

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-021634

01/24/2014

HONORABLE KATHERINE COOPER

CLERK OF THE COURT
D. Harding
Deputy

WILLIAM R CHEATHAM, et al.

CLINT BOLICK

v.

PHIL GORDON, et al.

JOHN A DORAN
MICHAEL NAPIER
MICHAEL J PETITTI

UNDER ADVISEMENT RULING

On November 25 and 26, 2013, the Court conducted the final trial on Plaintiffs' claim for injunctive relief from certain release time provisions in the 2012-14 Memorandum of Understanding ("2012 MOU") between Defendants City of Phoenix ("The City") and the Phoenix Law Enforcement Association ("PLEA"). On December 13, 2013, the parties submitted proposed additional findings of fact and conclusions of law. The Court has considered their proposals, the evidence, counsels' arguments, and the applicable law. The Court has also considered the evidence presented at the May 25, 2012 and January 5, 2013 preliminary injunction hearings.

The Court incorporates the Findings of Fact and Conclusions of Law set forth in the Minute Entry Rulings filed on June 5, 2012 and April 23, 2013. Testimony and exhibits received into evidence on at the May 25, 2012 and January 25, 2013 hearings are part of the record on the trial. Rule 65(a). The Conclusions of Law below are based on the evidence received on May 25, 2012, January 25, 2013, and November 25-26, 2013.

The standard for issuing a permanent injunction is substantially the same as that applied to a request for preliminary injunctive relief, except that the plaintiff must prove actual success

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on the merits rather than the likelihood of success on the merits. The evidence presented on November 25 and 26, 2013 further supports this Court's prior Findings of Fact and Conclusions of Law. Plaintiffs' request for a permanent injunction is **GRANTED**.

FINDINGS OF FACT

Control

1. The evidence reaffirms the Court's prior findings that the City does not control PLEA or PLEA's use of release time. PLEA is an independent entity that operates autonomously within the Police Department ("PD").

2. Officers *not* on release time report to a supervisor. Supervisors know where these officers are and what they are doing, direct and evaluate officers' work, and assign them based on operational needs. By contrast, PLEA assigns and directs officers on release time.

3. There are three categories of release time at issue. First, there are six officers on full-time ("FT") release. (MOU 1-3.B.1) They do not answer calls for service, investigate crimes, report to a supervisor, submit to evaluations, take assignments from the PD, or document their activities. The City lacks control over FT release officers because it does not control their assignments, know what they are doing, choose the six FT release positions, or even require them to show that they worked overtime hours before being paid overtime.

4. Second, pursuant to PLEA's direction, other officers to draw from a bank of hours to perform union business. (MOU 1-3.B.3) The City does not decide whether or for what purpose the bank will be used. The City has some say in when the bank is used; a supervisor may deny a request when operational demands require. The City does not require that PLEA or the released officer describe the officer's activities while on release time. The code "PW" on a leave slip represents time that an officer is released from regular police work to perform an assignment for PLEA.

5. Third, representation time (MOU 1-3.B.2.a) is time used to provide Unit 4 members with representation in grievance and disciplinary proceedings. There is no stated amount for representation time in the MOU. It is unlimited. It is time in addition to the 1,859 hours in the bank of hours, the six FT release positions, and the two officers available for representation in critical incidents. Officers on representation time are paid while providing representation for any of approximately ten boards and/or investigative processes. The City does not track the number of hours used. There was no evidence presented as to the amount of representation time that PLEA used annually before the injunctions.

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Harm

6. Since the 2012-14 injunction, former FT officer are assigned to squads. They are permitted to leave their assigned duties to perform PLEA activities. Their absence leaves their squads short-handed. Will Buividas, a former FT release officer, testified that his absence leaves a beat in South Phoenix uncovered and creates a “huge safety risk to the citizens of South Phoenix.” (11/26/13 Tran. 198:9-10.) Former FT officer Ken Crane testified that being pulled away sometimes affects the quality of his police work because he avoids protracted call situations when he knows he has a PLEA appointment to attend. (11/26/13 Tran. 199:19-23.)

7. Former FT release officer, Joe Clure, estimated the cost of training a new police officer is more than \$100,000.

8. Since the 2012-14 injunction, some officers have gone without representation at disciplinary and grievance proceedings. The City allows officers to leave their assigned duties (subject to supervisor approval) and to use personal leave time to provide representation to fellow officers. Under the City’s Meet and Confer Ordinance (Section 2-209 of the Phoenix City Code), PLEA is legally obligated to provide representation to officers.

