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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

OPERATING ENGINEERS LOCAL UNION
NO. 3,

Plaintiff and Appellant,

v.

CITY OF PORTERVILLE et al.,

Defendants and Respondents.

F067635

(Super. Ct. No. VCU249441)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Paul A. Vortmann, Judge.

Bennett & Sharpe, Barry J. Bennett, Thomas M. Sharpe, Heather N. Phillips, Katwyn T. Delarosa, Ann M. Bennett and Eric J. LiCalsi for Plaintiff and Appellant.

McCormick, Kabot, Jenner & Lew and Nancy A. Jenner for Defendants and Respondents.

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Operating Engineers Local Union No. 3 (Union) appeals from a judgment following the trial court's order denying its petition to compel arbitration. The Union and the City of Porterville (City) are parties to a Memorandum of Understanding (MOU). After a City employee was given notice of termination of her employment, the Union sought advisory arbitration of the termination decision, relying on the MOU, which provides for advisory arbitration of grievances. The City refused to arbitrate, asserting that an employee's challenge to a termination decision is not a grievance covered by the MOU's arbitration clause. The Union then filed a petition to compel arbitration, which the trial court denied.

On appeal, the Union contends the MOU's arbitration clause covers the termination decision at issue. The City offers various reasons the arbitration clause is not enforceable in this case, arguing that the clause does not cover disciplinary actions such as termination and that the Union waived its right to enforce arbitration. As a preliminary matter, the City contends the arbitration clause is not enforceable under the California Arbitration Act (CAA; Code Civ. Proc.,¹ § 1280 et seq.) because it does not provide for final and binding arbitration. We agree with the City that an agreement to submit a dispute to advisory arbitration is not enforceable under the CAA. Accordingly, we affirm the judgment.

BACKGROUND

Underlying employment dispute

Jodi Harper was a permanent employee of the Porterville Police Department working as Community Service Officer. She was also a member of a bargaining unit represented by the Union. On August 6, 2012, Harper was given a letter of intent to terminate her employment. The asserted reasons for termination of her employment were

¹ Further statutory references are to the Code of Civil Procedure unless otherwise indicated.

unsatisfactory work performance, disrespectful conduct, conduct unbecoming a member of the police department, and additional alleged violations of Porterville Police Department General Order 340.3.

Two days later, Douglas Gorman, a business agent for the Union, wrote to Police Chief Chuck McMillan, notifying him that Harper denied the allegations of misconduct and that the Union intended to appeal the decision to terminate. On August 13, 2012, Gorman wrote to the city manager, requesting appeal of Harper's termination and demanding additional information. In a memorandum dated August 14, 2012, with the subject heading, "Notice of Termination," McMillan informed Harper that he had determined termination was the appropriate course of action in her case.

On September 26, 2012, the Union demanded arbitration of the termination decision pursuant to the MOU. The City rejected the demand for arbitration, asserting that the arbitration clause in the MOU did not apply to Harper's termination.

MOU's arbitration clause

The MOU between the City and the Union was effective from July 1, 2011, to June 30, 2014. The arbitration clause is found in a section of the MOU titled "Grievance Procedure." This section begins, "Any employee in the City service shall have the right to grieve any action as defined in Rule XIV, Section 2-c, 'Definition of Grievance.'"

"Rule XIV, Section 2-c" refers to a rule in the City's Personnel System Rules and Regulations (City Rules). Rule XIV, section 2, subpart (c), defines a grievance as "an expressed claim by an employee that the City has violated, misinterpreted, or misapplied an obligation to the employee, as such obligation is expressed or written in the City and/or Departmental Personnel Rules and Regulations, Pay and Employee Benefit Plan, or employee Memorandum of Understanding."

