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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CITY OF LOS ANGELES and DOES 1 through 50, inclusive, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondents, ENGINEERS & ARCHITECTS ASSOCIATION, Petitioner and Real Party in Interest.	B228732 (Los Angeles County Super. Ct. No. BS126192)

ORIGINAL PROCEEDINGS in mandate. Gregory W. Alarcon, Judge. Petition for writ of mandate is granted and remanded to the trial court for further proceedings.

Carmen A. Trutanich, City Attorney, Zna Portlock Houston, Assistant City Attorney, Janis Levart Barquist and Jennifer Maria Handzlik, Deputy City Attorney, for Petitioner, City of Los Angeles.

Kronick, Moskovitz, Tiedemann & Girard, David W. Tyra and Meredith H. Packer for League of California Cities as Amicus Curiae on behalf of City of Los Angeles.

Levy, Stern, Ford & Wallach, Adam N. Stern and Lewis N. Levy for Real Party in Interest, Engineers & Architects Association.

Rothner, Segall & Greenstone, Ellen Greenstone and Jonathan Cohen for American Federation of State, County and Municipal Employees, District Council 36, as Amicus Curiae on behalf of Real Party in Interest, Engineers & Architects Association.

Faced with a deficit exceeding $500 million and an impending cash flow crisis, the Mayor and City Council of Los Angeles (City) approved an ordinance directing the Mayor to adopt a plan to furlough City civilian employees for up to 26 days per fiscal year. The Mayor adopted such a plan, and many employees filed grievances challenging the furloughs to which they were subjected. The grievances were denied and the employees, supported by their union, the Engineers and Architects Association (Union), requested arbitration of the grievances. When the City refused to arbitrate, the Union filed a petition to compel arbitration of over 400 such grievances. Concluding that the grievances were arbitrable, the trial court granted the petition to compel. The City challenged the order compelling arbitration by petition for writ of mandate. We issued an order to show cause and now grant the petition. While there are questions as to whether the issue of furloughs is grievable under the terms of the controlling Memoranda of Understanding (MOUs),[1] we conclude that any agreement to arbitrate the issue of furloughs would constitute an improper delegation of discretionary policymaking power vested in the City Council.

FACTUAL AND PROCEDURAL BACKGROUND

On May 12, 2009, Mayor Villaraigosa sent a letter to the City Council requesting the City Council to declare a fiscal emergency and adopt an urgency ordinance permitting reduced workweeks of less than 40 hours. The Mayor indicated his intent to propose and implement a plan of mandatory work furloughs for virtually all civilian

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[1] The relevant terms are the same in each of the four controlling MOUs. References to MOU in the singular refer to all of the MOUs at issue in the case.

employees of the City. In response to the Mayor's request, the City Council passed a resolution declaring an emergency and directing the Mayor to adopt a furlough plan. The resolution was approved by the Mayor on May 22, 2009, and thus became an ordinance.[2]

The resolution set forth the fiscal circumstances which justified the declaration of emergency. These included: (1) a $529 million general fund deficit for the 2009-2010 fiscal year; (2) ongoing revenue sources had plunged nearly $300 million; (3) continued declines in property tax revenues were expected; (4) taxes could not be raised; (5) the deficit was expected to grow to over $1 billion by the end of the 2010-2011 fiscal year if no changes were made; (6) 80% of the City's expenses were linked to salaries and benefits; (7) if no changes were made, the City would face a cash flow crisis; and (8) if the City could not borrow funds, it would be out of cash by the end of August 2009. As a result of these and other circumstances, the City declared a fiscal emergency.

The fiscal emergency was declared pursuant to Government Code section 3504.5 and Los Angeles Administrative Code section 4.850. These sections relate to the City's obligation to consult with employee unions prior to the adoption of ordinances relating to matters within the scope of the unions' representation, with an exception allowing for consultation after the adoption of such an ordinance, in cases of "emergency." The timing and extent of the City's attempts to meet and confer with the Union, as well as

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[2] The Mayor and City Council also approved an ordinance providing that when an employee is required to work 72 hours in a pay period, rather than the usual 80, as a result of a fiscal emergency, the employee will still receive all rights and benefits the employee would have received had the full 80 hours been worked.

the legal sufficiency of those attempts, is beyond the scope of this opinion. Indeed, the Union brought an unlawful employee relations practice claim raising the issue before the Employee Relations Board (ERB); that matter is currently proceeding. Suffice it to say, however, that, according to the Union, the City indicated a willingness to negotiate only the impact of the furloughs, not the furloughs themselves.[3]

Furloughs of one day per 80-hour pay period were implemented. Numerous employees filed grievances regarding the furloughs, arguing that furloughs violated the wage and workweek provisions in their MOUs.[4] The grievances were denied, generally on the basis that the furloughs were implemented in accordance with City Council action and were therefore not grievable.[5]

Under the MOUs, the final step of the six-step grievance process is submission to binding arbitration before the ERB; the request is to be jointly filed by the grievant and

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[3] According to the July 12, 2010 report of the hearing officer in the ERB matter, although the City indicated that it would not negotiate the furlough decision itself, the City *was* willing to consider alternatives to furloughing employees if the same cost savings could be achieved without furloughs.

