

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-021634

06/05/2012

HONORABLE KATHERINE COOPER

CLERK OF THE COURT
A. Melchert
Deputy

WILLIAM R CHEATHAM, et al.

CLINT BOLICK

v.

PHIL GORDON, et al.

KATHRYN RUTH ELIZABETH
BAILLIE
JOHN A DORAN

UNDER ADVISEMENT RULING

Plaintiffs filed an action for declaratory and injunctive relief against certain provisions of the 2010-12 Memorandum of Understanding (“MOU”) between Defendants City of Phoenix (“the City”) and the Phoenix Law Enforcement Association (“PLEA”) on the basis that these provisions violate the Gift Clause of the Arizona Constitution, Ariz. Const. Art. IX §7.

On May 25, 2012, the Court conducted an evidentiary hearing on Plaintiff's Application for Preliminary Injunction. Plaintiffs seek to enjoin Sections 1-3.G, I, K, and Q of the MOU, referred to as “release time” provisions. Having considered the evidence, the parties' briefs, and the applicable law, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Parties

1. Plaintiffs are Phoenix taxpayers and residents. Defendant PLEA is a labor organization that represents Phoenix Police officers below the rank of sergeant who pay dues to belong to it.
2. The mission of the City of Phoenix Police Department is the safety of the community.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-021634

06/05/2012

3. The mission of PLEA is to represent the interests of its members.

MOU

4. The MOU defines the rights of PLEA members. Collectively, Sections 1-3.G, I, K, and Q authorize six full-time paid PLEA positions, a bank of 1,583 hours for “legitimate Association (ie PLEA) purposes,” 500 release time hours for a lobbyist, 15 days of release time to attend PLEA seminars and conventions, and 160 overtime hours for the six full-time positions.
5. The MOU provides that officers on release time receive their regular salary and benefits and maintain full eligibility in the Public Safety Personnel Retirement System ("PSPRS"). It requires that the City, as employer, make the employer's contributions to PSPRS in the same way that it does for officers doing regular police work.
6. The MOU states that the cost of release time is covered by the City in the City's total compensation package.
7. The MOU does not obligate PLEA to provide any services to the City in exchange for the compensation and benefits the City gives to PLEA for release time.
8. The MOU states that release time is for “legitimate Association purposes.” The MOU does not define what constitutes “legitimate Association purposes.”
9. The current MOU expires on June 30, 2012.

Release Time

10. The estimated cost to the City for release time is \$1 million annually.
11. PLEA uses release time to provide representation for officers during administrative investigations and grievance/disciplinary appeal meetings with management; to facilitate communication between City and Department management and officers; to provide training on topics relating to law enforcement, employment, and the union; to lobby legislative issues on behalf of its members; to negotiate contracts for PLEA members' rights and benefits; to attend PLEA meetings and seminars; to sit on PLEA, City, and State committees; and to perform community service projects.
12. PLEA also uses release time to meet its obligations under the City's Meet and Confer Ordinance and A.R.S. § 38-1101 (representation for officers during investigations that may result in dismissal, demotion or suspension).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-021634

06/05/2012

13. Officers on release time are trained, sworn officers hired by the Phoenix Police Department who are relieved of their law enforcement duties to perform PLEA business. If the need arises, the Department can assign officers on release time to return to police duties. If the officers were not on release time, they would be doing regular police work.
14. PLEA controls and oversees release time. It decides which officers will receive the full-time positions and which officers may use time from the bank of hours. PLEA determines the activities of the full-time officers and the purposes for the bank hours. The City does not know or control what the release-time officers do with that time.
15. PLEA does not help fund release time. It is funded 100% by the City.