Alternatives to Release Time

9. Reimbursement. The City could allow PLEA to use release time but PLEA would reimburse the City for release time used for union business that does not serve a public purpose. The police union in Dallas, TX reimburses the City for the use of release time. Chief of Police Garcia testified that this is a process that Phoenix should use.

10. Donated leave. Some police organizations allow officers to donate leave time to the union. PLEA President Joe McClure testified that this would be a viable option for PLEA.

11. Off-duty and personal leave. Since the injunctions, PLEA officers use off-duty and leave time to perform PLEA business.

12. Paid by PLEA. Under the 2012-14 injunction, PLEA reimburses pays officers to provide representation \$40 per day, the rate paid by the City to officers on stand-by call.

13. Third-party agent. An outside business agent could be retained to represent officers in disciplinary proceedings. Outside legal counsel is already permitted for grievance representation. Assistant Chief Yahner testified that the PD does not favor this option.

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Compensation

14. Compensation for officers appears in the MOU under the section titled "Compensation/Wages." Release time appears in the section titled "Rights of Association."

15. Under the Meet and Confer Ordinance, compensation of employees is a mandatory subject of bargaining. Release time is not. An employer has no obligation to bargain over release time.

16. Since the injunctions, the City has not adjusted Unit 4 salaries to reflect the loss of release time and include that money in officers' pay. The City acknowledges that reductions in one area of the MOU do not automatically trigger increases in officer salaries. The MOU does not require the City to increase officer salary if release time is enjoined or removed.

17. Each item of the MOU is negotiated individually, not as a total package offered to Unit 4 with those members being allowed to divide it how they wished.

City Council

18. The City Council was not provided with the total cost of release time at or before the vote approving the 2012-2014 MOU.

19. The City's "costing worksheet" (Exh. 22) does not account for portions of the cost of release time to the City, including 1) the cost of representation time, 2) the cost of releasing the officer to perform PLEA business on-duty, and 3) the overtime that another officer may incur so that the PD can cover the released officer cost to cover for that officer if necessary.

Activities on Release Time

20. FT release officers spend a significant amount of time representing officers in grievances against the City. PLEA President, Joe Clure, testified that representing officers in grievances is "really one of the biggest chunks of what "full time release officers do." (11/26/13 Trans. At 209:7-209:8.)

21. PLEA represents the interests of officers, not the City, in both disciplinary and grievance proceedings.

22. PLEA uses release time to engage in political activities to advance the interests of its members. Mr. Clure testified that "given the fact that we're a governmental entity or a governmental employer/employee relationship, you're going to naturally be engaged in politics"

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(11/25/13 Tran. at 245:5-10.) “PLEA learned years ago that it was important to be active on the political front.” (Trial. Exh. 9 at 1).

23. PLEA endorses candidates for political offices outside of the Phoenix City Council, interviews candidates for City of Phoenix elections, distributes literature at election polling sites; takes official positions on ballot measures; and sends political mailers. It supports the Arizona Police Association which, in turn, endorses candidates for Phoenix City Council elections.

24. A mission of PLEA is to protect its members *from* the City and the PD. Mark Spencer, former PLEA President and Southwest Projects Coordinator for Judicial Watch, the entity representing the Intervenors, testified: “Five percent of the stress comes from the bad guys...Ninety-five percent of the stress of this job comes from the manager in back of me who gets to arm chair quarterback.” (11/26/13 Tran. 87:13-14, 20-22.) He testified that officers are subject to “frivolous and untrue allegations of misconduct,” (11/26/13 Tran. 86: 1), poor management decisions (11/26/13 Tran. 62:9), a chief who does not have the officers’ best interests in mind (11/26/13 Tran. 61:10-11), and being relegated to “the bottom” of the PD’s priorities (11/26/13 Tran. 58:16).

CONCLUSIONS OF LAW

The following Conclusions of Law are in addition to those stated in the June 5, 2012 and April 23, 2013 Minute Entry Rulings.

