COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PHOENIX LAW ENFORCEMENT ASSOCIATION, an Arizona non-profit corporation; BARRY JACOBS, EARLE AKRE, and ROBERT RAMSEY, and RICK FLUM, THERESA CLARK, NICHOLAS ROSANDER, CHARLES CONSOLIAN, RANDOLPH PALMER, SCOTT MCCAULEY, RODRIGO HERNANDEZ, NATALIE SIMONICK, JANINA AUSTIN, individually and on behalf of themselves and as representatives for similarly situated class members, Plaintiffs/Appellees, v. CITY OF PHOENIX, a body politic, Defendants/Appellees, and MICHAEL DUPUY, and JIM JOCHIM, Intervenors/Appellants.	1 CA-CV 15-0390 Maricopa County Superior Court Case No. CV2014-008711 CV2014-009114 (Consolidated)

APPELLANTS' CONSOLIDATED REPLY TO APPELLEES' ANSWERING BRIEFS

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INTRODUCTION

In arguing that the law does not say what it plainly does, Appellees avoid the obvious and focus on the immaterial. Appellees' case, moreover, is an attempt to manipulate a statewide pension system that includes 255 public employers and thousands of individual members. This Court should prevent Appellees from doing so by declaring that the law means what it says: Payments for vacation leave, sick leave, and uniform allowances are not pensionable for Public Safety Personnel Retirement System ("PSPRS") members. The definition of pensionable "compensation" under A.R.S. § 38-842(12) clearly excludes the payments at issue in this case, and as a result, those payments cannot as a matter of law be restored. If the Court agrees, the Court need not go further.

Yet, Appellees urge the Court to ignore the most relevant—and dispositive—part of the statutory definition of "compensation" to reach a result that is incompatible with the language and intent of the PSPRS statute. Even if we ignore the portion of A.R.S. § 38-842(12) that expressly excludes the payments at issue from the definition of pensionable compensation, as Appellees have, those payments still cannot qualify as pensionable pay under the statute's other provisions. The payments at issue are not "base salary," nor are they made "for the employee's performance of services," as Appellees contend. Rather they are extra payments for benefits that are not, and were never intended to be, pensionable.

For the reasons stated here and in Appellants' Opening Brief, the order under review should be reversed.

ARGUMENT

I. THE PAYMENTS AT ISSUE IN THIS CASE ARE NOT PENSIONABLE COMPENSATION UNDER STATE LAW.

Appellees argue that the payments at issue in this case are pensionable compensation for two reasons. First, Appellees contend that only payments made in a lump sum are excluded from the definition of pensionable compensation. (Clark Ans. Br. at 24–28); (PLEA Ans. Br. at 14). Second, Appellees characterize the pension payment arrangement as the ending of leave benefits that are not properly pensionable and the beginning of salary benefits that are. (Clark Ans. Br. 15–16); (PLEA Ans. Br. at 11). The first argument is irrelevant and unsupported by the plain language of A.R.S. § 38-842(12). The second is a mischaracterization of what is actually going on, and in any event, does not make a difference under the governing statute.

A. The payments at issue are not pensionable whether paid in a lump sum or otherwise.

Appellee Clark asserts the "Arizona Legislature's intent in amending A.R.S. § 38-842(12) in 1983 was to stop pension spiking . . . by excluding annual, lump-sum payments." (Clark Ans. Br. at 27–28). PLEA also reads into A.R.S. § 38-842(12) a legislative intent to "exclude only . . . lump sum payments." (PLEA

Ans. Br. at 14). A.R.S. § 38-842(12), however, makes no distinction between lump sum or regular payments in excluding "payment for unused sick leave, payment in lieu of vacation . . . or payment for any fringe benefits" from the definition of pensionable compensation. A.R.S. § 38-842(12). *Any* payment for unused sick leave, *any* payment in lieu of vacation, and payment for *any* fringe benefits are excluded from the definition of compensation under the PSPRS statute.

Moreover, nowhere in A.R.S. § 38-842(12) is the phrase "lump sum" used. And, the only part of the statute that references "regular monthly, semimonthly or biweekly" payments refers to those specific components of compensation that are included *in* the definition of compensation, not those excluded *from* the definition of compensation. Under the plain language of the statute, "payment for unused sick leave, payment in lieu of vacation . . . or payment for any fringe benefits," on the other hand, are categorically not pensionable compensation whether they are paid "regularly" or in one lump sum. As a result, the fact that a payment is "regular" does not automatically make it pensionable, and it certainly does not transform those types of pay that are explicitly *excluded* from the definition of pensionable compensation into pensionable pay.