The MOU's grievance procedure comprises six steps. Step 5 provides, "In the event the Grievant or the [Union] is not satisfied with the result at Step 4, it may, within fifteen (15) calendars days of completion of the Step 4 proceedings, submit the grievance

to advisory arbitration.” Step 5 describes the method for selecting an arbitrator and also provides that the arbitrator has no authority to hear grievances involving challenges to the following City actions:

- “1. The termination of services or failure to re-employ a probationary employee.
- “2. The placement of an employee on probationary status.
- “3. The termination of services or failure to re-employ any employee in a position for which extra compensation is received.
- “4. The contents of the employee’s evaluation.
- “5. The City’s promulgation of rules, policies.
- “6. A decision, action, or inaction of the City if such is required by a state and federal regulatory body or court.”

Step 6 of the grievance procedure provides: “The decision of the arbitrator shall be advisory to the party against whom the grievance was filed. The decision of the advisory arbitrator shall become final unless the party against whom the grievance was filed notifies the other party in writing of its decision within thirty (30) days of receipt of the advisory arbitrator’s opinion.... [¶] ... [¶] If notification is received in a timely manner, the decision set forth in the notification shall be final and appealable pursuant to ... § 1094.5.”²

City Rules

The City Rules were adopted by the Porterville City Council and were most recently amended in June 2000. Thus, the City Rules predate the MOU. Rule XIV of the

² Section 1094.5 provides for judicial review of “any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal” (§ 1094.5, subd. (a).) The initial pleading brought under section 1094.5 is commonly referred to as a petition for writ of administrative mandate. (E.g., *Young v. Gannon* (2002) 97 Cal.App.4th 209, 219.)

City's Rules is titled "Complaint and Grievance Procedure" and has five numbered sections. Section 4 of Rule XIV outlines a four-step grievance procedure. The MOU's grievance procedure tracks the language of the first three steps and part of the fourth step of Rule XIV, section 4. The MOU and Rule XIV differ in that Rule XIV, section 4, provides for an appeal to a Grievance Appeals Board while the MOU provides for advisory arbitration.

As we described above, Rule XIV, section 2, subpart (c), provides a definition of grievance. Rule XIV, however, expressly does not apply to disputes about employee discipline. Section 1 of Rule XIV provides, "The appeal of disciplinary action may not be made through the complaint and grievance procedure."

Instead, employee challenges to disciplinary actions are covered by Rule XI of the City Rules. Rule XI defines the types of conduct subject to discipline such as incompetency, inefficiency, and insubordination. The rule's definition of discipline includes dismissal. Rule XI, section 3, provides a procedure for appealing disciplinary action, including an administrative appeal hearing.

PROCEDURAL HISTORY

On November 2, 2012, the Union filed a petition to compel arbitration.

On December 17, 2012, the trial court heard oral argument on the petition. In opposition to the petition, the City cited the MOU's provision that an arbitrator has no authority to hear disputes that involve "[t]he termination of services or failure to re-employ a probationary employee," and argued this meant an arbitrator could not decide challenges to either "termination of services, in general" or "failure to re-employ a probationary employee." The City also argued that an arbitrator is limited to interpreting the MOU, but the MOU does not address discipline of employees. The Union argued that the arbitration clause in the MOU "included the broadest possible definition of grievance," which would include "violations of the MOU, of personnel rules, of various policies and rules within the City."

The court initially granted the petition and ordered the parties to submit to arbitration. It found, “In reviewing the city regulations [City Rules] and the MOU, it appears that the MOU supersedes the city regulations where the two conflict as the MOU was agreed to by both the city and [the Union] where the city regulations appear to have been adopted unilaterally by the City of Porterville.”

The court found that “[t]ermination proceedings appear to be within the definition of a grievance as specified in the MOU.” The court explained: “It appears that the parties contemplated termination proceedings in their negotiation of the MOU as it provides that the arbitrator has no authority to determine issues regarding termination of a probationary employee (MOU page 25). If the city had wanted to exclude termination proceedings for permanent employees, it could certainly have included such a provision in the MOU. It did not.”

