

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

Clint Bolick (021684)
Jonathan Riches (025712)
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org
Attorneys for Intervenors

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

PHOENIX LAW ENFORCEMENT ASSOCIATION,
an Arizona non-profit corporation; BARRY JACOBS,
EARLE AKRE, and ROBERT RAMSEY, individually
and on behalf of themselves and as representatives for
similarly situated class members,

Plaintiffs,

vs.

CITY OF PHOENIX, a body politic,

Defendants.

Case No. CV2014-009114

MOTION TO INTERVENE

Honorable Robert Oberbillig

Pursuant to Ariz. R. Civ. P. 24, Michael Dupuy and Jim Jochim, who are Phoenix taxpayers (“Taxpayers”), move to intervene in defense of this case on the grounds set forth in this Motion and accompanying proposed Answer (Exhibit A). They seek to intervene as of right; or, in the alternative, they seek permissive intervention. Taxpayers move to intervene to prevent the unlawful expenditure of taxpayer funds, which would result if Plaintiffs’ requested relief is granted.

Additionally, Mr. Jochim was previously the plaintiff in litigation that challenged the legality of the pension payments at issue in this case. *See Wright, et al. v. Stanton, et al.*, CV2013-010915. That litigation resolved when Defendant City of Phoenix (“City”) imposed terms and conditions of employment on employee groups that eliminated the pensionability of the unlawful components of compensation challenged in the *Wright* matter, including imposition of a Memorandum of

Understanding (“MOU”) on the Phoenix Law Enforcement Association (“PLEA”). The pensionability of those same components of compensation are now directly at issue in this case. Accordingly, Applicants’ participation as Intervenor-Defendants is crucial to the resolution of this lawsuit.

Undersigned counsel has contacted both Plaintiffs’ and Defendants’ counsel for their respective positions on this Motion to Intervene prior to its filing. Defendant City’s counsel, John Doran, indicated that there is no objection to the Motion. Plaintiffs’ counsel, Michael Napier, indicated that Plaintiffs oppose intervention.

I. INTRODUCTION

Applicants Michael Dupuy and Jim Jochim are Phoenix taxpayers. Their taxes finance the City’s employer contributions to the Public Safety Personnel Retirement System (“PSPRS”). PSPRS is a state retirement system; as a result, the terms of participation for both employers and members in PSPRS are governed by state statute. Plaintiffs are members and beneficiaries of PSPRS, who, in their prayer for relief, are asking this Court to order the City to remit pension contributions for vacation leave, sick leave, and uniform allowances that violate the very plain language of state law. (Complaint at 10, 11, 12-13). Specifically, Arizona law prohibits employers in PSPRS from permitting their employees to include “unused sick leave, payment in lieu of vacation . . . or payment for any fringe benefits” to increase compensation for pension calculations. A.R.S. § 38-842(12). Therefore, Plaintiffs’ request for relief is plainly illegal.

Because Defendant City has previously approved contracts that contain the components of compensation at issue in this case, only Taxpayers can reliably assert the illegality of the relief requested. The threat of a direct and unlawful expenditure of taxpayer funds gives Taxpayers the right to intervene to defend the contract provisions that eliminated the illegal pension payments at issue in this case. In addition, Taxpayers will demonstrate to this Court through intervention that any pension

payments made regarding the components of compensation in question violate the Arizona Constitution's ban against public gifts to private entities. ARIZ. CONST. art. IX, § 7.

Taxpayers satisfy the four requirements for intervention of right under Rule 24(a). Their application is timely. Taxpayers filed this Motion less than three weeks after the Complaint was filed. Additionally, they have a direct and significant interest in the question of whether the contract modifications at issue in this case are lawful because if Plaintiffs prevail it will result in the unlawful expenditure of taxpayer funds. Moreover, the outcome of this action will impair or impede Taxpayers' ability to protect their interests. Finally, the interests of Taxpayers are not adequately represented at present, as they are the only prospective party to maintain that the relief requested by Plaintiffs is patently illegal.

