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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**SERVICE EMPLOYEES
INTERNATIONAL UNION, LOCAL
1021,**

Petitioner and Appellant,

v.

**CITY AND COUNTY OF SAN
FRANCISCO, FINE ARTS MUSEUM,**

Respondent.

A132757

**(City and County of San Francisco
Super. Ct. No. CPF 11-411041)**

Service Employees International Union, Local 1021 (SEIU) appeals from an order denying its petition to compel arbitration of a grievance filed on behalf of one of its members. SEIU contends it did not waive its right to arbitrate because it timely served an arbitration demand on the employer, even though SEIU did nothing to pursue the arbitration during the next 19 months, while the member pursued the employer in litigation. We will affirm the order.

I. FACTS AND PROCEDURAL HISTORY

Howard Mitchell was a member of SEIU while employed as a security guard by respondent, the City and County of San Francisco, Fine Arts Museum. At the time, SEIU and the City and County of San Francisco were parties to a collective bargaining agreement effective July 1, 2006, through June 30, 2009 (CBA).

A. *The Parties' Collective Bargaining Agreement and Grievance Procedure*

Article IV, Part A of the CBA sets forth a grievance procedure that applies to “any dispute which involves the interpretation or application of, or compliance with [the CBA], discipline or discharge.” Only the union has the right on behalf of a disciplined or discharged employee to pursue a grievance.

The grievance procedure consists of four potential steps, which are pursued in order if the dispute is not resolved by an employee’s informal discussion with his or her supervisor. In Step I, the union submits a written statement of the grievance to the employee’s immediate supervisor. If the grievance is not resolved, in Step II the union submits a written grievance to the employee’s department head, who must respond in writing, and the parties meet to resolve the matter. If the grievance still is not resolved, in Step III the union submits the matter to the Employee Relations Director, who must respond in writing. If the grievance remains unresolved, the union may submit the grievance to final and binding arbitration. Where, as here, the grievance pertains to the termination of an employee, the union must submit the grievance initially at Step II or, at the union’s option, Step III.

The CBA places time limits on the grievance process and underscores the importance of those limits. Paragraph 530 states: “The parties have agreed upon this grievance procedure in order to ensure the swift resolution of all grievances. It is critical to the process that each step is followed within the applicable timelines.” Paragraph 531 provides, “All time limits referred to in this section are binding on each party.” Paragraph 532 reads in part: “Failure by the Union to follow the time limits, unless mutually extended, shall cause the grievance to be withdrawn. Failure by the City to follow the time limits shall serve to move the grievance to the next step.”

As to grievances concerning the termination of employment, as in this case, special deadlines apply. Paragraph 549 provides: “The parties agree to use their best efforts to arbitrate grievances appealing the termination of employment *within ninety (90) days of the Union’s written request to arbitrate.*” (Italics added.) Paragraph 551 states: “The parties shall commence arbitration of a grievance challenging the

termination of employment *within ninety (90) days of the request for arbitration*, unless it is not possible under the circumstances.” (Italics added.)

To facilitate the timely commencement of arbitration in this context, the CBA sets forth the following procedure: the union may file a termination grievance initially at Step II or, at the union’s option, Step III, no later than 15 days after the effective date of the termination; the City’s response is due within 15 days after the union’s filing; the union’s submission to Step IV arbitration from a Step III response is due no later than 15 days from its receipt of the City’s response; and the grievance proceeds to Step IV arbitration if the City fails to timely respond to the union’s Step III submission. In addition, SEIU and the City agreed to establish a standing termination arbitration panel with prescheduled arbitration dates for each arbitrator.

B. Mitchell’s Termination, Grievance, and Request for Arbitration

By letter dated July 11, 2008, the Director of Human Resources for the Fine Arts Museum notified Mitchell that it was treating his continuing absence from work as an abandonment of his position and recording it as an “automatic resignation,” effective July 15, 2008. According to the letter, the museum had invited Mitchell to correct his “AWOL status” in letters of May 9, June 5, June 27, and July 8, 2008, and Mitchell failed to appear at a meeting on July 11, 2008, to address the situation, notwithstanding a warning that the museum would proceed with an automatic resignation. The letter further advised that the museum was acting pursuant to Civil Service Commission Rule 122.11.1, and paragraph 171 of the CBA, which provide for automatic resignation for employees absent from duty without proper authorization for more than five continuous working days.

