IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WASHOE COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA,
Petitioner,
vs.
THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE BRENT T. ADAMS, DISTRICT JUDGE,
Respondents,
and
VIVIAN SIMONS, AN INDIVIDUAL; AND THE WASHOE COUNTY SHERIFF'S DEPUTIES ASSOCIATION, AN EMPLOYESS ORGANIZATION,
Real Parties in Interest.

No. 66501

ORDER DENYING PETITION

This is an original Petition for Writ of Mandamus. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

In this original petition for writ of mandamus, the Petitioner, Washoe County, seeks to vacate an interlocutory order of the district court compelling the parties to proceed to arbitration. Washoe County contends that the district court's order is erroneous because the right to seek arbitration was waived in this case pursuant to NRS 38.217(1), and such "waiver" resulted in "prejudice" to Washoe County. We disagree, and clarify that the concept of "waiver" set forth in NRS 38.217(1) refers to a "waiver" of the right to adjudicate a grievance through arbitration, and not

to a "waiver" of the right to assert the underlying claim at all. Because Washoe County's assertions of "prejudice" arise from the latter rather than the former, we conclude that no error occurred, and therefore dismiss the petition.

FACTS AND ARGUMENTS BELOW

Between 1996 and 2006, Real Party in Interest Vivian Simons was employed as a Deputy Sheriff with the Washoe County Sheriff's Office. The terms of her employment were governed by a collectively bargained agreement negotiated pursuant to NRS Chapter 288, which required the filing of a grievance and relating to, and arbitration of, any alleged adverse employment action.

In July 2004, Simons was suspended without pay for eleven days for violating her employer's internet usage policy. Subsequently, on April 28, 2006, Simons was terminated from employment for additional alleged violations of her employer's computer policies.

When those employment actions originally occurred, Simons timely filed a grievance against her then-employer, Washoe County, and an arbitration hearing was scheduled for July 13-14, 2006. The hearing was cancelled, and Washoe County asserts that it then attempted to reschedule the arbitration for February 2007, engaged in some kind of unspecified conversation with Simons' then-counsel in "2008 or 2009" regarding other potential hearing dates which led nowhere, and thereafter heard nothing from Simons for several years until receiving a letter dated November 4, 2013 indicating her desire to reschedule the arbitration. On February 20, 2014, Simons filed a Petition to Compel Arbitration in

district court asserting a right to arbitrate those two adverse employment actions.

Washoe County opposed the Petition. In district court, as well as in this writ before us, Washoe County contends that, under the circumstances, Simons has "waived" her right to proceed to arbitration by doing nothing for so long before filing her Petition to Compel Arbitration on February 20, 2014, some seven years after her employment was finally terminated. Washoe County contends that it will be severely prejudiced by being forced to proceed to arbitration after such a lengthy delay because: (1) it will have to locate potential witnesses to the employment actions who may no longer be employed with Washoe County and whose whereabouts may not be known; (2) witnesses may not recall the incident clearly or may have lost relevant documentary evidence; (3) in the event that the Arbitrator decides in Simons' favor, Washoe County might be forced to either re-hire Simons (which would require extensive retraining and certification as she has not worked for Washoe County since 2006), or might be forced to compensate Simons for back pay dating to 2006, during a period of time in which the collective bargaining agreement applicable to Simons' position and governing her pay and benefits was renegotiated and modified on five separate occasions (2008, 2009, 2010, 2011, and 2013), rendering the calculation of back pay and benefits extraordinarily complex; and (4) in the event that Simons prevails, any damages award would be offset by income from other jobs held by Simons since 2006, a calculation that would be difficult to compute since Simons is known to have held at least 3 other jobs with different employers since 2006. Washoe County notes that all of these concerns would have been mitigated

had the arbitration been timely held in 2006 or 2007, as Washoe County originally requested.

The district court entered an order compelling arbitration. The district court agreed that Simons' actions were inconsistent with a genuine intent to arbitrate this matter, but found that Washoe County had not demonstrated prejudice. Washoe County contends that this was error requiring interlocutory intervention by this Court.

DISCUSSION

A petition for writ of mandamus is the proper method to challenge a district court order compelling arbitration because such an order is otherwise not appealable. *Kindred v. Second Judicial District Court*, 116 Nev. 405, 409, 996 P.2d 903, 906 (2000). Nonetheless, mandamus is an extraordinary remedy, and it is within the discretion of this court to determine if a petition will be considered. *Id.* at 410, 996 P.2d at 906-07 (citing *State ex rel. Dep't Transp. v. Thompson*, 99 Nev. 358, 360, 662 P.2d 1338, 1339 (1983)).