If Appellees "lump sum" interpretation was correct, then any employer in PSPRS could unilaterally transform any benefit—sick leave, vacation leave,

uniform allowance, cell phone allowance, car allowance, "missed meal" allowance, etc.—into pensionable salary by merely providing that benefit in "regular" payments rather than in a lump sum. This would render the entire PSPRS statutory scheme irrelevant, inert, and void, nullifying the legislature's authority over the system. *See Hourani v. Benson Hosp.*, 211 Ariz. 427, 431 ¶ 7 (App. 2005) (internal citations omitted) ("In construing a statute, 'we consider the statutory scheme as a whole and presume that the legislature does not include statutory provisions which are redundant, void, inert, trivial, superfluous, or contradictory.'").

Appellees also contend, at some length, that the difference between lump sum payments and periodic payments is that the pension plan receives regular investment income on the latter but not on the former (PLEA Ans. Br. at 20; Clark Ans. Br. at 24–28). While this is partially true, it is also misleading, and in any event, has no bearing on whether payments are pensionable, as this Court has squarely held.

Appellee Clark principally relies on a hearsay interpretation of whether vacation leave and sick leave are pensionable compensation from Jack Cross (Clark An. Br. at 24–27), a former PSPRS administrator and lobbyist who unsuccessfully sued another state pension plan to have vacation leave and sick leave payments included in his pension calculation. *See Cross v. Elected Officials*

Ret. Plan, 234 Ariz. 595, 598 ¶ 1 (App. 2014). According to Appellee Clark, Cross's main concern with pension spiking in PSPRS was that it occurred "at the very end of a career" (Clark Ans. Br. at 26; IR 61at Ex. D, 78:5), and thus the pension plan could not earn investment income on the contributions. If that was, in fact, Mr. Cross's concern, then he should have been very concerned about the pension payments at issue in this case. All of the pension payments are made *at the very end* of Appellees' careers, where it is assured that the pension plan will not have any meaningful opportunity to invest contributions. *See* Appellants' Op. Br. at 25. Pension contributions in years, 18, 19, and 20 of PSPRS member's career would provide very little, if any, additional investment revenue than a lump sum payment made in the final year, year 20.[1] In other words, Jack Cross was simply wrong—the PSPRS system is not "getting its money" under either scenario.

And in any event, the notion that investment income on pension contributions has anything whatsoever to do with a meaningful interpretation of state statute has been squarely rejected by this Court. *Cross*, 234 Ariz. at 605 ¶ 34.

[1] For example, a lump sum pension payment of $30,000 to a PSPRS member would result in a $13,665 pension contribution to PSPRS. (A.R.S. § 38-843(B); IR 54 ¶¶ 6, 24) Three years of "periodic" pension payments of $10,000 would result in pension contributions totaling $4,555 each year. So, the only difference between the lump sum contribution in the PSPRS member's last year, and the "periodic" contributions over three years, is two years to invest a smaller sum. Any meaningful interpretation of A.R.S. § 38-842(12) cannot possibly rest on such an inconsequential difference.

Like Appellees argue here (Clark An. Br. at 24–27), Mr. Cross contended that paying contributions to the pension plan for unused vacation leave and sick leave payments was a significant factor in assessing whether the definition of "average annual salary" in the Elected Officials Retirement Plan ("EORP") should include payments for vacation leave and sick leave. *Id.* at 604–605, ¶¶ 32-33; *see* A.R.S. § 38-801(5). The Court rejected this argument: "[W]e reject any contention that the Plan's collection of contributions from Cross's bonuses and sick leave and vacation payments represent a considered interpretation of the statute to which we should defer." *Id.* at 605, ¶ 34. On the issue of whether member contributions inform a reasoned interpretation of statute, *Cross* is dispositive. Appellees' attempt to make the same argument in this litigation, therefore, fails.