On August 19, 2008 – more than a month after the effective date of Mitchell’s termination – SEIU submitted a written grievance to the museum’s human resources director regarding Mitchell’s automatic resignation. By this letter, SEIU invoked Step II of the grievance procedure, alleging that Mitchell was actually on authorized medical leave and attempting to meet with human resources. The grievance sought reinstatement

of Mitchell's employment "with all rights including but not limited to pay grade, seniority, benefits and leave rights."¹

By letter of August 26, 2008, the museum sent its Step II response, denying SEIU's request for reinstatement because Mitchell had been given approximately six months to provide an authorization note from his physician but failed to do so.

SEIU invoked Step III of the grievance procedure by letter dated September 15, 2008, to Martin Gran, the City's Employee Relations Director. SEIU's letter repeated the contentions in SEIU's letter of August 19, 2008. The City does not claim that it responded to this letter.

By letter dated October 7, 2008, SEIU wrote to Gran and invoked Step IV arbitration, based on the City's failure to respond to SEIU's Step III letter. The October 7 letter repeated the contentions set forth in SEIU's letters of August 19 and September 15.

On December 18, 2008, the City sent a written response to SEIU's October 7 letter, addressed to SEIU's attorney Kristina Hillman, stating as follows: "The Employee Relations Division is in receipt of SEIU, Local 1021's letter moving the above-referenced matter to arbitration. [¶] The next arbitration panel is #14 (Brand, Matt, Cossack, Askin, Nevins, Harris and Kanowitz). Please contact Deputy City Attorney Janet Richardson at [telephone no.] to select an arbitrator and schedule this matter. [¶] Please be advised that the City reserves all rights it may have regarding this matter, including but not limited to, procedural issues and arbitrability. The City Attorney's office will review the file and make the final determination of these issues."

SEIU did not respond to the City's December 2008 letter. Barbara Gorin, a legal secretary at the law firm representing SEIU, submitted a declaration in the trial court averring that she could not find a copy of the City's December 2008 letter in the office files, the letter would have been given to her if the office had received it, and to the best

¹ In its respondent's brief, the City contends that the initial grievance was untimely, because SEIU was required to submit the grievance within 15 days of the effective date of Mitchell's termination on July 15, 2008, but SEIU did not submit the grievance until August 19, 2008. The City contends it will pursue this argument "if the matter were to get to arbitration."

of her knowledge she never received it. At any rate, no one from SEIU or its attorneys contacted Richardson to proceed with the arbitration.

C. Mitchell's Pursuit of a Lawsuit Instead of Arbitration

In January 2009, represented by private counsel, Mitchell filed a lawsuit in superior court entitled *Howard L. Mitchell v. City & County of San Francisco, San Francisco Fine Arts Museums*, case number CGC 09-484232. In his lawsuit, Mitchell challenged his termination and asserted causes of action for disability discrimination and retaliation under the California Fair Employment and Housing Act (Gov. Code, §§ 12900 et seq.) and a cause of action for wrongful termination.² Mitchell alleged, among other things, that the City failed to accommodate his disability and failed to interact with him regarding his disability.

The City mounted a defense against Mitchell's lawsuit. It engaged in discovery, including service of a records subpoena on SEIU on March 12, 2009, in response to which SEIU produced records on May 13, 2009 and December 21, 2009. The City also responded to discovery propounded by Mitchell, including form interrogatories, special interrogatories, demands for production of documents, and requests for admission.

On August 20, 2010, the City filed a motion for summary judgment. Rather than opposing the motion, Mitchell voluntarily dismissed the lawsuit in pro per on October 18, 2010.

The City's records indicate that the City Attorney's Office incurred \$99,916.75 in attorney fees and \$5,717.06 in costs defending the lawsuit. After the dismissal, the City filed a memorandum of costs for \$2,995. SEIU paid the City's cost bill on Mitchell's behalf.