Applicants alternatively seek permissive intervention under Rule 24(b). Their claims or defenses share a common question of law with the main action, their intervention will not cause undue delay or prejudice to the existing parties, and the Court has an independent basis for jurisdiction over their claims. Accordingly, the Court should allow them to intervene.

II. FACTUAL BACKGROUND

PSPRS is a statewide pension program for eligible public safety personnel. A.R.S. § 38-841 *et seq.* At the time PSRPS was created, there was a wide variety of heterogeneous retirement programs among different municipalities and departments within municipalities with different pension contribution rates and varying retirement benefits for public safety employees in Arizona. *Id.* at § 38-841(A). In response to the resulting inequitable treatment of public safety officers throughout the state, the Arizona Legislature established PSPRS “to provide a uniform, consistent and equitable statewide [retirement] program for public safety personnel.” *Id.* at § 38-841(B).

Because PSPRS is administered by the state, employers in PSPRS, including Defendant City, are

bound by state rules. *Id.* Likewise, the terms of participation, pension contributions, and pension benefits for employees, or PSPRS “members,” including Phoenix Police Department officers, are governed by state statute. *Id.*

To direct municipalities and PSPRS members in pension determinations, Arizona law defines what payments count as pensionable “compensation” for PSPRS members. *Id.* at § 38-842(12). Arizona law is likewise clear and unequivocal regarding which payments *do not* count as compensation for purposes of pension calculations: “Compensation does not include, for the purpose of computing retirement benefits, payment for unused sick leave, payment in lieu of vacation, payment for unused compensatory time or payment for any fringe benefits.” *Id.*

Despite this statutory prohibition, Plaintiffs are now asking this Court, *inter alia*, to order “Defendant City of Phoenix to discharge its duty [by] allowing Phoenix police officers to continue to convert vacation and sick leave to base pay” and convert the fringe benefit uniform allowance to pensionable pay (Complaint at 11, 12). The requested relief, therefore, contravenes the plain language of state law.

The latest Memorandum of Understanding between Plaintiffs and the City to permit these payments was operative from July 2012 until July 1, 2014 (“2012-2014 MOU”). That document allowed Phoenix Police Department officers below the rank of sergeant to include payment in lieu of vacation (§ 5-5(J)), payment for unused sick leave (§ 3-4(B)(5)), and payment for a fringe benefit uniform allowance (§ 3-4B) as pensionable compensation items.

For each of these components of compensation, the City made employer contributions based on the payment amount to PSPRS each pay period. A.R.S. § 38-843(B). The employer contribution rate for fiscal year 2013-2014 for the Phoenix Police Department is 34.5% of the member’s compensation amount. Should Plaintiffs be successful in this litigation, these pension contributions would resume.

On October 8, 2013, in a separate action in Maricopa County Superior Court, Phoenix taxpayers filed an Amended Complaint that challenged the legality of the pension payments at issue in this case. *See Wright, et al. v. Stanton, et al.*, CV2013-010915. Specifically, plaintiffs in that case sought a declaration that the extent to which nearly identical provisions in the 2012-2014 Memorandum of Agreement between the City and the Phoenix Police Sergeants and Lieutenants Association (“PPSLA”) permitted pension payments for vacation leave, sick leave, and uniform allowances those provisions violated state law. Plaintiffs further requested declaratory and injunctive relief that prohibited the classification, approval, and remission of pension payments that included the challenged components of compensation.

On or about May 7, 2014, after failure to agree on the terms of a 2014-2016 MOU, pursuant to City Ordinance, the Phoenix City Council imposed a “Terms and Conditions of Employment” document (“2014-2016 TCE”) on PLEA and Unit 4 police officers below the rank of sergeant. The 2014-2016 TCE eliminated § 3-4B of the 2012-2014 MOU and revised payments made for vacation and sick leave conversions under 3-4(B)(5) and 5-5(J) of the 2012-2014 MOU, pronouncing that such payments are no longer “considered part of Final Average Salary for purposes of pension calculations.” The effective date for the 2014-2016 TCE was July 1, 2014.