In fact, that argument fails even more spectacularly than it did in *Cross* given the clarity of the language in A.R.S. § 38-842(12) vis-à-vis A.R.S. § 38-801(5), the statute this Court examined in *Cross*. Throughout his case, Mr. Cross argued that payments in lieu of sick time and vacation leave were pensionable because they fell within the definition of "average yearly salary" set out at A.R.S. § 38-801(5). *Id.* at 604, ¶ 32. A.R.S. § 38-801(5) defines "average yearly salary" as "the result obtained by dividing the total salary paid to an employee during a considered period by the number of years, including fractional years, in which the

salary was received."[2] The definition of "average yearly salary" under A.R.S. § 38-801(5) is not nearly as clear as the definition of "compensation" under A.R.S. § 38-842(12). Significantly, unlike the definition of "compensation" in A.R.S. § 38-842(12), the definition of "average yearly salary" in A.R.S. § 38-801(5) does not specifically exclude "payment for unused sick leave, payment in lieu of vacation . . . or payment for any fringe benefits." Yet this Court in *Cross* had no difficulty in holding that "average annual salary . . . does not include bonuses or payments made to a member in lieu of sick time or vacation." 234 Ariz. at 605 ¶ 35. Under *Cross*, if "payments made to a member in lieu of sick time or vacation" are not pensionable under A.R.S. § 38-801(5), *id.*, they are certainly not pensionable under A.R.S. § 38-842(12), a statute that specifically excludes such payments. Therefore, *Cross* is instructive because it guides this Court's treatment of sick leave and vacation leave as benefits that are not pensionable; it is dispositive because it holds directly that a pension system's collection of contributions has no bearing on an informed interpretation of state law.

Appellees attempt to create a distinction between lump sum payments and "regular" payments is unpersuasive. That interpretation does not accord with the

[2] A.R.S. § 38-801(5) goes on to read: "The considered period shall be: (a) For an elected official who becomes a member of the plan before January 1, 2012, the three consecutive years within the last ten completed years of credited service as an elected official that yield the highest average."

governing statute, the case law, or common sense. Put differently, a bank teller is guilty of larceny whether the teller steals $100 dollars a day for a month, or $3,000 in a lump sum. The only difference between the two, of course, is the likelihood of being caught.

B. The payments at issue are not payments for additional employee services; they are extra payments.

Appellees also argue that the payments at issue are pensionable because they are "payment by the employer for the employee's performance of services." (Clark Ans. Br. at 15; *see also* PLEA Ans. Br. 11). But this is actually not true. The payments at issue are simply *additional* or *extra* payments that are not made for the performance of additional services.

For example, when a PSPRS member exchanges his uniform allowance for additional salary payments, the member is performing no additional services. He or she is simply receiving a larger check that simultaneously increases the member's pension. (IR 54 at ¶¶ 14, 19; IR 55 at 34–35).

Similarly, in order to exchange sick leave for additional salary, an eligible member must have accumulated 1,714 hours, or 42 work weeks, of sick leave. (IR 54 at ¶¶ 13, 18; IR 55 at 38, 91). As Appellee PLEA helpfully observes, "When an eligible officer elected to end their sick leave benefits . . . [that] officer's bank of sick leave was not affected in any way by the election." (PLEA Ans. Br. at 13). In other words, the PSPRS member is simply receiving *additional* or *extra* payments,

but is not performing any additional services. If that PSPRS member gets sick, then the member still has a bank of 42 weeks of sick leave on which to draw over a three year period that is unaffected by the member's exchange for additional salary payments. What's more, the PSPRS member may sell back all of this unused sick leave for cash upon his or her retirement. (IR 54 at ¶¶ 13, 18; IR 55 at 38, 91). The arrangement is very much the same for vacation leave, except the number of hours that a PSPRS member needs to accumulate is smaller. *See* IR 54 at ¶¶ 12, 17; IR 55 at 46, 102).

Thus, for all of these provisions, there is not an agreement to perform services. There is merely an exchange of benefits for additional payments, which is precisely what A.R.S. § 38-842(12) forbids.

Nonetheless, throughout their briefs, Appellees attempt to characterize the payments at issue in this case as the ending of one benefit, which is not pensionable, and the beginning of a new benefit, which supposedly is pensionable. (Clark Ans. Br. at 16, 18; PLEA Ans. Br. at 11). That characterization is a logical contortion that does not reflect reality. When a PSPRS member elects to receive additional salary instead of vacation or sick leave, his or her leave benefits did not end, they were traded. The eligible PSPRS member exchanged leave, or payment for leave later if he or she were to cash it out, for additional payments now. That is quite clearly payment *in lieu of* leave, which A.R.S. § 38-842(12) plainly prohibits.

In other words, no benefit has "ended" for the PSPRS member. The PSPRS member has not forfeited anything. The member merely made a conscious choice to take cash payments in lieu of—literally meaning "instead of"—non-pensionable leave. That exchange of leave for pay does not change the fact that payments in lieu of leave are not pensionable under state law. No linguistic slight of hand can allow what the statute plainly forbids.