D. SEIU's Renewed Attempt to Arbitrate

On May 20, 2010 – about 17 months after the City's December 2008 letter inviting Hillman to select an arbitrator and schedule the arbitration and over a year after Mitchell filed his lawsuit – SEIU's counsel Hillman wrote to Deputy City Attorney

² Mitchell had filed a complaint with the California Department of Fair Employment and Housing, which issued a right to sue letter in September 2008.

Richardson, advising she was formally requesting arbitration and requesting Richardson to send her “the appropriate panel for which to select an Arbitrator on this case.”

On June 21, 2010, Richardson wrote to Hillman and advised her that the City would not proceed to arbitration because the City had “closed its file in this matter due to the union’s failure to pursue” the case after the City’s December 2008 letter.

On July 1, 2010, Hillman sent a letter to Richardson, asserting the arbitration was timely because SEIU had timely invoked Step IV arbitration in its October 7, 2008 letter. Hillman asked Richardson to contact Hillman’s assistant, Gorin, to select an arbitrator.

Richardson wrote to Hillman on August 3, 2010, noting that Hillman had not explained SEIU’s delay in responding to the City’s December 2008 letter. Richardson advised that the City maintained its position in regard to the proposed arbitration.

By letter dated August 13, 2010, Hillman replied that the parties’ failure to select an arbitrator did not constitute an abandonment of the grievance. She again instructed Richardson to contact Gorin to select an arbitrator. On September 21, 2010, Gorin sent an email to Richardson, asking Richardson to contact her to select arbitrators on a number of pending arbitration matters, including Mitchell’s.

On November 1, 2010, Richardson wrote to Hillman and reiterated that the City would not proceed to arbitration because SEIU had failed to pursue arbitration for nearly two years. On November 15, Hillman threatened to file a petition to compel arbitration. On December 15, Richardson advised Hillman that her November 15 correspondence did not change the City’s position.

E. SEIU’s Petition to Compel Arbitration

On January 27, 2011, SEIU filed a petition to compel arbitration in this case.

In opposition to the petition, the City argued that SEIU had waived any right to pursue arbitration based on (1) “its failure to comply with the contractual requirement that it proceed to arbitration in 90 days,” (2) Mitchell’s pursuit of a separate civil action, which the City claimed evidenced “inconsistent acts” by SEIU, and (3) SEIU’s alleged willful misconduct in not seeking arbitration for 17 months.

F. Denial of Petition

In May 2011, the trial court denied the petition, finding that SEIU “failed to make a timely demand for arbitration or ensure arbitration occurred within the ninety-day period provided for in [the CBA].”

This appeal followed.

II. DISCUSSION

Code of Civil Procedure section 1281.2 provides in part: “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.” (Italics added.)

In denying SEIU’s petition, the court found that SEIU failed to make a timely demand for arbitration or ensure that it occurred within 90 days as required by the CBA. Although the court did not expressly use the word “waiver” in its order, it is clear that this was the inference the court derived from its factual findings, since “waiver” under Code of Civil Procedure section 1281.2 was the basis for the City’s argument that the petition should be denied, and waiver was addressed at the hearing. Indeed, in this appeal SEIU asserts that “*the only issue properly before the trial court was whether Local 1021’s conduct resulted in a ‘waiver’ of the right to arbitrate.*” (Italics added.) We therefore determine whether the record supports the conclusion that SEIU’s right to compel arbitration under the Code of Civil Procedure was waived.

A. Waiver

A finding of waiver is usually reviewed for substantial evidence. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196 (*St. Agnes Med. Ctr.*)) “When, however, the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law and the reviewing court is not bound by the trial court’s ruling.” [Citation.]” (*Ibid.*; *Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th

307, 319 (*Platt Pacific*.) SEIU urges that we apply de novo review here “[b]ecause the essential facts are undisputed.” Under either standard of review, we would reach the same disposition in this appeal.³

As used in Code of Civil Procedure section 1281.2, the term “waiver” may be used “ ‘as a shorthand statement for the conclusion that a contractual right to arbitration has been lost.’ ” (*St. Agnes Med. Ctr., supra*, 31 Cal.4th at p. 1195, fn. 4.) It does not require proof of a voluntary relinquishment of a known right, but may arise from a party’s failure to perform an act it was required to perform, regardless of the party’s intent to relinquish the right. (*Ibid.*; *Platt Pacific, supra*, 6 Cal.4th at pp. 314-319.) Nonetheless, because California law reflects a strong public policy favoring arbitration, “waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof.” (*St. Agnes Med. Ctr.*, at p. 1195; *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 189.)