As a result of those changes, the taxpayer plaintiffs in the *Wright* matter received the relief they requested; viz., a cessation of unlawful pension payments to Phoenix Police Department officers. As a result, the parties in that case, including the City and PPSLA, agreed to dismiss the action.

Applicant Jochim, a Phoenix taxpayer, was a plaintiff in the *Wright* action. Applicant Dupuy is a Phoenix taxpayer seeking to ensure that his tax dollars are lawfully spent.

Plaintiffs now ask this Court to declare illegal contract provisions legal and to order the City to remit pension payments that violate the plain language of state law. If the Court grants Plaintiffs’

requested relief, Taxpayers' right to have their tax dollars lawfully spent will be violated.

III. INTERVENTION AS OF RIGHT

Rule 24(a), Ariz. R. Civ. P. provides for intervention of right:

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Arizona courts have repeatedly held that "Rule 24 is remedial and should be construed liberally in order to assist parties seeking to obtain justice in protecting their rights." *Planned Parenthood Ariz., Inc. v. Am. Ass'n of Pro-Life Obstetricians and Gynecologists*, 227 Ariz. 262, 279, ¶ 53, 257 P.3d 181, 198 (App. 2011) (quoting *Dowling v. Stapley*, 221 Ariz. 251, 270, ¶ 58, 211 P.3d 1235, 1254 (App. 2009)). Applicants seek intervention under Rule 24(a)(2), and they satisfy the requirements set forth in the rule: (1) that the application be timely; (2) that the Applicants claim an interest in the transaction which is the subject of the action; (3) that the applicants are "so situated that the disposition of the action may as a practical matter impair or impede" their ability to protect their stated interest in the transactions; and (4) the Applicants are not adequately represented by the existing parties. Taxpayers satisfy each of these factors.

A. Applicants' motion is timely.

Applicants' motion to intervene is timely. When determining whether a motion to intervene is timely, courts generally consider the stage to which the action progressed before intervention was sought, whether the applicant could have sought intervention at an earlier stage, and whether the delay in moving for intervention will prejudice existing parties. *Winner Enter., Ltd. v. Superior Court*, 159 Ariz. 106, 109, 765 P.2d 116, 119 (App. 1988). Here, the Applicants filed this motion less than three weeks

after Plaintiffs filed their Complaint and before Defendant filed an Answer. The applicants here have clearly acted with alacrity, exceeding the timeliness requirement for intervention. In no way will Applicants entrance into the case at this time cause delay or prejudice to the parties.

B. Applicants have a clear and direct interest in this litigation which will be irreparably impaired if intervention is denied.

Applicants have a direct interest in the question of the legality of the contract provisions at issue in this case. The interest entitling a person to intervene must be of “such direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment.” *Hill v. Alfalfa Seed & Lumber Co.*, 38 Ariz. 70, 72, 297 P. 868, 869 (1931). The Arizona Supreme Court has long-recognized that taxpayers may challenge the unlawful expenditure of public money. *Ethington v. Wright*, 66 Ariz. 382, 386, 189 P.2d 209, 212 (1948) (“It is now the almost universal rule that taxpayers of a municipality may enjoin the illegal expenditure of municipal funds.”). Arizona courts have regularly conferred broad taxpayer standing when municipal taxpayers challenge legislative acts or public contracts that violate state law or the Arizona Constitution. *See, e.g., Secrist v. Diedrich*, 6 Ariz.App 102, 104, 430 P.2d 448, 450 (1967); *Turken v. Gordon*, 220 Ariz. 456, 461, 207 P.3d 709, 714 (App. 2008), *rev’d on other grounds*, 223 Ariz. 342, 224 P.3d 158 (2010). “The right to maintain such suits is based upon the taxpayers’ equitable ownership of such funds and their liability to replenish the public treasury for the deficiency which would be caused by the misappropriation.” *Ethington*, 66 Ariz. at 386, 189 P.2d at 212.