[4] Interpreting the MOUs in this regard goes to the merits of the dispute, not its arbitrability. We therefore do not discuss these provisions. Indeed, the salary provisions of the MOUs are apparently set forth in appendices to those documents, which are not part of the record.

[5] The grievances were also denied on the basis that the Union's unlawful employee relations practice claim constituted an election of remedies, precluding pursuit of grievances challenging the same furlough decision. The City pursues this argument in this writ proceeding. We do not address it, although we note that it appears that the issue of whether furloughs could be imposed without prior consultation with the Union is different from the issue of whether furloughs could be imposed at all.

the Union. In this case, the employees and the Union requested arbitration of the denied grievances; the City refused arbitration.

On April 29, 2010, the Union filed its petition to compel arbitration of over 400 grievances.[6] The Union subsequently filed points and authorities in support of its petition, arguing that furloughs violated the salary and workweek provisions of the applicable MOUs and were grievable (and therefore arbitrable) under the terms of the MOUs. Specifically, the Union relied on the language of section 3.1 of the MOUs, which states, "A grievance is defined as any dispute concerning the interpretation or application of this written MOU or departmental rules and regulations governing personnel practices or working conditions applicable to employees covered by this MOU. An impasse in meeting and conferring upon the terms of a proposed MOU is not a grievance." The Union took the position that determining whether furloughs violated

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[6] The parties seem to agree that 408 grievances are at issue in this case; we are not so certain. Each grievance is identified in a separate paragraph of the complaint and has its own exhibit. There appear to be 409 paragraphs but 410 exhibits. It is unclear where the error lies. Moreover, several of the grievances attached to the petition to compel arbitration appear to have been included erroneously, as they have nothing to do with furloughs. For example, Exhibit 12 is the grievance of Kevin Walton, who challenges a reassignment from night shift to day shift and asserts an issue under the Americans with Disabilities Act; he does not contest furloughs. Exhibit 235 is the grievance of Juliet Daniels. (The exhibit is an appeal to the third level of grievance review; it is not yet ripe for an arbitration demand.) Ms. Daniels alleges that she was retaliated against for filing a discrimination complaint based on a hostile work environment; she does not contest furloughs. Exhibit 271 is the grievance of Keyvan Shahrouz, who alleged that he was working "out of class" and sought a promotion to the higher pay grade; he does not contest furloughs. Exhibit 272 is the grievance of Leon Agravante who grieves a failure to consult with the Union relative to his displacement from one position to another; he does not contest furloughs. In addition, at least two employees, Jack Scott and Gina Robles, grieved changes to their schedule, without specifically indicating that the schedule changes were related to furloughs.

the workweek and salary provisions of the MOUs would involve the "interpretation or application" of the MOUs, thus rendering furloughs grievable.

The City opposed the petition, arguing that furloughs implemented pursuant to a declaration of emergency are not grievable. The City relied on language in section 1.9 of the MOUs, which it argued granted the City the absolute management right to furlough employees. As section 1.9 of the MOUs will play a significant part in our analysis, we set it forth in detail: "As the responsibility for the management of the City and direction of its work force is vested exclusively in its City officials and department heads whose powers and duties are specified by law, it is mutually understood that except as specifically set forth herein no provisions in this MOU shall be deemed to limit or curtail the City officials and department heads in any way in the exercise of the rights, powers and authority which they had prior to the effective date of this MOU. The Association recognizes that these rights, powers, and authority include but are not limited to, *the right to . . . relieve City employees from duty because of lack of work, lack of funds* or other legitimate reasons . . . take all necessary actions to maintain uninterrupted service to the community and carry out its mission in emergencies; *provided, however, that the exercise of these rights does not preclude employees and their representatives from consulting or raising grievances about the practical consequences that decisions on these matters may have on wages, hours, and other terms and conditions of employment*." (Italics added.)

In its opposition to the petition to compel arbitration, the City relied on the language first italicized. That is, the City argued that the language retaining to the City

the right to relieve employees from duty because of lack funds permitted it to implement mandatory furloughs. However, the City did not call the trial court's attention to the second phrase we have italicized, the language indicating that employees retained the right to grieve "the practical consequences" that such decisions may have on wages, hours, and other terms and conditions of employment.

