

**Scharf-Norton Center for Constitutional Litigation at the
GOLDWATER INSTITUTE**
Clint Bolick (021684)
Taylor Earl (028179)
500 E. Coronado Rd., Phoenix, AZ 85004
(602) 462-5000; litigation@goldwaterinstitute.org
Attorneys for Plaintiffs

**IN THE SUPERIOR COURT OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA**

WILLIAM R. CHEATHAM; and MARCUS HUEY,)
)
) Plaintiffs,)
)
) vs.)
)
) SAL DICICCIO, in his official capacity as member of)
) the Phoenix City Council; CITY OF PHOENIX; and)
) PHOENIX LAW ENFORCEMENT ASSOCIATION.)
)
) Defendants.)
 _____)

Case No. CV2011-021634

**AMENDED COMPLAINT
for Declaratory and Injunctive
Relief**

INTRODUCTION

1. In September 2011, the Goldwater Institute issued a report entitled “Money for Nothing: Phoenix taxpayers foot the bill for union work.” The report revealed that the City of Phoenix had executed contracts with seven public labor unions containing illegal subsidies. Those subsidies were at their worst in the City’s contract with the Phoenix Law Enforcement Association (“PLEA”).

2. Under the Memorandum of Understanding between the City and PLEA, Phoenix is committed, among other things, to pay in excess of \$1 million dollars for Phoenix police officers to leave their official police duties to work on behalf of the union, while still receiving full pay and benefits. Because the City receives very little from PLEA in return, this grant to PLEA represents a clear violation of the Arizona Constitution. Plaintiffs in this case seek to enforce the Arizona Constitution's guarantees that limit the exercise of government power to truly public purposes and that prevent unjust enrichment of favored interests to the detriment of the taxpaying public

PARTIES, JURISDICTION, AND VENUE

3. Plaintiff William R. Cheatham is a citizen of the United States and a resident of the City of Phoenix in the state of Arizona. Plaintiff Cheatham pays property tax and sales tax in Phoenix.

4. Plaintiff Marcus Huey is a citizen of the United States and a resident of the City of Phoenix in the state of Arizona. Plaintiff Huey pays property tax and sales tax in Phoenix.

5. Defendant Sal DiCiccio is a member of the Phoenix City Council, and is sued in his official capacity only.

6. Defendant City of Phoenix is a municipal corporation organized under the laws of the State of Arizona.

7. Defendant Phoenix Law Enforcement Association is a labor union that represents Phoenix police officers below the rank of Sergeant.

8. Jurisdiction over this action and its claims is provided by A.R.S. §§ 12-123, 12-1831, and 12-1801.

9. Venue is proper pursuant to A.R.S. § 12-401.

FACTS COMMON TO ALL CLAIMS

10. The Phoenix Law Enforcement Association (“PLEA”) is a public labor union with complete organizational independence from the City of Phoenix, including its own board of trustees, staff, and mission statement.

11. PLEA has the exclusive right to serve as the “meet and confer” representative of all “unit members,” which consist of all Phoenix police officers below the rank of Sergeant, including assignments. (MOU § 1-3.A)

12. On or about May 2, 2012, Defendants City and PLEA agreed to a Memorandum of Understanding (“MOU”) that will govern their relationship between the period starting approximately July 1, 2012 until approximately June 30, 2014. The 2012-14 MOU is attached to the Amended Complaint. The 2012-14 MOU replaces the 2010-12 MOU that was in effect when the original Complaint was filed in this action.

13. The 2012-14 MOU was approved by the City Council by a vote of four in favor, four opposed, and one abstaining. The abstaining vote was counted as a “yes” vote to ratify the agreement.

14. Under the MOU, the City of Phoenix bestows lopsided benefits on PLEA, which constitute an unconstitutional subsidy under the gift clause.

15. While some of those benefits are described hereafter, others are unknown to Plaintiffs at this time and will be uncovered during factual discovery.

16. Whatever legitimate public purposes may be served by release time can be provided by PLEA or its members at their cost, or can be provided under the control and supervision of the Phoenix Police Department.