Taxpayers have a clear and unequivocal right to have their tax dollars lawfully spent. This litigation imminently threatens an unlawful expenditure of Taxpayer funds. If Plaintiffs prevail in this litigation, the City will be ordered to make pension contributions using Taxpayer funds that violate the plain language of state law. Once expended, those funds may never be recoverable.

Additionally, Applicant Jochim has previously been a plaintiff in litigation pertaining to the pensionability of the precise components of compensation at issue in this case. The *only* reason that litigation resolved was because the unlawful pension contributions ceased to occur as a result of the imposition of new terms and conditions of employment documents. The same provisions of the 2014-2016 TCE are now before this Court. Applicant Jochim, therefore, has a direct and continuing interest in the lawful expenditure of his tax dollars.

Assessing the legality of the pension payment provisions at issue is a prerequisite to a determination of alleged breach of those provisions. If this litigation is resolved without that issue being reached, Taxpayers interest in having their tax dollars lawfully spent will be impaired.

Accordingly, Applicants have a direct interest in the outcome of this litigation and adjudication without granting the Applicants' motion to intervene would substantially impair that interest.

C. Applicants interests are not adequately represented by the existing parties.

The final inquiry is whether Applicants interests are adequately represented by the existing parties. In interpreting the equivalent requirement in federal courts, the U.S. Supreme Court has held that "this prong of the intervention analysis requires the intervenor to show only that representation of its interest 'may be' inadequate, and the applicant's burden on showing this element should be viewed as 'minimal.'" *Am. Ass'n of People With Disabilities v. Herrera*, 257 F.R.D. 236, 247 (D.N.M. 2008) (citing *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n. 10, 92 S. Ct. 630, 30 L.Ed.2d 686 (1972)). While the Arizona courts have yet to set out a definitive test to determine whether the existing parties adequately represent the intervenor's interest, the Ninth Circuit has interpreted similar language in Fed. R. Civ. P. 24(a)(2), which allows intervention of right if the intervenor meets the other requirements "unless existing parties adequately represent" the intervenor's protectable interest. In

Arakaki v. Cayetano, the Ninth Circuit stated the three factors to consider in determining adequacy of representation: “(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor’s arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect.” 324 F.3d 1078, 1086 (9th Cir. 2003). The Applicants here satisfy all three prongs of *Arakaki*.

While the City will have an interest in defending the provisions of terms of conditions document imposed on PLEA from constitutional attack, Applicants will make the additional argument that, as a matter of law, the provisions in question *are not* pensionable. Considering that the City has previously approved labor agreements that provided for the pensionability of the components of compensation at issue, including as recently as the 2012-2014 MOU, the City is exceedingly unlikely to argue that its prior contracts were unlawful. Only Taxpayers are in a position to assert that the contract provisions at issue in this case were never and are not now pensionable because they violate the plain language of state law. Any orders entered restoring those provisions or payments made pursuant to them would directly harm Taxpayers’ interest in having their tax dollars lawfully spent. *See Weaver v. Synthes, Ltd.*, 162 Ariz. 442, 447–48, 784 P.2d 268, 273–74 (App. 1989) (intervenor’s interest must belong to the intervenor itself, not to the existing parties). Because no other party is capable or willing to make the argument regarding the legality of the pensionability of the provisions in question, Applicants’ participation in this lawsuit is essential.

Additionally, a determination regarding the pensionability of the provisions at issue is a prerequisite issue to whether the elimination of such provisions is constitutional. Taxpayers assert that the elimination of the provisions in the 2012-2014 MOU cannot be unconstitutional because neither the City nor the labor union had lawful authority to bargain for them in the first instance. That issue is a

necessary element to this proceeding, and will only be raised and addressed if Applicants are permitted to intervene.

