the only remedy sought by Union is the rescission of the layoff, and that Union is simply trying to manipulate a layoff decision into an arbitrable dispute. (See *Contra Costa Legal Assistance Workers v. Contra Costa Legal Services Foundation* (9th Cir. 1989) 878 F.2d 329, 330 (*Contra Costa Legal*) [union's allegation that layoff decision violated other provisions of collective bargaining agreement could not be used to circumvent provision that "layoff" decisions would not proceed through arbitration step of grievance process].)

The grievance filed by Union complains that the layoffs violated a number of provisions in the Agreement: paragraphs 16 (which sets out the "objective of the parties" to maintain programs and public service jobs to the extent possible), 62 (prohibiting discrimination based on race, gender and similar categories), 71 (prohibiting discrimination based on union activity) 121 (requiring use of city-wide "bumping" rights for workers who are being laid off), 123 (requiring minimum of 60 days notice for layoffs) and 125 (requiring City to meet and confer with Union after notice of layoffs have been sent). The Agreement, however, gives the City the unrestricted right to lay off employees due to a lack of funds absent "an express and specific provision to the contrary." In light of this language, there is no agreement to arbitrate any aspect of a layoff decision when that decision is based on the lack of funds. The superior court concluded that, based on substantial evidence, the layoff in question was due to a lack of funds, and it did not err in declining to order arbitration on the ancillary issues asserted by Union.[1]

In any event, a party may not obtain an order compelling arbitration simply by asserting that a particular contract provision has been violated. (*Contra Costa Legal, supra*, 878 F.2d at p. 330.) "[W]hile the trial court must not decide the merits of an alleged controversy when ruling on a petition to compel arbitration, it must nevertheless determine the threshold question of whether the petition adequately alleges facts

[1] A worker possessing a bona fide claim of discrimination or retaliation is not without a remedy, as he or she could pursue an action at law.

demonstrating the existence of an arbitrable controversy." (*Graphic Arts Internat. Union v. Oakland Nat. Engraving Co.* (1986) 185 Cal.App.3d 775, 780.) Neither the Union's grievance nor the petition to compel arbitration alleges sufficient facts to support the conclusory allegations regarding the breach of the various provisions in the Agreement.

A different result is not required by *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608 (*Fire Fighters*). There, the court concluded that while a reduction of workforce based on the city's decision that it employed too many people "would not be arbitrable in that it is an issue involving the organization of the service" (*id*. at p. 621), a proposal to reduce personnel *is* arbitrable to the extent it affects the working conditions, wages and hours of other employees (*id*. at pp. 621-622). Here, the petition to compel arbitration contains no allegations concerning the effect of the layoffs on the working conditions and safety of the remaining workers and the grievance is not arbitrable on that basis. (Compare *Engineers*, *supra*, 30 Cal.App.4th at p. 656.)

Finally, Union cites several decisions for the proposition that arbitrable disputes may arise from layoffs. (*O'Malley v. Wilshire Oil* (1963) 59 Cal.2d 482, 485, 496, 497, fn. 2; *Mossman v. City of Oakdale* (2009) 170 Cal.App.4th 83, 86-87 (*Mossman*); *City of Oakland v. United Public Employees* (1986) 179 Cal.App.3d 356, 360, 367.) While a public employer may agree to arbitrate certain disputes arising from employee layoffs, there is no such agreement in this case, where the operative contract gives the City the exclusive right to lay off employees due to lack of funds. (See *Engineers*, *supra*, 30 Cal.App.4th at p. 656; *San Diego Adult Educators v. Public Employment Relations Bd.* (1990) 223 Cal.App.3d 1124, 1134 ["decision to terminate employees, based on lack of sufficient funds to support their continued employment . . . [is] a 'fundamental management concern which requires that such decisions be left to the employer's prerogative' "].) Of the decisions cited by Union, only *Mossman* actually involves a layoff, and *Mossman* did not involve any challenge to the arbitral forum. (*Mossman*, at pp. 86-87.)

III. DISPOSITION

The judgment (order denying petition to compel arbitration) is affirmed. Costs on appeal are awarded to the City.

NEEDHAM, J.

We concur.

JONES, P. J.

SIMONS, J.