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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

COUNTY OF RIVERSIDE,

Plaintiff and Appellant,

v.

PHILLIP TAMOUSH,

Defendant;

KATHLEEN MATHESON,

Real Party in Interest and
Respondent.

E053005

(Super.Ct.No. RIC10004206)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Ronald L. Taylor, Judge.
(Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art.
VI, § 6 of the Cal. Const.) Affirmed.

Liebert Cassidy Whitmore, J. Scott Tiedemann and Julie L. Strom for Plaintiff and
Appellant.

Robert F. Hunt for Real Party in Interest and Respondent.

I. INTRODUCTION

Real party in interest and respondent Kathleen Matheson was a supervising network administrator for the office of the district attorney of plaintiff and appellant County of Riverside (the County). In August 2008, the County decided to terminate Matheson's employment. Pursuant to a memorandum of understanding (MOU) between the County and Matheson's labor union, Matheson's appeal of the decision was heard by a neutral arbitrator. The arbitrator ordered the County to reinstate Matheson after a 30-day suspension without pay and a six-month demotion to a subordinate position.

The County filed a petition for administrative mandamus and/or to vacate the arbitration award. Following a hearing, the court denied the County's petition and affirmed the award of the arbitrator. The County appealed.

On appeal, the County argues that the arbitrator substituted his own judgment for that of the district attorney and thereby exceeded the authority given to him under the MOU. Because we conclude the arbitrator did not exceed his authority, we affirm the trial court's judgment.

II. FACTUAL AND PROCEDURAL SUMMARY

Matheson had been employed by the County since 1991. She began working for the Riverside County District Attorney's Office in June 1997 as a local area network (LAN) administrator. She was promoted to the position of supervising network LAN administrator in 1999. Her duties were described in part as: "Supervise staff engaged in designing, programming, installing, configuring and/or maintaining computer resources

supporting application and database servers” Matheson testified that her duties included making sure that the office’s computer data was secure, data was transmitted efficiently and securely, computer infrastructure and operations supported the needs of the office, and computer users were provided with necessary access to the computer network. Prior to the events that gave rise to this case, no one had ever complained to her that she was doing her job improperly and she had never been disciplined.

In 2008, Tom Reddekopp and Ted Olko were network administrators for the district attorney’s office and subordinates of Matheson. Reddekopp showed Olko how he could access Olko’s e-mail account through the district attorney’s Web site. They then viewed a computer log which indicated that Matheson was logged into the e-mail account of Rod Pacheco, the district attorney at that time. Over the next four working days, the two noticed that Matheson accessed e-mail accounts of several other users.

Olko’s and Reddekopp’s observations led to an internal investigation of Matheson. Following the investigation, Matheson was given a written notice of proposed termination. According to the notice, Matheson “repeatedly accessed the e[-]mail accounts of various members of the Riverside County District Attorney’s Office without proper authorization which is a violation of Board of Supervisors Policy A-50,” which provides that “[e]mployees shall use good judgment at all times when using the Internet or other electronic media” and prohibits “[u]nauthorized access to any computer system.” (Italics omitted.)

Specifically, Matheson was accused of accessing e-mail of nine people on various occasions over a period of 12 days. According to the notice, the people whose e-mail accounts Matheson accessed did not give Matheson their authorization to do so, and Matheson admitted to repeatedly accessing the e-mail account of investigator Joe Del Giudice, “and reading e[-]mails that pertained to the Cal Gang Node project that [Del Giudice] was overseeing.”

The notice concludes: “You clearly had neither the justification nor the necessary approval to be accessing, opening, and reading the e[-]mails of any of the individuals named above during the period between May 29, and June 9, 2008. Your conduct lacked integrity, was unprofessional, inappropriate, contrary to both county and department policies, and entirely unacceptable for someone in your position. Clearly your actions described herein have adversely affected the operations of this department as well as your ability to continue to function effectively as a Supervising Network Administrator with this Office, and are good cause for this intended discipline.”

