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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN LUIS OBISPO

SAN LUIS OBISPO COUNTY EMPLOYEES ASSOCIATION, et al., Petitioners, vs. COUNTY OF SAN LUIS OBISPO, et al., Respondents.	CASE NO. 49982 MEMORANDUM OF INTENDED DECISION

Petitioners, the San Luis Obispo County Employees Association, hereinafter referred to as CEA, are seeking a writ of mandate pursuant to Code of Civil Procedure Sections 1085, 1086 and 1094.5, to compel the Board of Supervisors of the County of San Luis Obispo, hereinafter referred to as the Board, to ascertain and declare the prevailing wage as of July 1, 1976. In 1973, the voters of the County adopted by the initiative procedure Section 2.48.180 of the San Luis Obispo County Ordinance:

"2.48.180 Wages or salaries shall be fixed pursuant to prevailing salaries or wages. In fixing compensation to be paid to persons in the County's employ, the Board

of supervisors and every other authority authorized to fix salaries or wages, shall, in each instance, provide a salary or wage at least equal to the prevailing salary or wage for the same quality of service rendered to persons, governmental agencies, firms or corporations under similar employment, in case such prevailing salary or wage can be ascertained.

Prevailing salaries or wages shall be determined by negotiations between the county's employer representatives and the recognized employee organization(s).

In case such prevailing salaries or wages cannot be so ascertained or the parties are at an impasse as to the determination of such prevailing wage, the matter shall be submitted to a mutually selected arbitrator who shall make a determination on the findings of the negotiating parties or make findings of his own. (Ord. 1260 §4, 1973)."

On August 4, 1976, after an impasse developed between CEA and County representatives, the Board adopted as wages and salaries the last offer made by its negotiating team. Pursuant to the provisions of section 2.48.180 the matter was submitted to a mutually designated arbitrator, Francis R. Walsh, who conducted hearings from November 29th through December 1st, 1976 and who rendered his report and findings on April 26, 1977. The arbitrator's report and findings substantially agreed with CEA's concept of the prevailing wage.

On June 29, 1977, the Board refused to consider the arbitrator's report and findings; said report and findings were

merely filed by the Board. On July 19, 1977, CEA requested a hearing before the Board to determine an issue of prevailing wages. This request was denied.

PROCEDURAL HISTORY OF LITIGATION

On April 18, 1978, the petitioner filed a petition for a writ of mandate. Judge Robert Carter overruled the respondents' demurrer and indicated in his memorandum of decision that the Board had a duty to consider the findings and recommendation of the arbitrator after the arbitrator's decision was filed, and based on the entire record presented, accept, or reject and make its own final decision with respect to the matter determined.

On October 7, 1978, the Board considered the arbitrator's findings, rejected them and reaffirmed its prior decision of August 4, 1976 (see Exhibit A attached to the declaration of Carol J. Dahle, executed August 30, 1978).

On July 23, 1979, petitioners filed an amended petition to require the Board to implement findings with respect to prevailing wages. On June 2, 1980, Judge Richard Patton sustained the demurrer to the petition with leave to amend on the ground that Code of Civil Procedure 1094.5 mandamus was not a proper procedure to review a legislative act. Judge Patton ruled that the Board was not required to hold an evidentiary hearing or prepare written findings.

On July 18, 1980, petitioners filed a second amended petition for a writ of mandamus pursuant to Code of Civil Procedure sections 1085, 1086 and 1094.5. Additionally, a third cause of action for declaratory relief was pled, alleging that the Board had a ministerial duty to consider the findings of the arbitrator.

Subsequently, the respondents filed a motion for judgment on the pleadings which was denied on October 8, 1980, by Judge Nathaniel O'Bradley. The respondents then demurred to the petition and on January 30, 1981, Judge Robert Carter overruled respondents' demurrer.

DISCUSSION

1. THE CONSTITUTIONALITY OF SECTION 2.48.180.

The trial of this matter proceeded on the assumption that the ordinance in question created a system of non-binding arbitration, and that binding arbitration was proscribed by the dictates of Bagley v. City of Manhattan Beach, 18 Cal.3d 22. This court does not generally raise issues unnecessary to the resolution of a dispute, but feels that a higher court may not necessarily be mesmerized by the majority rationale in Bagley. Therefore, a brief analysis of Bagley and its application to the instant case is appropriate.

A reading of the ordinance in the case at bar indicates that the ordinance is ambiguous as to whether or not binding arbitration was intended. The initiative was drafted by CEA in 1973. There can be little doubt that the drafters of the ordinance, who were not inhibited by the "give and take" of the legislative process, intended to effect a scheme of binding arbitration.