Standard for Injunctive Relief

1. To obtain a permanent injunction, a plaintiff must prove success on the merits, the absence of an adequate remedy at law, irreparable harm if relief is not granted, and a likelihood that the defendant will in the future engage in the conduct to be enjoined. See *SAL Leasing, Inc. v. State ex rel. Napolitano*, 198 Ariz. 434, ¶ 39, 10 P.3d 1221, 1229 (App.2000); *Aguilar v. Immigration and Customs Enforcement Div. of the U.S. Department of Homeland Sec.*, 811 F. Supp. 2d803 (S.D.N.Y. 2011)

Public Purpose

2. The evidence presented at trial further supports the Court’s prior conclusion that release time, in general, does not serve a public purpose. 6/5/12 Order, COL 6; 4/23/13 Ruling, COL 5. PLEA exists to represent the interests of its members. It uses release time to satisfy its obligations to its members. In so doing, it diverts officers from performing police work. PLEA is a political entity. It promotes candidates for elected offices who support PLEA. In representing officers with a grievance or a disciplinary issue, PLEA advocates for its members,

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not the PD or the City. The testimony of PLEA's former President, Mark Spencer, revealed the adversarial nature of PLEA's mission. Mr. Spencer testified that PLEA's mission is to protect officers from management (i.e. the City) because the leadership allegedly makes poor decisions, does not consider officers' interests, and causes 95% of the stress that officers experience. This mission, also reflected in the PLEA publications in evidence, does not advance cooperation and harmony, nor does it serve the City or its citizens.

Consideration

3. Even if release time could be found to confer a public benefit, it does not meet the criteria for a constitutional expenditure under Arizona law. To make it lawful, Defendants must make major changes to comply with our courts' requirements for public funds used to benefit a private entity.

4. First, release time is permissible if the duties imposed are substantial and the cost is modest. *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 350, 687 P.2d 354, 358 (1984). In *Wisturber*, the Court upheld the union's contract with the school district because it found "the duties imposed upon [the release-time employee] are substantial, and the relatively modest sums required to be paid by the District are not so disproportionate as to invoke the constitutional prohibition." *Id.* at 350, 687 P.2d at 358. (Emphasis added.) The *Wistuber* contract bound the Association (union) President to perform certain tasks. The language was not permissive. It did stop at a list of examples. It stated: "The Association President **agrees [with the District] to....**" followed by a list of specific tasks.

Here, there are no duties imposed by the MOU. See 4/23/13 Order, COL 9(a).

5. Second, in evaluating the adequacy of consideration, i.e., the value the City derives from the duties imposed, only direct, tangible benefits (that which a party is obligated to do) may be considered. *Turken v. Gordon*, 223 Ariz. 342, 349, 224 P.3d 158, 165 (2910). PLEA contends release time confers the following benefits on the City, none of which constitute consideration under *Turken*.

- a. Unit 4 promises not to strike. A promise not to strike is a pre-existing legal obligation, not consideration in exchange for release time. It is an obligation that employees owe under the City charter and the City's Meet and Confer Ordinance.
- b. Release time promotes officers' cooperation, better communication, labor peace, and good relations. These are indirect benefits that, as a matter of law,

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are not consideration in the Gift Clause analysis. *Turken, supra*. See 4/23/13 Order, COL 7, 9(b).

- c. Release time officers will be available for stand-by, call-out, and critical incidents. PLEA officers receive separate compensation for these functions. Filling these positions is not consideration for the release time at issue.
- d. Officers are represented in grievance and disciplinary proceedings. The City has no obligation to provide that representation, only to permit it. PLEA is legally obligated under the Meet and Confer Ordinance to provide representation. Release time for this purpose funds PLEA's job. See 4/23/13 Order, COL 5(b).

Control

6. Third, under *Kromko v. Ariz. Bd. of Regents*, 149 Ariz. 319, 718 P.2d 478 (1986), the government must have control over how the resources it gives a private entity are used. How can the City of Phoenix exercise control when it does not know (or ask) how FT release and the bank of hours are used? Officers on release time are not supervised by the PD and are not required to provide any explanation for the use of this time. The City lacks even minimal control over how release time is used. See 4/23/13 Order, COL 5(c).

Measuring Cost v. Benefit

7. Finally, under *Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 172 Ariz. 356, 369, 837 P.2d 158, 171 (App. 1991), the government must have a mechanism to evaluate the cost versus the benefit. The City does not have systems in place to make this evaluation. 4/23/13 Order, COL 5(c), 9(c). It does not know the amount (let alone the cost) of representation time given to PLEA. There are also hidden costs that are not measured, including the cost of donating six fully-trained police officers to PLEA and the overtime incurred to cover the squad when a PLEA representative leaves to provide representation.