CONCLUSIONS OF LAW

1. The criteria for a preliminary injunction are 1) likelihood of success on the merits, 2) possibility of irreparable harm without an injunction, 3) balance of hardships, and 4) public policy favors the injunction. *Shoen v. Shoen*, 167 Ariz. 58, 804 P.2d 787 (App. 1990). Injunctive relief operates on a sliding scale. An injunction is warranted if either there is 1) a probability of success on the merits and the possibility of irreparable injury, or 2) serious legal questions are presented and the balance of hardships weighs strongly in favor of an injunction. *Id.*
2. The Gift Clause, Ariz. Const. Art. IX, §7, provides in relevant part, "Neither the state, nor any...municipality...shall ever...make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation...."
3. The \$1 million allocation by the City for release time is a "donation or grant, by subsidy or otherwise, to...an association" as contemplated by the Gift Clause. While these funds are part of the total compensation for Unit 4, the City's Police Department, the money is dedicated exclusively to PLEA, a third party. PLEA determines how the money is spent, by whom, and when. The City does not oversee the expenditure other than to track the total number of hours drawn from the bank of hours. No description is required by the City regarding how officers use release time. The Court finds that no public ownership or control exists over the benefits allocated to PLEA for release time. It is a subsidy subject to the Gift Clause analysis.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-021634

06/05/2012

4. To comply with the Gift Clause, an expenditure of public funds 1) must be for a public purpose, and 2) there must be adequacy of consideration in return for the expenditure. *Turken v. Gordon*, 223 Ariz. 342, 224 P.2d 158 (2010).
5. "Public funds are to be expended only for 'public purposes' and cannot be used to foster or promote the purely private or personal interest of any individual." *Turken*, 220 Ariz. at 467, 207 P.3d at 720, quoting *Kromko v. Arizona Board of Regents*, 149 Ariz. at 321, 718 P.2d at 480 (1986). The Arizona Supreme Court takes a "broad view of permissible public purposes under the Gift Clause." *Id.* at 349, 224 P.3d at 165.
6. Based on the evidence presented, the Court finds at least some applications of release time are not for a public purpose, including negotiating contracts for PLEA members, lobbying legislation that benefits police officers, attending PLEA functions, and any activity where the union is the primary, direct beneficiary. Such activities promote the private interests of PLEA and, as a result, do not constitute public purposes.
7. The Court further finds a lack of adequate consideration from PLEA in exchange for release time compensation and benefits. In Arizona, consideration under the Gift Clause analysis is "the objective, fair market value of what the private party has promised to provide in return for the public entity's payment." *Id.* at 349, 224 P.2d at 165. It is a measurable, bargained-for asset. Indirect benefits – no matter how attractive -- "when not bargained for as part of the contracting party's promised performance...are not consideration..." *Id.*
8. The MOU does not obligate PLEA to perform any specific service or give anything in return for the receipt of \$1 million for release time. It does not state that PLEA will commit a certain number of hours to work in furtherance of the City's (as opposed to PLEA's) interests. PLEA activities may indirectly benefit the City. Indirect benefits, however, are not consideration.
9. The Court finds that Plaintiff has demonstrated a likelihood of success on the merits of their claims because 1) PLEA uses the City's authorization of \$1 million for release time for private, not public, purposes, and 2) there is no legal consideration given by PLEA in exchange for the benefits it receives.
10. Plaintiffs have shown the possibility of irreparable harm. They have established, more likely than not, a violation of the Gift Clause. A constitutional violation generally constitutes irreparable harm. *Collins v. Brewer*, 727 F.Supp. 2d 797, 812 (D. Ariz. 2010). Further, the use of public funds for union business diverts resources away from law enforcement at a time when the City's financial resources are limited.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-021634

06/05/2012

11. The balance of harms favors an injunction. The staff necessary to perform functions relating to law enforcement that PLEA does will not change. PLEA already relies on officers within the Phoenix Police Department to do all the things that it does. The funds are already allocated to cover the time that serves a public purpose. Funds expended for PLEA work that does not serve a public purpose can be re-allocated to further the Police Department's mission of public safety. Officers will retain their right to union representation under A.R.S. § 38-1101. PLEA will retain its role to provide it. Representation is provided in other municipalities without city-funded release time.

IT IS HEREBY ORDERED granting Plaintiff's Application for Preliminary Injunction and enjoining Sections 1-3.G, I, K, and Q of the 2010-12 MOU through the end of the MOU term, June 30, 2012. The 2012-14 MOU is not before the Court at this time.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.