Pursuant to the MOU between the County and Matheson’s labor union, Matheson appealed the decision to terminate her employment. Under the MOU, appeals in cases of termination are heard by a “neutral” selected pursuant to a procedure set forth in the MOU. The neutral is required to submit written findings of fact, conclusions of law, and the decision. “The decision of the neutral shall be final subject to the right of either party to seek judicial review under Section 1280 et. seq. of the California Code of Civil Procedure.”

The MOU includes the following provisions in article XII, section 8(J):

“1. The neutral shall confine the decision to issues raised by the statement of charges and responses. The neutral shall act in judicial, not legislative manners. The neutral shall not amend, modify, nullify, ignore, add to or subtract from the provisions of the [MOU] but, rather, shall interpret and apply its terms.

“2. The neutral will not substitute his/her discretion and judgment for that of management for sustained charges unless the neutral finds that discrimination, unfairness, capriciousness, or arbitrary action by the County is proven. [¶] . . . [¶]

“4. In the case of discharges, if the neutral finds the order of discharge should be modified, the appellant shall be reinstated to a position in the classification held immediately prior to discharge subject to forfeiture of pay and fringe benefits for any period of suspension imposed by the neutral.

“5. If the neutral finds the order of discharge should be rescinded, the appellant shall be reinstated to a position in the classification held immediately prior to discharge and shall receive pay and fringe benefits for all of the period of time between the discharge and reinstatement.”

The parties submitted the following issue to be decided by the neutral: “Whether the Employer had just cause to terminate Ms. Matheson, and if not, what was the appropriate remedy.”

The arbitration hearing took place over four days.¹ The County presented evidence that (1) Matheson had accessed the e-mail accounts of several employees of the district attorney's office, as well as the district attorney, (2) Matheson had read at least one e-mail of one employee—supervising investigator Joe Del Giudice, and (3) the people whose e-mail accounts had been accessed did not authorize Matheson to do so. The County also presented evidence concerning their investigation of the matter and the decision to terminate Matheson's employment.

Matheson did not dispute that she accessed e-mail accounts without specific authorization from the e-mail users or that she had read an e-mail in Del Giudice's account. She contended, however, that accessing e-mail accounts was simply "part and parcel of her usual work," and there was nothing in the County's policies and procedures that precluded her from doing so. She identified at least 12 job-related reasons for accessing the accounts, and said she was not required to get the user's permission. With the exception of one e-mail of Del Giudice, she did not read any e-mails within the accounts she accessed.²

¹ The County has provided us with the reporter's transcript of the arbitration proceedings, which had been lodged with the trial court. Although the witnesses at the arbitration hearing refer to numerous documents introduced as exhibits in that proceeding, the exhibits do not appear to have been lodged with the trial court and have not been transmitted to this court.

² As Olko acknowledged, gaining access to a user's e-mail account does not necessarily mean that the person gaining access actually views or reads the user's e-mail. According to Reddekopp, there is no way of knowing whether Matheson opened or read e-mails in the accounts she accessed.

Regarding her access to Del Giudice's e-mail, she explained that Del Giudice had sent her an e-mail with an equipment list attached to it; she subsequently deleted the attachment; sometime later, when she needed the list, she accessed his e-mail to get a copy of the attachment. While she was looking for the equipment list in Del Giudice's e-mail account, she noticed that Del Giudice had forwarded to an outside agency an e-mail that she had sent to him. The forwarding of the e-mail disturbed Matheson because it indicated to her that Del Giudice was planning on "leaving us out of the loop" on a matter that involved the security of the computer network. This was the only e-mail in Del Giudice's account that she read.

The arbitrator issued a written opinion and award. Following a statement of the issue and a summary of the facts and contentions, the arbitrator began his discussion by noting that "[m]anagement responded with a solidly emotional reaction to the fact that it never knew, nor chose to understand, why Ms. Matheson would access other Managers' e[-]mails strictly for procedural reasons. There is no indication in the record as to whether Ms. Matheson . . . acted upon any reading of e[-]mails, except with regard to the Joe Del Giudice incident. In that case, Ms. Matheson, perhaps to some extent as an error in judgment, determined on her own that she needed to review his work rather than going to her Supervisors and discussing the matter more appropriately without reading his e[-]mails."