Factors to consider in deciding whether there has been a waiver include: (1) whether the party’s actions were inconsistent with the right to arbitrate; (2) whether “ ‘the litigation machinery has been substantially invoked’ and the parties ‘were well into preparation of a lawsuit’ before the party notified the opposing party of an intent to arbitrate;” (3) whether a party requested arbitration close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without requesting a stay; (5) “ ‘whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place’”; and (6) whether the delay affected, misled, or prejudiced the opposing party. (*St. Agnes Med. Ctr., supra*, 31 Cal.4th at p. 1196; *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 992 (*Sobremonte*).

³ We also note that, under fundamental principles of appellate review, we must uphold the trial court’s decision if it may be affirmed on any ground, whether or not the trial court’s legal basis or reasoning was correct. (*D’Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 18-19.)

1. *Acts Inconsistent With the Right to Arbitrate*

SEIU did nothing for approximately 19 months to pursue arbitration after it invoked the arbitration step on October 7, 2008. The parties were to use “best efforts” to arbitrate within 90 days after the union’s request, and to commence the arbitration within that time frame “unless it [was] not possible under the circumstances.” Although the City invited SEIU to contact Deputy City Attorney Richardson in December 2008 to select an arbitrator and schedule the arbitration, and even set forth the names of the potential arbitrators on the “next arbitration panel,” SEIU never responded. Instead, despite the City’s warning that it reserved its rights as to “procedural issues and arbitrability,” the union waited until Mitchell was well in the midst of his litigation against the City to make a “formal request” for arbitration and ask the City to engage in the process of selecting an arbitrator. SEIU’s conduct was plainly inconsistent with enforcing a right to arbitrate.⁴

SEIU’s arguments to the contrary are unpersuasive. SEIU notes that its lawyers cannot find the City’s December 2008 letter and do not think they received it. However, SEIU’s obligation to pursue the selection process and to help schedule the arbitration in a timely manner existed whether or not the City sent any correspondence. Certainly SEIU

⁴ The City argues that SEIU’s failure to prove that it abided by the 90-day deadline constitutes a failure to prove that its grievance was *arbitrable*. We view the SEIU’s failure to proceed with the arbitration as an issue of waiver, not an issue of whether there was an agreement to arbitrate the grievance.

The City also argues that SEIU’s failure to comply with the 90-day deadline constitutes a waiver based on *Platt Pacific, supra*, 6 Cal.4th 307, 313-314 [upholding denial of petition to compel arbitration where plaintiff failed to satisfy a “condition precedent that must be performed before the contractual duty to submit the dispute to arbitration arises,” by failing to demand arbitration within the time permitted by the arbitration agreement].) SEIU points out that *Platt Pacific* is factually distinguishable, because here SEIU did demand arbitration, and the failure to arbitrate within 90 days cannot literally constitute a condition precedent that must be performed *before* the duty to submit the dispute to arbitration arises. However, the salient point is not just that SEIU failed to arbitrate within 90 days, but that it failed to pursue the arbitration at all for approximately 19 months after its October 2008 letter, thereby waiving the right to compel the arbitration.

knew of its own October 2008 letter invoking Step IV arbitration and the contractual provision calling for “best efforts” to arbitrate within 90 days. SEIU made no efforts.