The trial court rejected the City's arguments and granted the petition to compel arbitration, concluding that the issue of furloughs fit within the broad definition of a grievance found in section 3.1 of the MOUs. The court also concluded that any conflict between (1) the language in section 1.9 permitting the City to reduce work hours and (2) the workweek and salary provisions in other sections of the MOU would involve issues of interpretation and application of the MOU, which were left to the grievance procedure under section 3.1.

The City filed a petition for writ of mandate, challenging the trial court's order compelling arbitration of the approximately 400 grievances. In the City's brief, it relied on section 1.9 of the MOU, but focused on the language permitting the City to take necessary actions to carry out its mission in emergencies, not the language allowing the City to relieve employees from duty due to lack of funds. Again, the City did not discuss the language reserving the employees' right to grieve the practical consequences of such decisions.

We issued an order to show cause and set the matter for hearing.[7] After our initial review of the matter, we requested additional briefing on what appeared to be the relevant language of section 1.9 of the MOU: (1) the provision allowing the City to relieve employees from duty due to lack of funds; and (2) the provision reserving to employees and the Union their right to grieve the practical consequences of such actions.

ISSUES PRESENTED

The first issue presented by this writ proceeding[8] is whether the courts or the arbitrator should determine the issue of arbitrability. We conclude the MOUs did not

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[7] Amicus briefs were submitted by a coalition of City unions, in support of Union, and the League of California Cities, in support of City.

[8] "By issuing our order to show cause, we necessarily determined the propriety of writ review." (*County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 336, fn. 6.) In any event, writ review of an order granting arbitration is proper if matters ordered arbitrated fall clearly outside the scope of the arbitration agreement or if the arbitration would appear to be unduly time consuming or expensive. (*Zembsch v. Superior Court* (2006) 146 Cal.App.4th 153, 160.) The latter situation, if not the former, clearly applies. The Union would have 400 separate arbitrations, before the ERB, of the propriety of the City's decision to furlough employees – the time consumption and expense would be extraordinary. The Union responds that "there is nothing in the MOUs which prevents the parties from consolidating the grievances." Indeed, there is – the "parties" to this writ are the City and the Union; a grievance cannot be pursued on a consolidated basis without the agreement of every employee. A grievance may be pursued by the Union on behalf of the employees only if all employees waive their rights to file individual grievances. Clearly, as the 400 grievances in this case attest, the Union and/or its employees did not choose to pursue this alternative. (We do note that some of the attached exhibits indicate that some employees pursued their grievances in small groups.) In any event, the City submitted an e-mail exchange with the Union, in which the City transmitted to the Union a "group grievance and individual waiver form," which the Union rejected as it might not be acceptable to all City departments and bureaus. The Union ended its e-mail with, "I guess what we will do is handle each grievance [as] a separate issue

clearly and unmistakably assign the issue to the arbitrator, thus, arbitrability remains an issue for the courts. Second, we turn to the language of the MOUs and consider whether, under sections 1.9 and 3.1, the MOUs provide for arbitration of the decision to furlough employees. We conclude the relevant contractual language is ambiguous and, as the issue was not properly presented to the trial court, we decline to resolve it in the first instance, as extrinsic evidence may be available and thus necessary to any determination of the issue. Third, we consider whether, even if the MOUs *did* provide for the arbitration of the decision to furlough employees, the agreement to arbitrate such a decision would be valid under the law. We conclude that such an agreement would constitute an improper delegation of discretionary policymaking power vested in the City Council. We will therefore hold that the issue is not arbitrable and will grant the petition.

DISCUSSION

1. *Standard of Review*

"Code of Civil Procedure section 1281.2 specifically states that [a court] must order an arbitration of a dispute 'if it determines that an agreement to arbitrate the controversy exists . . . ' It goes on to provide, '[i]f the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may

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which will require separate responses from management on each grievance, separate step meetings for each grievance, separate arbitrations for each grievance, etc." As it appears that the City sought group resolution of the grievances, and the Union rejected the attempt, specifically indicating that "separate arbitrations for each grievance" would be necessary, the Union cannot now assert that arbitrating the grievances would not be unduly time consuming or expensive, on the basis that such arbitration would proceed on a consolidated basis.

not be refused on the ground that the petitioner's contentions lack substantive merit.' In determining whether there is an obligation to arbitrate this particular dispute, we must examine and, to a limited extent, construe the underlying agreement." (*United Public Employees v. City and County of San Francisco* (1997) 53 Cal.App.4th 1021, 1025-1026.)