Later, however, the trial court issued a notice of further hearing on the petition to compel arbitration. In its notice, the court wrote, “After further review, the court finds it did not fully appreciate the interrelationship between the [MOU], agreed to by the parties, and the City of Porterville’s Personnel Rules and Regulations adopted by the City.” The court further wrote, “[I]t appears that the court was incorrect in finding that the grievance procedures included in the MOU replaced [Rule] XIV in its entirety.”³

After a second hearing, the court found that the MOU modified the City’s Rules, implicitly rejecting its previous finding that the MOU superseded the City Rules. The court ruled:

“[The Union] is not entitled to compel arbitration under the terms of the MOU. The termination of employee Jodi Harper from her employment

³ In its supplemental brief filed after the second hearing was ordered, the Union referred to a subsequent decision by a different judge in Tulare County Superior Court on a similar issue between the same parties. The Union suggested that the subsequent decision may have caused the trial court to doubt its initial ruling.

with the [C]ity does not provide her with a right [to] grieve the decision of the City but is a discipline [matter] covered by the City's Rules and Regulations and not the MOU where termination is excluded from the provisions of advisory arbitration."

Notice of entry of judgment denying the petition to compel arbitration was filed on June 18, 2013. The Union filed a notice of appeal on June 25, 2013.

DISCUSSION

I. Legal principles

"The CAA 'represents a comprehensive statutory scheme regulating private arbitration in this state.'" (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 983.) Section 1281.2 of the CAA provides, in relevant part:

"On a 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 petitioner;
or

"(b) Grounds exist for the revocation of the agreement."

Under section 1281.2, the trial court determines whether a written arbitration agreement exists and whether the parties should be ordered to arbitrate. (*Hartnell Community College Dist. v. Superior Court* (2004) 124 Cal.App.4th 1443, 1449 (*Hartnell Community College*)). "The right to arbitration ultimately depends on the terms of the collective bargaining agreement, and a petition to compel arbitration is essentially a suit in equity seeking specific performance of that agreement." (*Amalgamated Transit Union Local 1277 v. Los Angeles County Metropolitan Transportation Authority* (2003) 107 Cal.App.4th 673, 685.)

Under both federal and state law, public policy favors arbitration agreements. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195.) Our Supreme Court has observed, "California's arbitration statutes reflect "a strong public

policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.”” (Id. at p. 1204.) Specifically in the labor context, courts recognize, “For disputes arising under collective bargaining agreements, there is a ‘presumption of arbitrability,’ under which a court should order arbitration of a grievance “‘unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.’” [Citation.]” (*City of Los Angeles v. Superior Court* (2013) 56 Cal.4th 1086, 1096, citing *AT&T Technologies v. Communications Workers* (1986) 475 U.S. 643, 650.) On the other hand, “[t]here is no public policy favoring arbitration of disputes which the parties have not agreed to arbitrate.” (*Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 653.)

“The standard of review for an order on a petition to compel arbitration is either substantial evidence where the trial court’s decision on arbitrability was based upon the resolution of disputed facts, or de novo where no conflicting extrinsic evidence was admitted in aid of interpretation of the arbitration agreement.” (*Hartnell Community College, supra*, 124 Cal.App.4th at pp. 1448-1449.)

II. An agreement for advisory arbitration is not enforceable under the CAA

As a preliminary matter, the City argues that section 1281.2 does not apply in this case because the arbitration clause at issue does not provide for final and binding arbitration.⁴ The City cites *Cheng-Canindin v. Renaissance Hotel Associates* (1996) 50 Cal.App.4th 676 (*Cheng-Canindin*).

In *Cheng-Canindin*, a former employee of a hotel brought a wrongful termination lawsuit against the hotel, and the hotel petitioned to compel “‘mandatory contractual

⁴ Although the trial court did not rely on this argument in denying the petition to compel arbitration, the City raised the issue in its response, filed on March 12, 2013, to the Union’s supplemental brief and again during oral argument.

arbitration” of the employee’s claims. The trial court denied the petition, and the Court of Appeal affirmed. (*Cheng-Canindin, supra*, 50 Cal.App.4th at p. 678.) The hotel’s petition was based on an “Internal Problem Solving Procedure” found in its employee handbook. (*Id.* at pp. 679, 682.) The final step of the procedure provided that an employee could bring his or her “problem or concern to the Renaissance Review Committee.” (*Id.* at p. 679.) The review committee was to consist of two employees (chosen at random by the personnel department), two members of hotel management, and the general manager. (*Id.* at pp. 680-681.) Considering the review committee procedure, the Court of Appeal concluded, “the parties did not in fact enter into an arbitration agreement nor did they even intend to do so.” (*Id.* at p. 684.)