SEIU argues that the CBA places the burden of commencing arbitration within 90 days on *both* parties, and the City did nothing to pursue the arbitration either. SEIU’s factual premise is incorrect, however, in light of the City’s December 2008 letter – which the City at least *sent*, even if SEIU’s attorneys do not remember receiving it. The ball was thereby placed in SEIU’s court, and SEIU did nothing. Moreover, it is *SEIU* that sought to compel arbitration; there being no evidence that the City did anything to impede SEIU from pursuing arbitration, the issue is what *SEIU* did to pursue the arbitration, not what the City did. SEIU’s unreasonable inaction was inconsistent with enforcing a right to arbitrate. (*Engalla v. Permanente Med. Group, Inc.* (1997) 15 Cal.4th 951, 983-984 (*Engalla*) [party’s delay in choosing arbitrators, if unreasonable or undertaken in bad faith, could be found to be a waiver of the right to compel arbitration].)

Also inconsistent with enforcing a right to arbitrate was Mitchell’s decision to litigate his discharge in court. Both the proposed arbitration and the litigation related to Mitchell’s termination and, more particularly, whether the City adequately communicated with Mitchell regarding his disability: SEIU’s Step IV letter of October 2008 asserted that Mitchell was on “authorized medical leave and was attempting to meet with management about the leave;” Mitchell’s complaint alleged that the City “failed to properly interact with [Mitchell] about his disability” and failed to adequately communicate with him concerning it. In his litigation, Mitchell propounded discovery, forced the City to divulge information in its discovery responses, and caused the City to incur about \$100,000 in legal expenses.

SEIU does not debate the facts of Mitchell’s litigation, but argues that the litigation cannot count as an act of *SEIU* (as the party seeking to compel arbitration) inconsistent with SEIU’s right to arbitrate the grievance, since SEIU was not a party to the lawsuit and the litigation asserted causes of action not covered by the grievance.

We disagree. In the first place, while it might be SEIU’s right to invoke arbitration on Mitchell’s behalf under the CBA, it is Mitchell who would benefit from the

enforcement of that right. SEIU filed the grievance on behalf of Mitchell, as the CBA requires. While SEIU urges that the grievance merely seeks to vindicate its own contractual rights under the CBA, the bottom line is that SEIU sought relief on behalf of Mitchell, and sought no relief on behalf of itself or anyone else. The sole beneficiary of an arbitral award in this case would be Mitchell, not SEIU or any of its other members. Under the circumstances of *this* case, it is entirely fair to conclude that the right to arbitrate Mitchell's grievance was lost due in part to Mitchell's litigation.

Furthermore, the reason that acts inconsistent with arbitration create a waiver resides in the fact that those acts adversely affected the party *opposing* the arbitration (the City), regardless of what those acts say about the party seeking to enforce the arbitration (SEIU). In other words, the significance of Mitchell's litigation against the City lies in the cost the City incurred, the information Mitchell gleaned by discovery, and the delay the City suffers in the resolution of Mitchell's termination. Whether or not Mitchell's litigation might be attributed to SEIU for any other purpose, it should be considered in deciding whether the arbitration of Mitchell's grievance must now be compelled.

At any rate, Mitchell's litigation should be considered in the waiver analysis because, based on the record, Mitchell's litigation *explains* SEIU's failure to pursue the arbitration. SEIU was aware of the lawsuit, since it responded to a document subpoena issued by the City in the litigation. After SEIU had promptly advanced the grievance to Step IV arbitration, its failure to do anything to pursue the grievance for 19 months suggests, in light of this knowledge, that SEIU's inaction was calculated to allow Mitchell to pursue his litigation. SEIU has never demonstrated otherwise, remaining steadfastly mute about the reason for its delay despite repeated inquiries by the City, the proceedings in the trial court, and this appeal.

SEIU's reliance on *Camargo v. Cal. Portland Cement Co.* (2001) 86 Cal.App.4th 995 (*Camargo*) is misplaced. There, the plaintiff was a member of a union that had entered into a collective bargaining agreement providing for the resolution of grievances by binding arbitration. (*Id.* at p. 998.) Plaintiff submitted her grievances based on sex discrimination and sexual harassment to arbitration, and the arbitrator ruled against her.