"In reviewing the superior court's order [granting] the petition to compel arbitration, we apply basic rules for interpreting contracts, to analyze both the agreement and the arbitration clause within it. [Citation.] An 'arbitration agreement is subject to the same rules of construction as any other contract, including the applicability of any contract defenses.' [Citation.] '[U]nder both federal and California law, arbitration agreements are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. [Citations.] In other words, . . . an arbitration agreement may only be invalidated for the same reasons as other contracts.' [Citation.] [¶] 'A motion to compel arbitration is, in essence, a request for specific performance of a contractual agreement. The trial court is therefore called upon to determine whether there is a duty to arbitrate the matter; necessarily, the court must examine and construe the agreement, at least to a limited extent. Determining the validity of the arbitration agreement, as with any other contract, " 'is solely a judicial function unless it turns upon the credibility of extrinsic evidence; accordingly, an appellate court is not bound by a trial court's construction of a contract based solely upon the terms of the instrument without the aid of evidence.' [Citation.]" ' [Citation.]" (*Duffens v. Valenti* (2008) 161 Cal.App.4th 434, 443.)

2. *The Courts Resolve the Issue of Arbitrability*

"The question of whether a collective bargaining agreement creates a duty for the parties to arbitrate a particular grievance is an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator. The court also determines what issues are subject to arbitration. [Citation.]" (*United Public Employees v. City and County of San Francisco, supra,* 53 Cal.App.4th at p. 1026.)

"The issue of who should decide arbitrability turns on what the parties agreed in their contract." (*Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547, 551.) "California courts use the same principles of contract interpretation whether the arbitration clause is in a collective bargaining agreement or a commercial contract. 'Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.' " (*Id.* at p. 553.)

The trial court may consider evidence on factual issues relating to the issue of arbitrability, i.e., "whether, under the facts before the court, the contract excludes the dispute from its arbitration clause or includes the issue within that clause." (*Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 653.) In this case, however, no such evidence was submitted to the trial court.

We thus turn to the language of the MOUs to determine whether the contractual language "clearly and unmistakably" provides that the arbitrator is to determine whether an issue is arbitrable. We find no such language. The only language which discusses

the scope of an arbitrator's jurisdiction is the language of section 3.1 defining a grievance "as any dispute concerning the interpretation or application of this written MOU or departmental rules and regulations governing personnel practices or working conditions applicable to employees covered by this MOU." While the Union argues that "interpretation . . . of this written MOU" encompasses interpretation of the definition of an arbitrable grievance itself, the quoted language does not clearly and unmistakably lead to that conclusion.[9] Instead, it may simply mean that issues of interpretation of the MOU are among the issues subject to the grievance procedure, but it is up to the courts to determine whether any particular issue is, in fact, subject to that procedure. With no clear and unmistakable provision that the arbitrator determines arbitrability, the issue is one for the courts. (See *Engineers & Architects Assn. v. Community Development Dept., supra,* 30 Cal.App.4th at pp. 651-652 [court determined whether the right to lay off an employee for lack of funds was within the scope of the grievance and arbitration procedure].)

3. *The MOU Is Ambiguous as to Whether Furloughs are Arbitrable*

Turning to the language of the MOU itself, the issue of whether the decision to furlough employees is arbitrable appears to be one requiring the interpretation of sections 1.9 and 3.1 of the MOUs. As discussed above, section 3.1 provides a broad definition of "grievance," encompassing, "any dispute concerning the interpretation or application of this written MOU or departmental rules and regulations governing

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[9] Strictly speaking, the clause in question does not discuss the scope of the arbitrator's jurisdiction at all; it simply defines a grievance which is subject to the six-step grievance procedure, ending in arbitration.

personnel practices or working conditions applicable to employees covered by this MOU." The Union argues that furloughs, as they affect working conditions, are within the scope of this provision.[10] Similarly, the Union argues that whether the City has the right to unilaterally furlough employees under the MOU involves interpretation and application of the MOU.[11]

Section 1.9 of the MOU, however, provides, "it is mutually understood that except as specifically set forth herein[12] no provisions in this MOU shall be deemed to

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[10] Although the City does not make the argument, we note that the definition of grievance applies to "*departmental rules and regulations* governing personnel practices or working conditions." The Mayor's implementation of the furlough program was not a department rule or regulation, but the citywide application of an ordinance.

[11] Strictly speaking, we question whether the issue is one of MOU interpretation. The Union takes the position that unilaterally-imposed furloughs violate the MOU, and that is the end of the matter. While the City argues that section 1.9 of the MOU permits it to unilaterally furlough employees, the City also argues that, even if the MOU does not permit the imposition of furloughs, the City nonetheless may implicitly suspend operation of the MOU by emergency ordinance properly enacted. This raises an issue of interpretation of law, not interpretation of contract. Indeed, the Union argues that while the State may furlough its employees (despite contrary MOU terms) by properly enacted Legislation, the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.) forbids local government entities from doing so. This appears to raise a legal issue, which would not be amenable to labor arbitration.