In reaching its conclusion, the *Cheng-Canindin* court discussed what attributes a dispute resolution procedure must have for the procedure to be considered arbitration under the CAA. The court identified three necessary elements: “[A]lthough arbitration can take many procedural forms, a dispute resolution procedure is not an arbitration unless there is [1] a third party decision maker, [2] a final and binding decision, and [3] a mechanism to assure a minimum level of impartiality with respect to the rendering of that decision.” (*Cheng-Canindin, supra*, 50 Cal.App.4th at pp. 687-688, fn. omitted.)

The court found the hotel’s review committee procedure was not a true arbitration procedure because it did not provide for a third party decision maker and some minimum level of impartiality. Instead, “[e]veryone involved in the decisionmaking process is employed by, selected by, and under the control of the Hotel.” (*Cheng-Canindin, supra*, 50 Cal.App.4th at p. 688.)

In *American Federation of State, County & Municipal Employees v. Metropolitan Water Dist.* (2005) 126 Cal.App.4th 247, 258 (*AFSCME*), a case neither party cited, the court considered a grievance procedure that included the first and third elements identified in *Cheng-Canindin* but lacked the “second element of a final and binding decision” by the decision maker. *AFSCME* involved a grievance procedure in a

memorandum of understanding between a union (the Local) and a water district (MWD). The Local sought to enforce the grievance procedure through a petition to compel arbitration, which the trial court denied. (*AFSCME, supra*, at p. 253.) The multi-step grievance procedure in that case provided a final step of appeal to a neutral hearing officer. The memorandum of understanding specified that the hearing officer's decision was "final and binding on the parties" but also provided that the decision could be appealed to a court pursuant to section 1094.5. (*AFSCME, supra*, at p. 254.) The court found the grievance procedure did not provide a final and binding decision, as "[a] hearing officer's decision is not final and binding where it is reviewable by a trial court under ... section 1094.5." (*Id.* at p. 259.)

The court explained that, under the CAA, arbitration decisions are subject to very limited judicial review and generally are not reviewable for errors of fact or law. Administrative decisions subject to review under section 1094.5, in contrast, are subject to more extensive trial court examination. (*AFSCME, supra*, 126 Cal.App.4th at p. 259.) In deciding a petition for writ of administrative mandate challenging an administrative decision, "the trial court is authorized to ... examine [1] whether the decision-maker proceeded in excess of jurisdiction; (2) whether there was a fair trial; and (3) whether there was any prejudicial abuse of discretion because of a failure to proceed as required by law, the order or decision was not supported by the findings, or the findings were not supported by the evidence. The court is also authorized to consider the weight of the evidence." (*Ibid.*, citing § 1094.5, subs. (b) & (c).) The *AFSCME* court found that a hearing officer's decision could not be considered final because the grievance procedure allowed for trial court review of findings and of the merits of the proceeding. (*AFSCME, supra*, at p. 259.)

Because a dispute resolution procedure must include all three elements identified in *Cheng-Canindin* to qualify as arbitration under the CAA, the *AFSCME* court concluded the grievance procedure in the memorandum of understanding between the

Local and the MWD was “not an agreement to arbitrate” and the petition to compel arbitration was properly denied. (*AFSCME, supra*, 126 Cal.App.4th at p. 260.)