(*Ibid.*) Plaintiff then filed a lawsuit under California’s Fair Employment and Housing Act (FEHA) and for intentional infliction of emotional distress. (*Ibid.*) The court of appeal ruled that the collateral estoppel effect of the arbitrator’s decision did not preclude litigation of Camargo’s FEHA claims. (*Ibid.*) Although an arbitration decision might preclude subsequent lawsuits based on the same issues, at least as to common law causes of action, the arbitrator’s findings did not collaterally estop Camargo’s FEHA action, because it was not adequately shown that the collective bargaining agreement provided for arbitration of FEHA claims or that the arbitration procedures would have afforded full litigation and fair adjudication of those claims. (*Id.* at pp. 998, 1018-1019.)

Camargo is inapposite to the matter at hand. *Camargo* addressed whether a union member who arbitrates her grievance is collaterally estopped from thereafter pursuing statutory claims in litigation. At issue here, by contrast, is whether a delay during which the union member pursued litigation against the employer may constitute a waiver of the right to compel arbitration of the grievance. As such, *Camargo* did not address the question before us. Furthermore, *Camargo* did not suggest any significance to the fact that a grievance is filed by the union on the member’s behalf, while the member files litigation on his own behalf. To the contrary, *Camargo* treated the arbitration of the grievance as belonging to the *union member* who was also attempting to litigate, not the union.

We recognize that acts held to be inconsistent with the right to arbitrate are usually acts performed without notice of an intent to arbitrate, while here SEIU did request arbitration in October 2008. (See, e.g., *Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 558 [waiver found where moving party answered complaint and participated in discovery without claiming a right to arbitrate until three months later]; *Law Offices of Dixon R. Howell v. Valley* (2005) 129 Cal.App.4th 1076, 1098 [waiver found where pursuit of litigation for 15 months, without requesting arbitration, was “entirely inconsistent” with the right to arbitrate].) However, even if a party has timely demanded arbitration, it can thereafter act in such a manner as to waive whatever right it might have purported to secure by its initial demand. More specifically, what a party

does after claiming it wants to arbitrate can be so inconsistent with arbitration that the party loses its right to later *compel* arbitration by judicial enforcement. (See Code Civ. Proc., § 1281.2, subd. (a).) To hold otherwise would sanction a type of gamesmanship contrary to the very purpose of arbitration: the union demands arbitration but does nothing about it; the employee takes a shot at a lawsuit, obtains the fruits of discovery, runs up the employer's litigation costs, and ultimately dismisses the case when he realizes he is going to lose; and the union gives him a second bite at the apple by resurrecting arbitration 16 months after the litigation began.

Under the circumstances of this case, SEIU's failure to do anything to pursue arbitration for 17 months after the City's response, while Mitchell litigated with the City in court, is so substantially inconsistent with the arbitration of the grievance that it vitiated SEIU's earlier request for arbitration. The reasonable inference from the record is that SEIU abandoned the arbitration it had initially requested, and only later attempted to revive it after Mitchell had obtained discovery from the City and ran up the City's costs.

In sum, SEIU's over 17-month failure to pursue the requested arbitration of Mitchell's grievance concerning his termination, in light of Mitchell's litigation to obtain relief for his termination (and even *without* considering Mitchell's litigation), constitutes acts inconsistent with the enforcement of a right to arbitrate Mitchell's grievance.

2. *Substantially Invoked the Litigation Machinery*

The City argues that Mitchell substantially invoked the litigation machinery by filing his lawsuit against the City and propounding discovery. SEIU does not dispute that Mitchell's actions constituted substantial invocation of the litigation machinery; it contends instead that Mitchell's actions cannot be attributed to SEIU. For reasons stated *ante*, we disagree with SEIU on this point and conclude that Mitchell's substantial litigation activity may be factored into the waiver analysis. Furthermore, although the litigation activity occurred after SEIU's initial arbitration notice in October 2008, it occurred during SEIU's delay that negated such notice, and it commenced before SEIU's May 2010 renewed attempt to request arbitration and its ensuing motion to compel.

3. *Requested Arbitration Close to Trial Date or Long Delay Before Seeking Stay*

SEIU initially invoked Step IV arbitration in October 2008. For this reason, it could be said that SEIU's initial *request* to arbitrate did not occur close to a trial date or after an undue delay. Literally speaking, this factor would not apply.