[12] The Union suggests that the "except as specifically set forth herein" language should be interpreted to mean, "except as otherwise set forth in the MOU," thus creating a conflict between section 1.9 and section 3.1. We disagree. The language reads, "except as specifically set forth herein no provisions in this MOU shall be deemed to [limit the City's enumerated rights]." Accepting the Union's interpretation, the clause would mean, "except as otherwise set forth in the MOU, no provisions in this MOU shall be deemed to [limit the City's enumerated rights]," a nonsensical interpretation which reads the entire section out of existence. The "except as specifically set forth herein" can only be read to mean "except as specifically set forth in this section." Thus, section 1.9 of the MOU provides a limitation on the remainder of the MOU. Under it,

limit or curtail the City officials and department heads in any way in the exercise of the rights, powers and authority which they had prior to the effective date of this MOU. The Association recognizes that these rights, powers, and authority include but are not limited to, the right to . . . relieve City employees from duty because of lack of work, lack of funds or other legitimate reasons . . . provided, however, that the exercise of these rights does not preclude employees and their representatives from . . . raising grievances about the practical consequences that decisions on these matters may have on wages, hours, and other terms and conditions of employment." The "provided, however" clause appears to limit the employees' rights to raise grievances regarding the exercise of the City's reserved rights to those grievances which pertain only to the practical consequences of the City's decisions. That is, the City retains the right to relieve employees from duty because of lack of funds, while the employees retain the right to grieve the practical consequences of such relief from duty – *not* the decision to relieve employees from duty itself. Indeed, no other construction of section 1.9 makes sense. If the employees retained the right to grieve the management decisions themselves, section 1.9 would have so provided, rather than indicating only that they retained the right to grieve the practical consequences.

This court addressed this issue in *Engineers & Architects Assn. v. Community Development Dept., supra*, 30 Cal.App.4th 644. In that case, an employee was laid off from work due to lack of work and lack of funds. The employee filed a grievance,

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"no provisions in th[e] MOU shall be deemed to" limit the City's enumerated rights, except as specifically provided in section 1.9 itself.

asserting that sufficient work and funds existed. The City denied the employee's request for arbitration, and the Union filed a petition to compel arbitration. The trial court concluded that substantial evidence existed that there was a lack of funds prompting the layoff, thus triggering section 1.9's exclusion from arbitration. We affirmed. (*Id.* at p. 655.) Once the layoff was established to be the result of lack of work and/or lack of funds, the decision was a management decision under section 1.9, which excluded it from the grievance and arbitration process. (*Ibid.*) We also rejected the argument that the "practical consequences" exception applied; the employee was challenging his layoff itself, not the consequences thereof. (*Ibid.*)

The issue thus becomes whether a decision to *furlough* employees due to a fiscal emergency is a management decision protected from arbitration under section 1.9 of the MOU.[13] Certainly, the language of section 1.9 is capable of this construction.

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[13] The issue sought to be arbitrated by the Union is whether the furloughs themselves were permissible, not the practical consequences of the furloughs. We note, however, that the 400 grievances at issue in this case did not always draw such a clear distinction. Prior to the furloughs, many employees were on a schedule in which, for each two-week pay period, rather than working 8 hours per day, they worked 9 hours per day for 9 days, and took the tenth day off. In giving effect to the furloughs, some departments apparently put all employees on an 8-hour workday, with every other Friday off. The result was that employees on the non-traditional work schedule did not get an additional day off due to furloughs, but simply reduced their workdays by one hour per day. Additionally, employees who had their scheduled day off as a day other than Friday were rescheduled to take every other Friday off. Grievances challenging these schedule changes appear to be challenges to the practical consequences of the furloughs, not the furloughs themselves. The responses to grievances raising these issues varied. In some cases, the relevant City department responded by saying, "the [d]epartment will reevaluate work schedules of furloughed staff." In others, the grievant withdrew the claim, saying that schedule changes were no longer an issue. In others, the department responded by saying scheduling necessitated by the furloughs was a management responsibility which was not grievable. In still others, the

Section 1.9 applies to a decision to "relieve City employees from duty because of . . . lack of funds." Surely, a furlough imposed due to fiscal emergency is a decision to relieve an employee from duty because of lack of funds. However, the Union argues that the "relieve City employees from duty because of . . . lack of funds" language was meant to apply *only* to layoffs, not to furloughs.[14] There is language in the recent Supreme Court decision of *Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989, 1041-1042, fn. 35, which states that similar language "reasonably can be interpreted" to refer only to layoff authority. Thus, it appears that the clause may be ambiguous.