In his conclusion, the arbitrator stated: "[T]here was not just cause to terminate Ms. Matheson. Rather, her actions should be dealt with through corrective activities. An

alternative that can be considered, and will be applied in this case, could be for her to serve a short suspension on the basis of some of the rationale provided by Management that she may well have been accessing e[-]mails without true work justification. She should be demoted in favor of one of her subordinates being placed in an Acting capacity for six months until the work of her Department can be clarified. In this case, while the undersigned does find and conclude that the management action in terminating Ms. Matheson after 17 years of apparently satisfactory service was ^[c]capricious and arbitrary^[b] pursuant to the parties^[b] MOU, he also concludes that she is in need of strong managerial supervision/retraining and whatever other administrative actions are necessary to clarify her duties and responsibilities as supervisor.”

In his statement of the award, the arbitrator expressly found that the district attorney’s office did not have just cause to terminate Matheson. He ordered the County to reinstate Matheson to a subordinate network administrator position, less a 30-day suspension without pay; such demotion lasting no longer than six months, after which she should be reinstated to her former position.

The County filed a petition for writ of administrative mandamus to compel the arbitrator to set aside his finding that Matheson was not terminated for just cause and the award of reinstatement. It subsequently filed an amended petition for writ of administrative mandamus and/or to vacate arbitration award. The trial court treated it as a petition to vacate an arbitration award pursuant to Code of Civil Procedure section 1286.2, subdivision (a)(4).

Following a hearing, the court denied the petition and entered judgment confirming the arbitrator's award.

III. STANDARDS OF REVIEW

We review the trial court's order confirming the arbitrator's award de novo. (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 376, fn. 9 (*Advanced Micro*); *Ajida Technologies, Inc. v. Roos Instruments, Inc.* (2001) 87 Cal.App.4th 534, 541.) In essence, we review the arbitrator's decision, not the trial court's order.

The scope of judicial review of the arbitrator's decision is "extremely narrow." (*California Faculty Assn. v. Superior Court* (1998) 63 Cal.App.4th 935, 943.) Although courts have the authority to overturn an award when the arbitrator exceeded his or her power (Code Civ. Proc., § 1286.2, subd. (a)(4)), courts must accord "substantial deference to the arbitrators' own assessments of their contractual authority" (*Advanced Micro, supra*, 9 Cal.4th at p. 373.)

This judicial deference to the arbitrator is based upon the arbitrating parties' intent. As our state Supreme Court explained in *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1 (*Moncharsh*): "Because the decision to arbitrate grievances evinces the parties' intent to bypass the judicial system and thus avoid potential delays at the trial and appellate levels, arbitral finality is a core component of the parties' agreement to submit to arbitration. Thus, an arbitration decision is final and conclusive *because the parties have agreed that it be so*. By ensuring that an arbitrator's decision is final and binding,

courts simply assure that the parties receive the benefit of their bargain.” (*Id.* at p. 10, fn. omitted.)

Judicial review of arbitration awards is further limited by the principle that “[a]rbitrators, unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action.” [Citations.]” (*Moncharsh, supra*, 3 Cal.4th at pp. 10-11.) The *Moncharsh* court thus concluded, “both because it vindicates the intentions of the parties that the award be final, and because an arbitrator is not ordinarily constrained to decide according to the rule of law, it is the general rule that, ‘The merits of the controversy between the parties are not subject to judicial review.’ [Citations.] More specifically, courts will not review the validity of the arbitrator’s reasoning. [Citations.] Further, a court may not review the sufficiency of the evidence supporting an arbitrator’s award. [Citations.]” (*Id.* at p. 11.) In short, as a general rule, “an arbitrator’s decision cannot be reviewed for errors of fact or law.” (*Ibid.*)

In *Advanced Micro, supra*, 9 Cal.4th 362, our state Supreme Court explained that judicial deference to the arbitrator extends to the arbitrator’s choice of remedies. (*Id.* at p. 376.) This choice, the court explained, “may at times call on [the] decisionmaker’s flexibility, creativity and sense of fairness. In private arbitrations, the parties have bargained for the relatively free exercise of those faculties. . . . Were courts to reevaluate independently the merits of a particular remedy, the parties’ contractual expectation of a

decision according to the arbitrators' best judgment would be defeated." (*Id.* at pp. 374-375, fn. omitted.)