The point of this factor, however, is that the party who eventually asks the court to compel arbitration should not have been lying in the proverbial weeds while the opposing party continued to be embroiled in litigation. In this sense, the factor does apply. While SEIU's October 2008 letter had put the City on notice of SEIU's intent to arbitrate as of October 2008, SEIU's inaction between then and the 90-day deadline under the CBA, and its continued inaction for well over a year while Mitchell litigated, implicitly notified the City that Mitchell was not pursuing the arbitration of his grievance.⁵ SEIU's letter in May 2010, in which it made its "formal request" to arbitrate, came only after a long and undue delay.

Furthermore, "[c]ourts will consider the existence or absence of a reasonable explanation for the party's delay in asserting its arbitration right in making a determination of waiver." (*Howell, supra*, 129 Cal.App.4th at p. 1100.) SEIU provides no explanation at all for its delay in pursuing the arbitration between October 2008 and May 2010.

4. *Significant Discovery Had Taken Place in the Lawsuit*

The next factor is "whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place" before seeking arbitration. (*St. Agnes Med. Ctr., supra*, 31 Cal.4th at p. 1196.)

Here, it is undisputed that the City and Mitchell engaged in substantial discovery (with SEIU's knowledge of at least some of it) in Mitchell's litigation of his discharge. Although this discovery occurred after SEIU invoked arbitration for his grievance, it

⁵ That the City was misled by SEIU's failure to pursue arbitration and Mitchell's pursuit of litigation is confirmed by the City's reaction to SEIU's May 2010 demand for arbitration, to which the City replied that it had already closed its file.

occurred at least in substantial part before SEIU's May 2010 letter formally requesting arbitration, and entirely before SEIU sought to compel arbitration.

5. *The Delay Prejudiced the City*

SEIU's extended delay in pursuing arbitration of the grievance, while Mitchell used the court to litigate his termination, prejudiced the City.

In Mitchell's lawsuit, which continued well past 90 days after the arbitration demand, the City engaged in discovery, responded to discovery, filed a motion for summary judgment, and incurred litigation expenses of approximately \$100,000.

Incurring court costs and legal expenses is usually not in itself sufficient to demonstrate the prejudice necessary for a finding of waiver. (*St. Agnes Med. Ctr., supra*, 31 Cal.4th at p. 1203.) "Prejudice typically is found only where the petitioning party's conduct has substantially undermined this important public policy or substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration." (*Id.* at p. 1204.)

Here, the City's prejudice went beyond mere litigation expense. A reasonable inference from the City's having to respond to Mitchell's discovery is that the City provided Mitchell information and insight into defenses and strategy that Mitchell (and SEIU) would not have otherwise obtained. SEIU does not contend otherwise.

Moreover, even without considering the impact of the litigation, SEIU's failure to pursue the arbitration prejudiced the City in other ways. In the first place, the evidence presented to the trial court was that SEIU typically seeks, and arbitrators ordinarily award, back pay from the date of termination if the employee is reinstated, as SEIU requests here. During the months that SEIU did nothing to pursue the arbitration, Mitchell's back pay claim skyrocketed. Based on evidence presented to the trial court, the City could be responsible for approximately \$147,933 plus interest for back pay dating back to Mitchell's termination date in July 2008. In short, by doing nothing to pursue arbitration, SEIU has put Mitchell in a position where he can obtain a significant monetary windfall, by which he would be paid not for his work, but for SEIU's delay.

In addition, SEIU's failure to pursue the arbitration for over 17 months substantially undermined the City's ability to obtain the benefits of arbitration under the CBA. The CBA specifically provides that the grievance procedure, of which Step IV arbitration is a part, is intended to ensure the "*swift* resolution" of the grievance. (Italics added.) Forcing the City to arbitrate the grievance now, after SEIU's inaction and the litigation of Mitchell's causes of action in court, is contrary to both the CBA's specific intent and the general arbitral purpose of affording a speedy and inexpensive means of resolving a dispute. It is simply not what the City bargained for.