As this precise issue was not raised before the trial court,[15] there was no extrinsic evidence presented to the court as to the meaning of "relieve City employees from duty because of . . . lack of funds." There is some reason to believe such extrinsic evidence may exist. We note that the language of section 1.9 of the MOU is nearly identical to

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scheduling grievances were addressed on the merits, with a decision being made that the scheduling changes were not arbitrary, capricious or discriminatory. The Union made no effort in its petition to compel arbitration to identify grievances which challenged scheduling as a practical consequence of the furlough decision, or to argue that these grievances should proceed to arbitration of that issue alone.

[14] There may be a judicial estoppel issue, at least with respect to some employees. In the grievance proceedings pursued by four employees, Angel Calvo, the Union's representative, argued that layoff protections should have been triggered by the furloughs "since furloughs are in essence layoffs."

[15] The City *had* argued that a furlough is a decision to relieve an employee from duty because of lack of funds. However, the City had argued that this interpretation of section 1.9 resulted in its furlough decision being *permissible under the MOU*, not that it resulted in the furlough decision being *inarbitrable* under the MOU. The trial court, thus believing that the issue went to the merits rather than arbitrability, declined to resolve it.

section 4.859 of the Los Angeles Administrative Code, which provides, in pertinent part, "It is . . . the *exclusive* right of City management to take disciplinary action for proper cause, *relieve City employees from duty because of lack of work or other legitimate reasons* . . . and to take any necessary actions to maintain uninterrupted service to the community and carry out its mission in emergencies; provided, however, that the exercise of these rights does not preclude employees or their representatives from consulting or raising grievances about the practical consequences that decisions on these matters may have on wages, hours, and other terms and conditions of employment." (Emphasis added.) In other words, the Administrative Code provides that management retained the right to relieve City employees from duty because of lack of work or other legitimate reasons, but when this language was incorporated into the MOUs, the right to relieve employees from duty because of *lack of funds* was added to the list. Presumably, there was some reason that this language was added to the MOUs – although whether it was intended to refer to layoffs only, or layoffs and furloughs, is not clear.[16]

If these were the only circumstances, we would remand for a trial court determination of whether the language in section 1.9, exempting certain management decisions from the grievance procedure, applies to furloughs.[17] However, it is

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[16] We note that when the City Charter refers to layoffs, it does not use the term "relieve from duty." Instead, the charter refers to "suspension and restoration," when discussing layoffs. (L.A. City Charter, § 1015.)

[17] The City also relies on the language in section 1.9, protecting from the grievance procedure management's decision to "take all necessary actions to maintain

unnecessary to do so as we will conclude that even *if* the MOU provided that the decision to furlough employees in a fiscal emergency was subject to arbitration, such a provision would be an improper delegation of the City Council's discretionary power. We now turn to that issue.

4. *An Agreement to Arbitrate Furloughs Resulting from Fiscal Emergencies Would be an Improper Delegation of the City Council's Discretionary Policymaking Power*

We assume, arguendo, that in the MOUs, which the City Council approved, the City Council had agreed that its decision to furlough employees due to a lack of funds would be subject to review by an arbitrator. The City contends that such an agreement would be an improper delegation of power. We agree.

Preliminarily, we note that cases discuss at least three different types of improper delegations. While language used in each of these types of cases may be relevant to our analysis, only one type of improper delegation is at issue in this case. We discuss the other two types of improper delegations briefly.

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uninterrupted service to the community and carry out its mission in emergencies," arguing that it applies to furloughs resulting from declarations of fiscal emergency. The Union responds that this language was not intended to apply to *fiscal* emergencies. Again, the MOU is reasonably capable of both interpretations; but the parties presented no extrinsic evidence, choosing to rely instead on legal interpretations of the term "emergency" in the context of whether the employer is relieved from a meet and confer obligation prior to acting. (E.g., *Sonoma County Organization etc. Employees v. County of Sonoma* (1991) 1 Cal.App.4th 267, 275-276.) That these are two different types of emergencies should be apparent – an emergency relieving the City from its obligation to consult with unions prior to adoption of an ordinance does not exempt the City from consulting at the earliest practical time thereafter (L.A. Admin. Code, § 4.850), while an exercise of the City's power to take necessary actions to carry out its mission in emergencies relieves the City from consulting on anything but the practical consequences thereof (L.A. Admin. Code, § 4.859).

First, the City discusses improper delegations of municipal power to private individuals under California Constitution, article XI, section 11. Subdivision (a) of this section provides, "The Legislature may not delegate to a private person or body power to make, control, appropriate, supervise, or interfere with county or municipal corporation improvements, money, or property, or to levy taxes or assessments, or perform municipal functions." This provision is inapplicable to the instant dispute as it deals with *State* delegations of municipal power to private individuals, not a City's delegation of its own power. (*California Assn. of Retail Tobacconists v. State of California* (2003) 109 Cal.App.4th 792, 828.) We are concerned with the City Council's purported delegation of its authority to an arbitrator; article XI, section 11 does not apply.