Binding arbitraion was probably constitutional until September 1976 when our Supreme Court decided Bagley in a five to two decision. The court held that a general law city cannot submit unresolved employee relations disputes to binding arbitration. This court entertains serious doubts about the future variability of Bagley in light of the fact that four of the five justices who

participated in the majority opinion are no longer members of the court. The majority opinion was predicated on two postulates. First, that the Legislature, in enacting Government Code Section 36506, placed the power to determine salaries in a general law city with the City Council.[1/] Secondly, that in enacting the Meyers-Millias-Brown Act (Government Code Sections 3500-3510), that the Legislature did not intend to provide for binding arbitration.

Government Code Section 28003,[2/] which applies to all counties, does not contain the mandatory language found in Government Code Section 36506, which applies to general law cities. Accordingly, the majority rationale of Bagley may not apply to a general law county such as San Luis Obispo. On the other hand, the ordinance in the case at bar, unlike the proposed initiative for Manhattan Beach[3/] contains none of the safeguards that were alluded to by Justice Mosk in his dissenting opinion.

If this court were to find that Section 2.48.180 created a scheme of binding arbitration, then under either the majority or dissenting rationale in Bagley, the ordinance would be invalid.

1/ "By resolution or ordinance the City Council shall fix the compensation of all appointed officers and employees. Such officers and employees hold office during the pleasure of the City Council."

2/ "In any county, the Board of Supervisors may by ordinance fix a date or schedule of dates for the payment of salaries of the officers, deputies, clerks, and employees of the several departments and institutions of county government."

3/ Since the Supreme Court opinion did not include the text of the proposed initiative, a true copy of the proposed initiative for the City of Manhattan Beach entitled "A Proposed Peaceful Settlement of Labor Dispute Ordinance Through Arbitration" is attached as Appendix "A." The court has taken judicial notice of the proposed ordinance which is contained in the Los Angeles Superior Court file No. C 76275, Bagley v. City of Manhattan Beach and reproduced a legible true copy.

On the other hand, it is the duty of the Court to construe legislation enacted so as to uphold its contitutionality whenever possible, and to avoid, if possible, any construction or render a statute (ordinance) unconstitutional. (See Bodinson MSG. Co. v. California Employment Commission, 17 Cal. 2d 321, 327.)

Notwithstanding the intent of the draftsman, the ordinance by its own terms is ambiguous and the court finds that the arbitrator's findings were merely advisory on the Board.

2. THE BOARD NEED NOT MAKE FINDINGS OR CONDUCT A TRIAL-TYPE HEARING.

The proceedings before the arbitrator and his findings provide an adequate record to test the Board's legislative act of setting the prevailing wage, and make it unnecessary for the Board to act in a quasi-judicial capacity. Therefore, although it is permissible, it is not necessary for the Board to conduct a trial-type hearing or to make findings.

In Walker v. County of Los Angeles, 55 Cal.2d 626, our Supreme Court found that the Board of Supervisors failed to exercise their quasi-judicial, non-legislative, fact-finding function preceding the performance of the indicated legislative act. Unlike the instant case, the Los Angeles County Ordinance contained no arbitration provision so the Board had to act in a quasi-judicial capacity in order to establish a record capable of being reviewed by a court. A court could then determine whether or not the Board acted arbitrarily or abused its discretion.

"The courts will not interfere with the Board's

determination of whether proposed rates of compensation are in accord with general prevailing rates unless the 'action is fraudulent or so palpably unreasonable and arbitrary as to indicate an abuse of discretion'." 55 Cal.2d 626, 639.

On August 7, 1978, the Board considered and rejected the arbitrator's findings and reaffirmed its previous decision of August 4, 1976. While the proceedings before the Board on August 7 might not be as explicit and legalistic as one might like, there can be no doubt that the Board considered the arbitrator's findings and rejected them.

3. THE BOARD DID NOT ABUSE ITS DISCRETION IN REJECTING THE ARBITRATOR'S FINDINGS AND REAFFIRMING ITS PRIOR ACTION OF AUGUST 4, 1976.

While it is not technically within the parameters of the pleadings, it might be beneficial, in order to avoid future litigation, to comment on the propriety of the Board's action of August 7, 1978. The Court has considered the proceedings before Arbitrator Francis Walsh, his report and findings, and the proceedings before the Board on August 7, 1978. In the final analysis, the legality of the Board's action depends upon whether any substantial evidence was contained in the record of the arbitration proceedings which would justify the action of the Board.

In attempting to answer the question of whether or not the Board abused its discretion, it should be noted that the prevailing wage ordinance gives no clue as to the appropriate methodology of computation to be used in ascertaining prevailing wages. The core of the dispute between CEA and the Board centers around the fact that CEA and the arbitrator believe that the wages of California State Employees should be factored into the equation

on a weighted basis whereas the county takes the position that prevailing wages should not be tied to state compensation since they are the largest and highest paying employer in the area, and if they are to be considered at all, it should be on an unweighted average basis.