In light of all of the foregoing, the right to compel arbitration of Mitchell's grievance was waived for purposes of Code of Civil Procedure section 1281.2.

B. SEIU's Remaining Arguments

SEIU argues that the arbitrator, not the court, should determine whether SEIU timely and adequately complied with the grievance procedure set forth in the CBA. Obviously, however, the court may decide whether the right to compel arbitration has been *waived*, as the statute expressly gives the court that very authority. (Code Civ. Proc., § 1281.2; see *Engalla, supra*, 15 Cal.4th at p. 982.)

SEIU's reliance on *Napa Association of Public Employees v. County of Napa* (1979) 98 Cal.App.3d 263 (*Napa Association*) is misplaced. There, the trial court's finding of waiver was held erroneous because it was based exclusively on the union's failure to file the *grievance* within the time specified in the arbitration agreement. (*Id.* at p. 268.) The court of appeal explained that, in the *absence* of proof of abandonment of the right to arbitrate or substantial prejudice from the delay (so as to support a finding of waiver), the issue of a party's failure to file a timely grievance was for the arbitrator. (*Id.* at pp. 270-271.) Here, by contrast, the issue was not whether SEIU failed to file a timely grievance, but whether it had waived arbitration by its undue delay in pursuing arbitration.⁶ And unlike *Napa Association*, in the matter before us there *is* proof of

⁶ As our Supreme Court in *Pacific Platt* observed: "In holding that the failure to timely submit a labor grievance was not a 'waiver' of the right to arbitrate in the absence of intentional relinquishment of the right or substantial prejudice, the court in *Napa*

abandonment of the right to arbitrate and substantial prejudice from the delay, as demonstrated *ante*.

The other cases on which SEIU rely are also inapposite. In *Brock v. Kaiser Foundation Hospital* (1992) 10 Cal.App.4th 1790, it was held that only the arbitrator has the authority to dismiss an arbitration for failure to diligently pursue the matter to a hearing. (*Id.* at p. 1808.) *Brock* is distinguishable from the matter before us, since the case had already been submitted to arbitration, and the litigation had already been stayed, when the request for dismissal was made. In *John Wiley & Sons, Inc. v. Livingston* (1964) 376 U.S. 543, the court held that the arbitrator had to decide whether parties had exhausted their remedies in the preliminary stages of the grievance process, before invoking arbitration. (*Id.* at pp. 557-558.) That question is not before us in this case. Instead, the question is whether the right to compel arbitration has been waived by SEIU's unexplained 17-month delay in pursuing arbitration, in light of the litigation pursued by Mitchell. (See *Engalla, supra*, 15 Cal.4th at p. 982.)

Lastly, SEIU argues that the CBA does not expressly provide that the union waives arbitration if it fails to request a panel of arbitrators or complete the arbitration within a specific timeframe. We question that proposition, since the CBA specifically warns: "Failure by the Union to follow the time limits, unless mutually extended, shall cause the grievance to be withdrawn." In any event, SEIU's argument misses the point. Whether a court may find a waiver under Code of Civil Procedure section 1281.2 does not depend on whether the arbitration agreement expressly provides that a waiver must be found. SEIU's failure to request a panel of arbitrators, attempt to schedule the arbitration, or do anything to pursue arbitration for over 17 months while Mitchell litigated his civil lawsuit (with SEIU's knowledge) and his potential back pay award

Association emphasized that its decision was limited to the grievance issue. As it pointed out: "What is involved here is not a contractual "statute of limitations" with respect to the time within which arbitration must be demanded, but rather a time schedule with respect to the filing and processing of grievances." Therefore, there was no reason for the court in *Napa Association* to address the consequences of failing to make a timely demand for arbitration." (*Pacific Platt, supra*, 6 Cal.4th at p. 317.)

skyrocketed, justifies the conclusion that SEIU waived its right to compel arbitration under the statute.

SEIU has failed to demonstrate error in the trial court's denial of its petition to compel arbitration.

III. DISPOSITION

The order is affirmed.

NEEDHAM, J.

We concur.

SIMONS, Acting P. J.

BRUINIERS, J.

(A132757)