The "Uniform Arbitration Act of 2000" (NRS 38.206 - 38.248) governs arbitration agreements in Nevada. Contractual arbitration clauses are enforceable. *Kindred*, 116 Nev. at 410, 996 P.2d at 907 (citing *Clark Co. Public Employees v. Pearson*, 106 Nev. 587, 590, 798 P.2d 136, 137 (1990)) ("[w]hether a dispute is arbitrable is essentially a question of construction of a contract."). The Act "directs a court to order an arbitration proceeding upon a showing that there is an agreement to arbitrate." *International Ass'n of Firefighters, Local #1285 v. City of Las Vegas*, 104 Nev. 615, 618, 764 P.2d 478, 480 (1988). The question of arbitrability lies with the district court rather than the arbitrator, but

courts should normally order arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Id.* at 620, 764 P.2d at 481 (citing *AT&T Technologies v. Communications Workers of America*, 475 U.S. 643, 650 (1986)). Thus, Nevada courts resolve all doubts concerning the arbitrability of the subject matter of a dispute in favor of arbitration. *Exber, Inc. v. Sletten Constr. Co.*, 92 Nev. 721, 729, 558 P.2d 517, 522 (1976).

In this case, the parties do not dispute that a valid employment agreement existed between Washoe County and Simons (in the form of the collectively bargained agreement), that it contains an enforceable arbitration clause, or that the subject matter sought to be arbitrated (the two adverse employment actions) falls within the scope of the arbitration clause. Rather, Washoe County contends that the district court erred in compelling arbitration because Simons waived any right to arbitrate that otherwise may have been guaranteed in her employment contract.

NRS 38.217(1) permits a party that is otherwise entitled to arbitrate a dispute to waive that right "to the extent permitted by law." A party seeking arbitration may be deemed to have waived the right to do so if it: (1) knew of its right to arbitrate; (2) acted inconsistently with that right; and (3) prejudiced the other party by those inconsistent acts. *Nevada Gold & Casinos, Inc. v. American Heritage, Inc.*, 121 Nev. 84, 90, 110 P.3d 481, 485 (2005). Waiver is generally a question of fact, but when the facts are not contested and the question of waiver rests on the legal implications of those uncontested facts, waiver may be determined as a matter of law. *Id.* at 89, 110 P.3d at 484 (citing *Merrill v. DeMott*, 113

Nev. 1390, 1399, 951 P.2d 1040, 1045-46 (1997)). Orders compelling arbitration frequently involve mixed questions of fact and law, and thus, on appeal, a district court's factual findings are entitled to deference, but its conclusions of law are reviewed *de novo*. *See Marquis & Aurbach v. Eighth Judicial Dist. Ct.*, 122 Nev. 1147, 1156, 146 P.3d 1130, 1136 (2006); *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 553, 96 P.3d 1159, 1162 (2004).

The threshold legal question before the Court relates to the types of conduct that can legally constitute a "waiver" pursuant to NRS 38.217(1). Simons argues, and the district court agreed, that waiver can only be found if Simons had actively participated in litigating the very same matter in district court that she now seeks to arbitrate, something that she did not do in this case. In *Nevada Gold*, the Nevada Supreme Court held that, under certain circumstances, litigating a matter in district court can constitute a waiver of a right to arbitrate the same dispute if doing so has cause prejudice to the other party. 121 Nev. at 90-91, 110 P.3d at 485, citing *Kelly v. Golden*, 352 F.3d 344 (8th Cir. 2003) ("Prejudice may be shown (1) when the parties use discovery not available in arbitration, (2) when they litigate substantial issues on the merits, or (3) when compelling arbitration would require a duplication of efforts"). On the other hand, participation in litigation in another forum does not constitute waiver in every case if no such prejudice results. *Cnty. of Clark v. Blanchard Constr. Co.*, 98 Nev. 488, 491, 653 P.2d 1217, 1220 (1982).

Most Nevada cases relating to "waiver" under NRS 38.217(1) arise from similar sets of facts, involving the simultaneous litigation of the same claim before different tribunals. Simons thus argues that waiver cannot be found here because she did not seek to litigate her claim in another forum. However, Washoe County argues that the concept of

waiver embodied within NRS 38.217(1) should be read broadly to apply not only to instances in which a party actively litigated the same issue in another forum, but also to Simons' delay in seeking arbitration in this case. As a general proposition, there appears to be some support for this concept within existing case law. For example, the Nevada Supreme Court suggested, in dicta, in *Blanchard* that waiver might be found where "the delay in seeking arbitration was unreasonable or that [the party seeking arbitration] engaged in willful misconduct or acted in bad faith." 98 Nev. at 491, 653 P.2d at 1220. Furthermore, a waiver could potentially be found as a matter of contract law if the parties mutually entered into a subsequent written modification expressly waiving the right to assert the arbitration clause. *See International Association of Firefighters, Local #1285*, 104 Nev. 615, 764 P.2d 478 (concluding that employee's written stipulation did not constitute a waiver under the particular circumstances of the case, but impliedly recognizing that right to arbitration could be waived by written stipulation in appropriate situations). *See also* NRS 38.219(1) ("An agreement . . . to submit to arbitration . . . is valid, enforceable and irrevocable except . . . upon a ground that exists at law or in equity for the revocation of a contract.").