Neither contention is inherently unreasonable. The court will take judicial notice that the salaries of the employees of small rural counties are generally lower than those situated in urban areas or large urban counties, whereas compensation paid to state employees would be the same whether or not they are situated in Alpine or Los Angeles counties.

When the salaries of state employees are added into the equation on a weighted basis, this method of calculation probably improperly skews the prevailing wage to a higher level.

It would have been very simple for the drafters of the initiative to include within the proposed ordinance a provision mandating the use of a weighted approach as contrasted with a straight averaging approach. Not only did the drafters of the initiative fail to address this issue, but they failed to set forth any other criteria to be used in establishing the prevailing wage.

The drafters of an initiative should be in no different position than a party who drafts an ambiguous contract. The language of the contract is to be interpreted most strongly against the party who caused the uncertainty to exist. (See Civil Code section 1654, Lassing v. James, 107 Cal. 348).

Since the ordinance does not specify the methodology to be used in computing the prevailing wage, the action of the Board in rejecting the arbitrator's weighted averaging approach was not

palpably unreasonable, arbitrary or an abuse of discretion.

The petition for writ of mandamus is denied. Respondents to recover their cost. Unless otherwise waived, respondent to prepare findings of fact and conclusions of law.

DATED: October 5, 1981.

Peter S. Smith

PETER S. SMITH
Judge of the Superior Court

A PROPOSED PEACEFUL SETTLEMENT OF LABOR DISPUTE
ORDINANCE THROUGH ARBITRATION

a) It is hereby declared to be the policy of the voters of the City of Manhattan Beach to establish and maintain fair wages, hours, and other terms and conditions of employment for members of the Fire Department which are comparable to similar private and public employment without the potential of labor strife, dissension, and strikes. To achieve this objective, the voters of the City hereby recognize the value of and adopt the principle of binding arbitration as an equitable alternative to labor strikes as a means to arrive at a fair resolution of terms and conditions of employment when the parties have been unable to resolve these questions through negotiations.

b) Pursuant to the public policy herein declared, either the City or the recognized employee organization for the members of the Fire Department may, as the result of impasse after meeting and conferring in good faith on matters within the scope of representation as required by applicable State law, refer any such matters which are unresolved to binding arbitration under the provisions of this section; except that the Charter provisions concerning the Fire Retirement System and such other provisions of this Charter which specifically govern wages, hours, and other terms and conditions of employment of members of the Fire Department shall not be subject to change by arbitration. In any such arbitration, the arbitrator is directed to take into consideration the City's purpose and policy to create and maintain wages, hours and other terms and conditions of employment which are fair and comparable to similar private and public employment and which are responsive to changing conditions and changing costs and standards of living. The arbitrator shall also consider: the interests and welfare of the public; the availability and sources of funds to defray the costs of any changes in wages, hours and conditions of employment; and all existing benefits and provisions relating to wages, hours and terms and conditions of employment of the members of the Fire Department whether contained in this Charter or elsewhere.

c) Any unresolved dispute or controversy arising under the provisions of this section, or any unresolved dispute or controversy pertaining to the interpretation or application of any negotiated agreement covering uniformed members of the Fire Department shall be submitted to an impartial arbitrator. Representatives designated by the City and representatives of the recognized employee organization affected by the dispute or controversy shall select the arbitrator. In the event that said parties cannot agree upon the selection of the arbitrator within five days from the date of any impasse, then the California State Conciliation Service shall be requested to nominate five (5) persons, all of whom shall be qualified and experienced as labor arbitrators. If the representatives of the recognized employee organization and the City cannot agree on one of the five to act as arbitrator, they shall strike names from the list of said nominees alternately until the name of one nominee remains who shall thereupon become the arbitrator. The first party to strike a name from the list shall be chosen by lot. Every effort shall be made to secure an award from the impartial arbitrator within thirty (30) calendar days after submission of all issues to him.

d) The arbitration proceedings herein provided shall be governed by Sections 1280, et seq., of the California Code of Civil Procedure. The arbitrator's award shall be submitted in writing and shall be final and binding on all parties. The City and the affected employee organization shall take whatever action is necessary to carry out and effectuate the award. The expenses of arbitration, including the fee of the arbitrator's services, shall be borne equally by the parties. All other expenses which the parties may incur individually are to be borne by the party incurring such expenses.

e) Nothing herein shall be construed to prevent the parties from submitting controversies or disputes to mediation, fact-finding or other reasonable method to finally resolve the dispute should the City and the recognized employee organization in the controversy or dispute so agree. An impasse may be declared by either the City or the recognized employee organization in the event the parties fail to reach agreement on matters within the scope of representation after meeting and conferring in good faith as required by applicable State law, or after other mutually agreed upon settlement methods fail to result in agreement between the parties.