However, the *Advanced Micro* court made clear that while a reviewing court is "not in a favorable position to substitute its judgment for that of the arbitrators as to what relief is most just and equitable under all the circumstances," the arbitrator's discretion is not "unrestricted or unreviewable." (*Advanced Micro, supra*, 9 Cal.4th at p. 375.) In determining whether an award exceeds the arbitrator's power, the court explained that the remedy "must bear some rational relationship to the contract and the breach. The required link may be to the contractual terms as actually interpreted by the arbitrator (if the arbitrator has made that interpretation known), to an interpretation implied in the award itself, or to a plausible theory of the contract's general subject matter, framework or intent. [Citation.] The award must be related in a rational manner to the breach (as expressly or impliedly found by the arbitrator). Where the damage is difficult to determine or measure, the arbitrator enjoys correspondingly broader discretion to fashion a remedy. [Citation.] [¶] The award will be upheld so long as it was even arguably based on the contract; it may be vacated only if the reviewing court is *compelled* to infer the award was based on an extrinsic source. [Citations.] In close cases the arbitrator's decision must stand. [Citation.]" (*Id.* at p. 381, fn. omitted.)

IV. DISCUSSION

As noted above, a court may overturn an arbitrator's award when the arbitrator exceeded his or her power. (Code Civ. Proc., § 1286.2, subd. (a)(4).) Generally, "it is

within the ‘powers’ of the arbitrator to resolve the entire ‘merits’ of the ‘controversy submitted’ by the parties.” (*Moncharsh, supra*, 3 Cal.4th at p. 28.) Here, an issue explicitly submitted by the parties and squarely addressed by the arbitrator was whether the employer had just cause to terminate Matheson. The arbitrator expressly found that the district attorney’s office did not have just cause to terminate Matheson. The County does not challenge the arbitrator’s authority to make this finding.

As the County points out, the arbitrator’s power is also limited by the MOU. In particular, the arbitrator “will not substitute his/her discretion or judgment for that of management for sustained charges *unless the neutral finds that discrimination, unfairness, capriciousness, or arbitrary action by the County is proven.*” (Italics added.) Reading this together with the issue submitted by the parties, even if the arbitrator concludes that there was no just cause to discharge Matheson, he may not overturn the district attorney’s decision unless he finds “*that discrimination, unfairness, capriciousness, or arbitrary action by the County is proven.*” (Italics added.) The County contends that the italicized requirement was not satisfied.

Here, the arbitrator expressly found that “the management action in terminating Ms. Matheson after 17 years of apparently satisfactory service was [⁴] *capricious and arbitrary*^[1] pursuant to the parties^[1] MOU” (Italics added.) This language would appear to bring the arbitrator’s decision squarely within his power as defined by the MOU. In light of the rules limiting judicial review set forth above, our review would

seem to be at an end. (See Code Civ. Proc., § 1286.2; *Moncharsh, supra*, 3 Cal.4th at p. 28 [judicial review is generally limited to the grounds specified by statute].)

The County contends, however, that the arbitrator used the phrase “arbitrary and capricious” “superficially,” in a “fleeting and ambiguous” manner, and as mere ““magic words.”” The County asserts that the decision to terminate Matheson cannot reasonably fit within judicial definitions of arbitrary and capricious decisionmaking. In particular, “Matheson was afforded an extensive and thorough investigation by a senior investigator, her full pre- and post-disciplinary rights under *Skelly* [*v. State Personnel Board* (1995) 15 Cal.3d 194], and lengthy and serious discussions by the [district attorney] and his staff.” “Such a decision making process,” the County continues, “can hardly be said to meet the basic standard of ‘arbitrary or capricious’ actions as defined by the California courts.”

In a related argument, the County asserts that “Matheson did not prove that the decision to terminate was ‘arbitrary or capricious.’” (Underlining omitted.) The County again points to the County’s ““detailed investigation, including in-depth interviews with all the principals involved,”” among other facts. It points to “the stark contrast between the definition of ‘arbitrary or capricious’ on the one hand and the reasonable process employed by the County on the other” Because Matheson failed to prove the employer’s actions were arbitrary or capricious, the County continues, “the arbitrator should not have exceeded his contractual authority by substituting his own judgment for that of the [district attorney].”