A second type of improper delegation is when a legislative body improperly delegates its own lawmaking power to another actor, such as an administrator (e.g. *Hess Collection Winery v. Agricultural Labor Relations Bd.* (2006) 140 Cal.App.4th 1584, 1604) or arbitrator (e.g., *Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 455). The purpose of the doctrine "is to ensure that the Legislature resolves the truly fundamental policy issues and that a grant of authority is accompanied by sufficient safeguards to prevent abuses." (*Id.* at p. 455.) "That a third party performs some role in the application and implementation of an established legislative scheme does not render the legislation invalid as an unlawful delegation of legislative authority." (*Ibid.*) While we are concerned with the legislative power of the

City Council, that is, its power to pass the ordinance authorizing furloughs, this is not the type of improper delegation that is properly applicable to this case.

The third type of improper delegation, and the one which controls the result in this case, is the improper delegation by a public agency or officer of its *discretionary* power. "As a general rule, powers conferred upon public agencies and officers which involve the exercise of judgment or discretion are in the nature of public trusts and cannot be surrendered or delegated to subordinates in the absence of statutory authorization." (*California Sch. Employees Assn. v. Personnel Commission* (1970) 3 Cal.3d 139, 144; *San Francisco Fire Fighters v. City and County of San Francisco* (1977) 68 Cal.App.3d 896, 901 (*San Francisco Fire Fighters*).) The *San Francisco Fire Fighters* case is instructive. In that case, the city charter gave authority over the city's fire department to the fire commission, and granted the fire commission the powers and duties to provide reasonable rules and regulations for the conduct of its affairs. (*San Francisco Fire Fighters, supra,* 68 Cal.App.3d at p. 899.) An MOU, approved by the fire commission itself, as well as the city's mayor and board of supervisors, provided for arbitration of grievances regarding the terms and conditions of employment. (*Id.* at p. 900.) The union argued that this provision was an agreement to arbitrate matters such as the right to strike, disciplinary matters, fitness requirements, and conditions of assignment and transfer. (*Id.* at p. 898.) The issue presented in the *San Francisco Fire Fighters* case was whether the fire commission (and/or the mayor and board of supervisors) had the authority to surrender, via the MOU, the fire commission's powers and duties to prescribe rules and regulations over the fire

department to an arbitrator. The court concluded that it did not. The court relied on the fundamental principle that powers conferred upon a municipal corporation and its officers and agents cannot be delegated to others unless so authorized by the legislature or charter. (*Id.* at p. 901.) Where the law imposes a personal duty upon an officer relating to a matter of public interest, that officer *cannot* delegate its duty to others, as by submitting it to arbitration. (*Ibid.*) In the absence of an appropriate amendment to the city's charter, the discretionary authority vested by the charter in the fire commission could not be delegated to an arbitrator, even by the fire commission itself. (*Id.* at p. 904.)

In this case, it is undisputed that the City's Charter vests budgeting discretion in the City Council and the Mayor. (L.A. Charter, §§ 310-315.) It is also undisputed that the City's Charter provides that the City Council "shall set salaries for all officers and employees of the City."[18] (L.A. Charter, § 219.) Clearly, a mandatory furlough is encompassed within salary setting (see *Professional Engineers in California Government v. Schwarzenegger, supra,* 50 Cal.4th at p. 1036) and a furlough imposed in a fiscal emergency is encompassed within budget making. Moreover, it cannot legitimately be disputed that setting salaries is a *discretionary* function. In a case involving the authority of a county board of supervisors to set wages, the court stated,

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[18] That section goes on to provide, "Salaries shall be set by ordinance, unless otherwise set through collective bargaining agreements approved by the Council and entered into in accordance with the provisions of state law." The Union does not suggest that the reference to collective bargaining agreements in this Charter provision somehow constitutes implicit permission for the City Council to delegate its salary-setting authority to an arbitrator by means of an MOU.

"It is . . . clear that '[t]he fixing of the number of employees, the salaries and employee benefits is an integral part of the statutory procedure for the adoption of the county budget . . . . ' [Citation.] The exercise of the board's legislative power in budgetary matters 'entails a complex balancing of public needs in many and varied areas with the finite financial resources available for distribution among those demands. . . . [I]t is, and indeed must be, the responsibility of the legislative body to weigh those needs and set priorities for the utilization of the limited revenues available.' [Citation.] In so doing, the board must weigh 'a number of other factors besides the level of the union members' salaries.' " (*County of Sonoma v. Superior Court, supra,* 173 Cal.App.4th at p. 343.) The court concluded that setting employee wages is a "creative legislative function." (*Ibid.*)