The Union urges us to reject *Cheng-Canindin* and instead follow a Ninth Circuit case decided under the Federal Arbitration Act (FAA; 9 U.S.C. § 1 et seq.). In *Wolsey, Ltd. v. Foodmaker, Inc.* (9th Cir. 1998) 144 F.3d 1205, 1209 (*Wolsey*), the Ninth Circuit held: “In light of the strong presumption in favor of arbitrability ..., we hold that arbitration need not be binding in order to fall within the scope of the [FAA]. The FAA is no less applicable to the [agreement between the parties] than it would be if the parties had agreed to submit to binding arbitration.” Nothing in the court’s discussion in *Wolsey*, however, persuades us that *Cheng-Canindin* and *AFSCME* were wrongly decided. The *Wolsey* court, for example, did not consider whether an advisory arbitration clause that provides for judicial review of the arbitration decision through an administrative writ (as the arbitration clause in this case does) would still be enforceable under the FAA. (See *Dluhos v. Strasberg* (3d Cir. 2003) 321 F.3d 365, 370, 372 [holding dispute resolution policy that called for nonbinding procedure did not fall under the FAA, and noting, “If a dispute-resolution mechanism indeed constitutes arbitration under the FAA, then a district court may vacate it only under exceedingly narrow circumstances.”].) In addition, at least one federal district court has held that an arbitration agreement that does not “require the parties to arbitrate the dispute through to final decision by the arbiters ... does not mesh with the concept of ‘arbitration’ within the contemplation of the FAA.” (*Advanced Bodycare Solutions v. Thione Intern.* (S.D. Fla. 2007) 514 F.Supp.2d 1326, 1333, fn. omitted.) For these reasons, we decline to follow *Wolsey* and instead follow *Cheng-Canindin* and *AFSCME* for the proposition that a dispute resolution procedure must provide for a final and binding decision to be enforceable under the CAA.

Here, the arbitration clause in the MOU expressly provides for “advisory,” not final and binding, arbitration. Also, like the grievance procedure in *AFSCME*, it provides for review by writ of administrative mandate under section 1094.5. Under

Cheng-Canindin and *AFSCME*, this arbitration clause does not qualify as an arbitration agreement under the CAA. As a result, we agree with the City that the Union cannot enforce the agreement to submit grievances to advisory arbitration through the procedural mechanism of a petition to compel arbitration under section 1281.2. The Union’s petition to compel arbitration was properly denied. (*Estate of Kampen* (2011) 201 Cal.App.4th 971, 1000 [“If the decision of the trial court is correct on any theory of law applicable to the case, the appellate court will affirm the judgment, whether the trial court’s reasons were correct or not.”].)

In its reply brief, the Union asks us to ignore this “procedural flaw” and adjudicate the matter on the merits. The Union suggests we treat its petition to compel arbitration as a “Petition for Writ of Mandate or a Petition to Compel Specific Performance” and asserts, “The difference in procedure at the trial court level is non-existent, as all available causes of action with which to bring this matter before the court follow a motion procedure in which no live testimony is received and the court renders a decision sitting without a jury,” citing section 1088.⁵

The Union cites no authority for the proposition that we may deem its petition to compel arbitration—which was treated as such by the parties and the trial court—as a different claim for the first time on appeal.⁶ We decline to consider in the first instance

⁵ Section 1088 provides that a writ of mandate sought under section 1085 cannot be granted by default. Section 1085, in turn, provides that a writ of mandate may be issued by any court “to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station.” A proceeding under section 1085 is sometimes referred to as a writ of traditional mandate. (E.g., *Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802, 813-814, abrogated by statute on a different ground as stated in *Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 678, fn, 11 [section 1085 deals with “so-called ‘traditional mandate,’” while section 1094.5 deals with “so-called ‘administrative mandate’”].)

⁶ All cases cited by the Union involved a trial court or appellate court treating a petition for writ of traditional mandate under section 1085 as a petition for writ of administrative mandate under section 1094.5. None of the cases cited involved a proceeding that was initially brought incorrectly under section 1281.2.

whether the Union would be entitled to any relief if it had brought a petition for writ of mandate or a contract claim where the parties have not argued or presented evidence on those claims, which were suggested for the first time in the Union's reply brief.

DISPOSITION

The judgment is affirmed.⁷ The parties are to bear their own costs on appeal.

Kane, J.

WE CONCUR:

Levy, Acting P.J.

Detjen, J.

⁷ The City's motion for judicial notice is granted.