We reject the County's arguments. First, we disagree with the County's disparaging characterization of the arbitrator's use of the phrase "capricious and arbitrary." There is nothing about its use that appears superficial, fleeting, or ambiguous. It is used in the final paragraph of the opinion where the arbitrator states quite clearly that he "does find and conclude that the management action in terminating Ms. Matheson after 17 years of apparently satisfactory service was [c]apricious and arbitrary [c] pursuant to the parties [c] MOU" His use of quotation marks around the phrase and the reference to the MOU indicate that he was aware of its role under the MOU and its relationship to the limits of his power. The phrase does not appear to us to be mere "magic words" lacking in substance, but rather essential to his decision and deliberately chosen with an understanding of its legal significance.

Second, the County's argument is, in essence, that the arbitrator made an error of law: he failed to properly apply the correct legal standard for arbitrary and capricious action. As *Moncharsh* makes clear, however, "with narrow exceptions, an arbitrator's decision cannot be reviewed for errors of fact *or law*." (*Moncharsh, supra*, 3 Cal.4th at p. 11, italics added.) This is true even if the error of law appears on the face of the award and causes substantial injustice. (*Id.* at pp. 25, 28; *California Faculty Assn. v. Superior Court, supra*, 63 Cal.App.4th at pp. 943-944.) Although one of the "narrow exceptions" to this general rule is that the arbitrator exceeded his authority, this exception cannot swallow the rule of limited judicial review by allowing a litigant to "contend the arbitrator erred and thus exceeded his powers." (*Moncharsh, supra*, at p. 28.) This is

precisely what the County is attempting to do here by arguing that the arbitrator erroneously found (and Matheson failed to prove) that the district attorney's office acted in an arbitrary and capricious manner and therefore exceeded his power.

The County also suggests that the arbitrator's finding that Matheson's actions were worthy of a suspension and demotion (before full reinstatement) is inconsistent with finding that the decision to discharge Matheson was arbitrary and capricious. The argument calls upon us to review the validity of the arbitrator's reasoning, which we cannot do. (See *Moncharsh, supra*, 3 Cal.4th at p. 11.) Moreover, it is not necessarily inconsistent to conclude that an employer acted capriciously or arbitrarily in discharging an employee if the employee's conduct could reasonably warrant no more than suspension and demotion.

Finally, the County argues that reinstating Matheson threatens the district attorney's statutory and ethical duty to enforce the law and protect confidential and privileged communications. The County relies on an opinion by the State Bar of California Standing Committee on Professional Responsibility and Conduct which notes the duty of attorneys to exercise reasonable care to prevent his or her employees from disclosing or using confidences or secrets of a client. (See State Bar Standing Com. on Prof. Responsibility & Conduct, Formal Opn. No. 1979-50.) The County contends that the district attorney complied with this obligation by terminating Matheson, and that "[u]pholding the arbitrator's decision would force the [district attorney] to have an

employee on staff who has shown she does not respect the confidentiality of private communications.”

Although an arbitrator’s award can be vacated on public policy grounds, this exception to the general rule of limited judicial review is applicable only “in those rare cases where ‘according finality to the arbitrator’s decision would be incompatible with the protection of a statutory right’ or where the award contravenes ‘an explicit legislative expression of public policy.’ [Citations.]” (*City of Palo Alto v. Service Employees Internat. Union* (1999) 77 Cal.App.4th 327, 334.) Here, there is nothing in our record to suggest that Matheson viewed, used, or disclosed any client communication or that she might do so if she is reinstated. The County has failed to show that reinstatement of Matheson would endanger the district attorney’s ability to comply with the cited rule.

For the foregoing reasons, we reject the County’s arguments and affirm the judgment.

V. DISPOSITION

The judgment is affirmed. Matheson is awarded her costs on appeal.

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KING
J.

We concur:

RAMIREZ
P.J.

HOLLENHORST
J.