Saunders v. Superior Court in and for Maricopa County is instructive. 109 Ariz. 424, 425-26, 510 P.2d 740, 741-42 (1973). There, citizen taxpayers challenged PSPRS as unconstitutional. *Id.* at 424-25, 510 P.2d at 740-41. Intervenors were firefighters and police officers who wished to defend that system. *Id.* at 425, 510 P.2d at 741. In permitting intervention, the Arizona Supreme Court found: “As a practical matter if the Public Safety Personnel Retirement System is declared unconstitutional in the proceeding below, the beneficiaries under the act would have no chance in future proceedings to have its constitutionality upheld.” *Id.* at 425-26, 510 P.2d at 741-42. Similarly, if the contract changes at issue in this litigation are found unconstitutional, Taxpayers will have no opportunity to argue that the pensionability of those provisions were always and remain unlawful. *See also id.* at 426, 510 P. 2d at 742 (“In a sense the interests of the taxpayers and petitioners are in conflict, and each should be entitled to their own legal representation.”)

Based on the foregoing, Taxpayers are entitled to intervention as of right.

IV. PERMISSIBLE INTERVENTION

Applicants alternatively seek permissive intervention pursuant to Rule 24(b)(2), which provides that, upon timely application, intervention is appropriate:

When an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Applicants satisfy the conditions set forth in Rule 24(b)(2).

Applicants' defense shares questions of fact and law. Applicants' primary defense to Plaintiffs' action is that the relief Plaintiffs seek is unlawful. Insofar as the contract provisions at issue create pensionable components of compensation, those provisions violate state statute. This defense rests on facts common to those relied upon by the existing parties. Applicants anticipate that the factual development of the record by the parties and applicants will be substantially the same. However, the resolution of that issue will unquestionably affect Applicants' right to have their tax dollars lawfully spent. Furthermore, Applicants have acted quickly to intervene in this action in order to prevent any delay, and they will continue to act quickly. Finally, the Applicants' participation in the litigation will cause no prejudice to any party and will conserve judicial resources.

V. CONCLUSION

Applicants seek to intervene because of their concrete and particular interest in ensuring the lawful expenditure of their tax dollars. The relief Plaintiffs seek is unlawful as a matter of black letter law. If the relief Plaintiffs seek is granted, it will result in the immediate and potentially irreparable unlawful expenditure of Taxpayer funds.

Based on the foregoing, Taxpayers respectfully request that this Court grant their Motion so that all of the necessary issues be litigated completely and properly.

RESPECTFULLY SUBMITTED this 15th day of July, 2014 by:

/s/ Jonathan Riches
Clint Bolick (021684)
Jonathan Riches (025712)
Scharf-Norton Center for Constitutional Litigation
at the GOLDWATER INSTITUTE
Attorneys for Intervenors

CERTIFICATE OF SERVICE

ORIGINAL E-FILED this 15th day of July, 2014, with a copy delivered via the ECF system to:

The Honorable Robert Oberbillig
Maricopa County Superior Court

Clerk of Court
Maricopa County Superior Court

COPY of the foregoing E-MAILED this 15th day of July, 2014 to:

Michael Napier
Eric R. Wilson
NAPIER, CORY & BAILLIE, P.C.
2525 E. Arizona Biltmore Circle, Suite 135
Phoenix, AZ 85016-0001
Mike@napierlawfirm.com
Ewilson@napierlawfirm.com
Attorneys for Plaintiffs

John Alan Doran
Matthew Hesketh
SHERMAN & HOWARD LLC
201 E. Washington St., Suite 800
Phoenix, AZ 85004
jdoran@shermanhoward.com
mhesketh@shermanhoward.com
lhinkel@shermanhoward.com
Attorneys for Defendant City of Phoenix,

/s/ Kris Schlott