As the decision to impose mandatory furloughs due to a fiscal emergency is an exercise of the City Council's discretionary salary setting and budget making authority, the City Council cannot delegate this authority to an arbitrator. The Union argues against this conclusion by raising the difference between "grievance" arbitration and "interest" arbitration. " 'Interest arbitration concerns the resolution of labor disputes over the formation of a collective bargaining agreement.' [Citation.] It differs from the more commonly understood practice of grievance arbitration because, ' "unlike grievance arbitration, [it] focuses on what the terms of a new agreement should be, rather than the meaning of the terms of the old agreement. . . . " [Citation.]' [Citation.] Put another way, interest arbitration is concerned with the acquisition of future rights, while grievance arbitration involves rights already accrued, usually under an existing

collective bargaining agreement. [Citation.] An interest arbitrator thus does not function as a judicial officer, construing the terms of an existing contract and applying them to a particular set of facts. [Citation.] Instead, the interest arbitrator's function is effectively legislative, because the arbitrator is fashioning new contractual obligations. [Citation.]" (*County of Sonoma v. Superior Court*, *supra*, 173 Cal.App.4th 322, 341-342.) The Union argues that only interest arbitration can constitute an improper delegation of discretionary authority and that, in contrast, it is seeking here only to arbitrate a grievance. The Union argues, "No fiscal policymaking functions will be performed by the arbitrator who merely interprets and applies the wage and hour provisions of [an] existing labor contract. Here, the Petitioner has already agreed to and ratified the wage and hour provisions contained in the MOUs and, therefore, the arbitrator will not be creating new obligations by adjudicating the subject grievances. The arbitrator will merely engage in a *quasi-judicial* inquiry as to whether the Petitioner has complied with its obligations under pre-existing terms of the MOUs." (Italics in original.)

The Union's argument is an elevation of terms over substance. The issue is not whether the Union is seeking arbitration of a grievance (and thus "grievance arbitration"), but whether the Union is seeking arbitration of policy matters left to the discretion of the City Council. Interest arbitration is problematic from a delegation point of view because it impacts policy matters, not because it is called interest arbitration. "[W]hen binding interest arbitration is applied in the public sector, it may result in the arbitrator's involvement in matters that extend beyond those over which

labor and management customarily bargain in private sector disputes; binding interest arbitration may push the arbitrator into the realm of social planning and fiscal policy. [Citation.] The obvious reason for this is that costs arising from the terms of a binding interest arbitration award must be paid out of governmental funds. For example, if an interest arbitrator were to accept the demand by a firefighters' union that a local government add an engine company, this might require 'the building of a new fire house or the purchase of new equipment, . . . [and] could very well intrude upon management's role of formulating policy.' [Citation.] A decision in a binding public sector interest arbitration proceeding might therefore require the governmental employer either to cut other items from its budget or to increase taxes. [Citation.]" (*County of Sonoma v. Superior Court, supra,* 173 Cal.App.4th at p. 342.) Interest arbitration may constitute an improper delegation because it involves the submission to arbitration of a general policymaking power to determine the terms and conditions of employment, a matter of public policy. (*Taylor v. Crane* (1979) 24 Cal.3d 442, 453.)

When considering the claims made in the employee grievances, and the relief sought by the Union, it is clear that the Union is seeking to have an arbitrator determine issues of discretionary policymaking which have been assigned to the City Council. The Union wants a determination made that the City *violated* the salary and workweek provisions of the MOU by instituting furloughs, and that the furloughs were therefore improper. Grievance after grievance argued that the furloughs were improper and that the employees should be returned to full-time work and repaid for the days on which they were furloughed. This is not a case where a single employee, or a single class of

employees, is questioning a departmental decision[19] to change their schedules or cut their pay. This is a challenge to a City Council's decision to impose furloughs as a response to the City's dire financial condition. If the City Council had agreed to arbitral review of such a decision, it would have been an improper delegation of its salary setting and budget making powers.

Finally, amici curiae on behalf of the Union rely on *Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, for the proposition that once a City executes an MOU setting salaries, it cannot set lower salaries by ordinance. The case is inapplicable. That case involved only the issue of whether a ratified MOU is binding on the parties; it is. (*Id.* at p. 332.) It did not consider whether a public employer could, within the MOU, delegate its discretionary salary setting and budget making authority to an arbitrator. It thus has no bearing on this case.

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[19] We note that the arbitration step of the grievance process requires service of the request for arbitration on "the head of the department, office or bureau." This supports the conclusion that arbitration was never intended to address discretionary policy decisions of the *City Council*.

DISPOSITION

The petition for writ of mandate is granted. The matter is remanded to the trial court for further proceedings consistent with this opinion. The City shall recover its costs in this proceeding.

CERTIFIED FOR PUBLICATION

CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

ALDRICH, J.