Compensation

8. Defendants maintain that release time is compensation and, as such, is not subject to Gift Clause scrutiny. The Court respectfully disagrees. As stated by the Court previously, "the issue is not the value of release time to the officers; it is the objective value of release time to the public." 4/23/13 Order, COL 9(d). In addition, the evidence itself fails to support Defendants' claim. For example,

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- a. Release time is not deemed compensation in the MOU. Compensation for officers appears in the MOU under the section titled “Compensation/Wages.” Release time is not. It appears in the section titled “Rights of Association.” There is no provision in the MOU that requires the City to increase officer salary if release time is enjoined or removed.
- b. Under the Meet and confer Ordinance, compensation of employees is a mandatory subject of bargaining. Release time is not.
- c. The City does not treat release time as compensation. First, during the injunction, the City did not adjust salary to reflect the loss of release time and include that money in officers’ pay (approx. \$322 per year per officer). If release time were compensation, officers’ salaries would and should have automatically increased equal to the value of release time during the injunctions. This did not happen. Second, each item of the MOU was negotiated individually, not as a total package offered to Unit 4 with those members being allowed to divide it how they wished. Third, release time cannot be “costed” from Unit 4 members’ compensation when large amounts of release time, such as the unlimited representation-time hours, are not calculated by the City.
- d. City funds for release time are designated for PLEA. The money is not paid to the officers, and officers cannot change the designation of these funds – even if they do not agree. The City is issuing payment pre-destined to pay for six full-time PLEA officers and for PLEA to allocate as it wishes.

City Council

9. Defendants maintain that the Gift Clause analysis requires Plaintiffs show that the City Council abused its discretion in approving the 2012-14 MOU with the disputed release time provisions. The Court respectfully disagrees with Defendants based on *Wistuber*, *Turken*, and the other cases cited in the Court’s rulings in this case. However, if the law did require the Court to find an abuse of discretion, Plaintiffs presented undisputed evidence that the City Council approved the 2012-14 MOU without 1) knowing the cost of release time to the City, 2) requiring documentation by PLEA showing the use of the release time funds, and 3) implementing a system to evaluate the cost versus benefit of release time to the City. This evidence supports the conclusion that the City Council abused their discretion in approving the release time at issue.

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Harm

10. Plaintiffs have shown that irreparable harm will result without an injunction. A constitutional violation generally constitutes irreparable harm. *Collins v. Brewer*, 727 F.Supp. 2d 797, 812 (D. Ariz. 2010). In addition, even Defendants' witnesses agree that release time diverts officers from their job which is to protect the safety of the public. Public safety is a factor in determining injunctive relief. See *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1307 (1976); *Harris v. Bd. of Supervisors*, 366 F.3d 754, 766 (9th Cir. 2004).

PLEA claims the present injunction has harmed some officers who did not have representation in disciplinary and grievance proceedings. The City has no legal duty whatsoever to fund representation of officers. Further, the evidence established several ways in which PLEA can provide representation without public funds. The gaps in representation that PLEA has experienced since the injunction could be resolved with any of the options presented at trial. See FOF above, 9-13.

Accordingly,

IT IS HEREBY ORDERED:

1. Enjoining Sections 1-3.B, 1-3.C and 1-3.Q of the 2012-14 MOU.
2. Enjoining the City and PLEA from entering into future MOUs or agreements involving the release time at issue in this litigation unless the MOU satisfies the requirements as set forth above and in the Court's prior Orders, including but not limited to:
 - a) The MOU states in clear, obligatory language the specific duties that confer a direct public benefit that *will* be performed by PLEA;
 - b) PLEA agrees to and does reimburse the City for hours used for activities that do not confer a direct benefit to the City, i.e., time used for union business;
 - c) The City implements a system for knowing how release time is used;
 - d) The City institutes a mechanism to evaluate the cost versus the benefit of those union activities it deems to confer a public benefit and for which the City does not expect reimbursement, such as the time to attend City committee meetings;

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e) Release time may not be used for lobbying or political activities adverse to the City unless approved by the City Manager.

f) Release time may not be used to fund PLEA's outside lobbyist.

An injunction against future MOUs is warranted and justified by the evidence. PLEA and the City have demonstrated that future violations will occur without it. *SAL Leasing, supra*. The Court initially enjoined release time under the 2010-12 MOU. When that MOU expired in June, 2012, PLEA and the City promptly resumed the prohibited release time on July 1, 2012 under the 2012-14 MOU. Without an injunction prohibiting not just the provisions, but also the practice, release time will continue to exist in violation of the Gift Clause and Arizona law.

Finally, at trial, evidence was presented that the City has MOUs with other unions. While these MOUs are not before this Court, the law regarding City-funded release time applies to these unions as well as PLEA. The City should review its MOUs with these unions to ensure that these agreements are consistent with the Court's rulings here.

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.