As applied to the instant case, however, Washoe County's argument conflates waiver of the forum, which is permitted under NRS 38.217, with waiver of the underlying claim, which has nothing to do with NRS 38.217. Fundamentally, Washoe County does not contend that because Simons has waived her right to pursue arbitration she must therefore pursue her claim in district court. Rather, Washoe County seeks dismissal of Simons' claim in its entirety because Washoe County actually contends that Simons' delay constitutes a waiver of her right to pursue her

claim at all, whether in district court or in arbitration. But that is not the kind of "waiver" referenced within NRS 38.217(1). By its plain language, what is "waivable" under NRS 38.217(1) are the procedures for conducting an arbitration set forth in NRS 38.206 through 38.248; NRS 38.217(1) does not encompass the waiver of the right to seek redress anywhere for an alleged violation of a substantive right under Nevada employment law that, but for the contractual arbitration clause, might have been asserted in another forum such as district court. That is precisely why the vast majority of cases interpreting NRS 38.217(1), such as *Nevada Gold* and *Blanchard*, deal narrowly with claims that were purportedly "waived" because they were first litigated in an improper forum. That is also why the test of "prejudice" enunciated in *Nevada Gold* is generally applied to consequences typically arising from having already previously litigated the same claim in another forum. *Nevada Gold*, 121 Nev. at 90-91, 110 P.3d at 485 (defining "prejudice" as advantage gained by litigating in another forum).

Washoe County's argument is thus not one fundamentally arising from an alleged "waiver" pursuant to NRS 38.217(1), for which the remedy would be to require Simons to litigate her claim in district court. Instead, Washoe County's argument is more akin to a request for dismissal with prejudice from any forum for lack of timeliness under the legal doctrines of laches, estoppel, failure to comply with the statute of limitations, or similar doctrines associated with a delay in initiating an action. But questions of timeliness are generally required to be adjudicated by the arbitrator, not by the courts. *See* Unif. Arbitration Act (2000) § 6 cmt. 2, 7 U.L.A. (Part 1A) 26 (2009) ("issues of procedural arbitrability, i.e., whether prerequisites such as time limits, notice, laches,

estoppel, and other conditions precedent to an obligation to arbitrate have been met are for the arbitrators to decide"). *See Dozier v. State*, 124 Nev. 125, 129, 178 P.3d 149, 152 (2008) (lack of compliance with the statute of limitations is a non-jurisdictional affirmative defense).

In this case, the district court concluded that Simons engaged in conduct inconsistent with a genuine intent to arbitrate the 2004 and 2006 adverse employment actions, but that Washoe County had failed to demonstrate that it suffered any prejudice resulting from any delay by Simons in seeking arbitration. The district court specifically noted that Simons had not engaged in litigating the same matter in another forum, and therefore the kinds of "prejudice" outlined in *Nevada Gold* did not exist in this case. The record demonstrates that the district court's conclusions were correct. Simons fails to proffer a credible reason for failing to take any action to seek redress for her alleged grievance for so long. It appears from the record that, between February 2007 and November 2013, the only action taken by Simons to pursue arbitration was a single telephone conversation between her then-counsel and Washoe County. Thus, the district court did not err when it concluded that the failure to take action for this excessively long period of time constituted conduct inconsistent with a genuine interest in pursuing arbitration.

Nonetheless, the district court found that Washoe County could not demonstrate the kinds of "prejudice" outlined in *Nevada Gold* because Simons never attempted to initiate any other competing litigation of her claim. Washoe County does not disagree with this conclusion, but nevertheless contends that the district court erred because Washoe County can demonstrate the existence of other kinds of "prejudice" arising from Simons' delay, namely that witnesses and evidence may be missing,

and that enforcement of any judgment in favor of Simons would be unduly complicated and expensive. But the "prejudice" asserted by Washoe County bears no relation to the question whether Simons has waived the forum of arbitration and should instead seek relief from the district court; indeed, the categories of "prejudice" identified by Washoe County would exist even if her claims were to be adjudicated in district court. Washoe County's claims of "prejudice" relate to alleged difficulties in defending against the merits of Simons' claims wherever they may properly be adjudicated, rather than to the question of where those claims ought to be heard. They are simply not the types of "prejudice" that are relevant to an alleged "waiver" under NRS 38.217(1).

Consequently, we conclude that the district court correctly concluded that Simons did not waive her right to adjudicate her grievance through arbitration pursuant to the arbitration clause contained in the collective bargaining agreement. *See International Ass'n of Firefighters*, 104 Nev. at 621, 764 P.2d at 482 (citing *Blanchard Constr. Co.*, 98 Nev. at 491, 653 P.2d at 1219) ("In view of Nevada's public policy strongly favoring arbitration when the parties previously agreed to that method of dispute resolution, a waiver should not be lightly inferred.").

CONCLUSION

For the reasons set forth above, we conclude that our intervention is not warranted and, therefore, we deny the Petition for Writ of Mandamus.

It is so ORDERED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Silver

cc: Second Judicial District Court, Department 6
Washoe County District Attorney/Civil Division
Dyer, Lawrence, Penrose, Flaherty, Donaldson & Prunty
Washoe District Court Clerk