17. The City of Phoenix finances the benefits to PLEA under the MOU through city tax revenue.

18. Plaintiffs Cheatham and Huey pay property tax and sales tax in the City of Phoenix. Because their taxes finance the City's MOU with PLEA, they are directly harmed by the City's grant of illegal subsidies to PLEA in the MOU.

Release Time Hours

19. Under the MOU, the City of Phoenix grants PLEA tens of thousands of "release time hours."

20. Release time hours permit PLEA to release Phoenix police officers from their official duties to perform union duties while still receiving full pay, benefits, and insurance coverage from the City.

21. Release time provisions are set forth in Section 1-3 of the MOU, entitled "Rights of Association." The "Association" referred to is Defendant PLEA.

22. Section 1-3(B) sets forth "examples" of uses of release time. However, the use of release time is not limited to the examples set forth, and in fact can and does include lobbying,

union organizing, union meetings and conferences, negotiations with the City, and work on ballot measures. All release time activities are subject to the exclusive discretion, direction, and control of Defendant PLEA. Many of the uses of release time are for private rather than public purposes, and all are for the benefit of Defendant PLEA.

23. Section 1-3(B)(1) provides that six police officers shall be released full-time from police duties at their regular salary and benefits.

24. Section 1-3(B)(2) provides that PLEA may designate 42 PLEA representatives.

25. Section 1-3(B)(3) establishes a bank of 1,859 annual release time hours. The section sets forth “[e]xamples of how these hours are used by the Association,” but does not in any manner limit release time to those purposes.

26. Section 1-3(B)(3)(c) provides, among other things, for additional hours under certain circumstances, and that unused hours will be carried over into the first year of the next contract to a maximum total bank of 2,789 hours.

27. Section 1-3(C) provides that the PLEA president may appoint a “legislative representative” to “work with and assist the city’s legislative lobbyist,” with 500 additional release hours provided for that purpose. PLEA also may and does engage in lobbying using the six full-time release provisions and the bank of hours, with no limitations on the lobbying activities for which PLEA may use lobbying.

28. Section 1-3(P) provides that the “Association will be allowed an opportunity to attend” a quarterly briefing with each squad “to discuss Association business and issues of mutual concern to labor and management.”

29. Section 1-3(Q) provides an additional 960 hours of compensation for full-time release positions.

Accountability for Use of Release Time

30. PLEA is not required to account for its use of release time hours nor is the City of Phoenix granted permission to audit PLEA’s use of the hours.

31. The City has no policies regarding how release time may be used.

32. The City has no mechanism to determine how release time is used.

33. Police officers using release time from the bank of hours are not required to account for how the release time is used, and merely fill out leave slips using the designation “PW” which means “union business.”

34. PLEA officials who occupy full-time release positions do not have to account for their time in any fashion and ordinarily report to PLEA headquarters rather than to the Police Department.

Additional MOU Notes

35. The practice of providing release time to unions is widespread in contracts between municipal governments and unions and is present in all seven contracts between the City of Phoenix and employee unions in the City.

36. Because of the limited duration of the MOU and the common practice of release time, the situation presented here is capable of repetition yet evading review.

Count One—Gift Clause

37. As Phoenix taxpayers, Plaintiffs are responsible for paying and/or remitting sales, property, and other taxes, and will bear a share of the burden for replenishing the coffers of the City of Phoenix for revenues lost from the benefits granted to PLEA pursuant to the MOU.

38. Article 9, § 7 of the Arizona Constitution provides that neither the State nor any city “shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association or corporation. . . .”

39. A payment by the State or a subdivision is proper under the gift clause only if “(1) the agreement serves a public purpose, and (2) there is neither donation *nor* subsidy to a private association.” *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 348, 687 P.2d 354, 356 (1984).

40. A “subsidy” is “a grant of funds or property from a government, to a private person or company to assist in the establishment or support of an enterprise deemed advantageous to the public.” *State Tax Comm’n v. Miami Copper Co.*, 74 Ariz. 234, 241, 246 P.2d 871, 876 (1952).

41. Cities must receive direct public benefits of roughly proportionate value in exchange for their expenditure of public funds on goods and services. Indeed, the Arizona

Supreme Court has reiterated that indirect public benefits do not satisfy the Gift Clause. *Turken v. Gordon*, 223 Ariz. 342, 224 P.3d 158 (2010).

42. The benefits to PLEA under the MOU serve to promote the union's purposes, and do not serve a public purpose.

43. The benefits derived from the MOU by the City of Phoenix, if any, are not equivalent to the benefits the City has obligated itself to make to PLEA, and are so inequitable and unreasonable as to amount to an abuse of discretion on the part of Defendants.

44. For all those reasons, the benefits the City has granted to PLEA under the MOU, including release time hours to further the mission and organizational existence of PLEA, constitute a subsidy and an impermissible gift to an association, which exceeds Defendants' lawful powers in violation of Ariz. Const. Art. 9, § 7.

REQUEST FOR RELIEF

For their relief, Plaintiffs request that this Court take the following actions:

- A. Declare that MOU is unconstitutional and preliminarily and permanently enjoin its further effect;
- B. Award costs and attorney fees pursuant to A.R.S. §§ 12-341, 12-348, and the private attorney general doctrine; and
- C. Award such other and further relief as may be just and equitable.

RESPECTFULLY SUBMITTED this 23rd day of July, 2012.

/S/ Clint Bolick

Clint Bolick (021684)

Taylor Earl (028179)

**Scharf-Norton Center for Constitutional Litigation
at the GOLDWATER INSTITUTE**

500 E. Coronado Rd., Phoenix, AZ 85004

(602) 462-5000

litigation@goldwaterinstitute.org

Attorneys for Plaintiffs

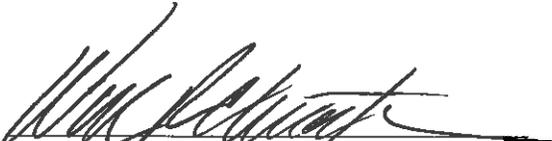
Verification in Support of Complaint

Pursuant to Arizona Rule of Civil Procedure 80(i), William R. Cheatham declares as follows:

1. I am an individual Plaintiff in this action.
2. I have read the foregoing and know the contents thereof.
3. The statements and matters alleged are true of my own personal knowledge, except as to those matters stated upon information and belief, and as to such matters, I reasonably believe them to be true.

I declare under penalty of perjury that to the best of my knowledge the foregoing is true and correct.

Dated: 7-20-12


William R. Cheatham

Verification in Support of Complaint

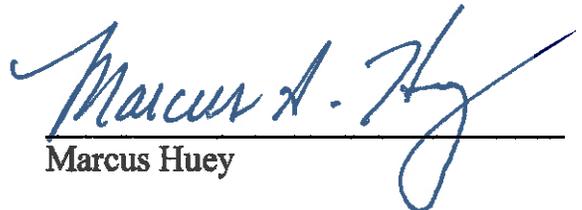
Pursuant to Arizona Rule of Civil Procedure 80(i), Marcus Huey declares as follows:

1. I am an individual Plaintiff in this action.
2. I have read the foregoing and know the contents thereof.
3. The statements and matters alleged are true of my own personal knowledge, except as to those matters stated upon information and belief, and as to such matters, I reasonably believe them to be true.

I declare under penalty of perjury that to the best of my knowledge the foregoing is true and correct.

Dated: _____

July 20, 2012



Marcus Huey

E-FILED this 23rd day of July, 2012 with:

Clerk of Court
101 W. Jefferson St.
Phoenix, AZ 85003

COPY of the foregoing HAND DELIVERED this 23rd day of July, 2012 to:

John Alan Doran
Thomas J. Kennedy
Rose C. McCaffrey
201 E. Washington Street, Suite 800
Phoenix, Arizona 85004
JDoran@ShermanHoward.com
TKennedy@ShermanHoward.com
RMcCaffrey@ShermanHoward.com
Attorneys for City of Phoenix Defendants

Michael Napier
Kathryn R. E. Baillie
2525 East Arizona Biltmore Circle
Suite 135
Phoenix, Arizona 85016
Mike@napierlawfirm.com
Kathryn@napierlawfirm.com
Attorneys for Phoenix Law Enforcement Association

By: /S/ Sulane Voyles
Sulane Voyles