II. NO DEFERENCE IS OWED TO AGENCY ACTIONS AT ODDS WITH THE PLAIN LANGUAGE OF STATE LAW.

An administrative agency's statutory interpretation is reviewed *de novo*. *W. Maricopa Combine, Inc. v. Ariz. Dep't of Water Res.*, 200 Ariz. 400, 404 ¶ 11 (App. 2001).

No deference is owed to interpretations or actions by either the Public Safety Personnel Retirement System ("PSPRS") or the Phoenix Police Pension Board ("Local Board") because their interpretations are contrary to the plain language of state law, those entities do not possess any special expertise in statutory interpretation that this Court does not possess, and there has been no long-standing or consistent interpretation of A.R.S. § 38-842(12) by the agencies.

A. Any agency interpretation finding that the payments at issue in this case are pensionable are owed no deference because such interpretations are contrary to the plain language of state law.

Appellee PLEA contends that this Court should give deference to the Local Board's interpretation of the definition of compensation set out in A.R.S. § 38-842(12), and PSPRS's supposed acquiescence to that interpretation. (PLEA Ans. Br. 21–24). Statutory interpretations that are contrary to the plain language of state law, however, are owed no deference. "[O]f course, no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language." *Public Emps. Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 171, (1989), *superseded by statute as stated in Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 94 (2008). Deference to an administrative agency's own statutory interpretation is only appropriate where a statute is ambiguous. As described *supra* and in Appellants' Opening Brief, the prohibition on the pension payments at issue in this case as set out in A.R.S. § 38-842(12) is clear and the plain language controls. No deference is owed to an agency interpretation at odds with the plain language of state law.

B. Neither PSPRS nor the Local Board possess special expertise that this Court does not possess on a question of statutory interpretation.

Although Appellee PLEA correctly observes that PSPRS is responsible for administering the PSPRS pension fund and the Local Board is charged with authority pertaining to system administration (PLEA Ans. Br. 21–22), Appellee PLEA incorrectly assumes that either entity possesses expertise on a matter of pure statutory interpretation that is owed deference. Statutory interpretation is a fundamental judicial function. "When the issue involves an interpretation of law . . . 'the [superior] court . . . [is] free to draw [its] own legal conclusions and determine whether the agency erred in its interpretation of the law.'" *McMurren v. JMC Builders, Inc.*, 204 Ariz. 345, 348 ¶ 5 (App. 2003) (internal citations omitted). In this case, no issue of special administrative expertise is required. Nor is this a circumstance that involves detailed knowledge of pension fund administration generally or the claims of individual beneficiaries specifically. Rather, this a pure question of statutory interpretation which this Court, not PSPRS or the Local Board, is most properly suited to resolve. *See U.S. Parking Sys. v. City of Phoenix*, 160 Ariz. 210, 211 (App. 1989) ("courts must remain the final authority on critical questions of statutory construction."). And no deference should be afforded administrative entities that have improperly interpreted the law. *Id.* (Superior Court owed no deference to the ALJ's interpretation of the law.).

Additionally, PLEA asserts that because the Local Board "reaffirmed the longstanding interpretation of the compensation definition to include the salary payments at issue in this case" in a hearing on March 26, 2014, the Court should afford deference to that assessment. (PLEA Ans. Br. at 24). Appellants note that the Local Board made those findings during the pendency of litigation in the *Wright v. Stanton* matter, CV2013-010915, where the Local Board was named as a defendant for approving pension payments that were specifically excluded by state law in a plan it was charged with administering. Arizona courts have held that "an agency interpretation developed in litigation is not entitled to judicial deference." *McKesson Corp. v. Arizona Health Care Cost Containment Sys.*, 230 Ariz. 440, 443 ¶ 9 (App. 2012). Because those payments are no longer being included in officer salary as pensionable pay, the Local Board is no longer reviewing or approving final average salaries that include the payments at issue in this case. The Local Board's interpretation of the pensionability of payments for vacation leave, sick leave, and uniform allowances, on which PLEA now apparently relies, however, was "developed in litigation," and as such, is not entitled to judicial deference.

The Local Board's interpretation should also not be afforded deference because the Local Board's authority extends only to its members, not to the 255 other employers in the statewide PSPRS system. Pursuant to A.R.S. § 38-842(30),

the Local Board consists of "persons appointed to administer the system *as it applies to their members in the system*" (emphasis added). Under the law, and by its nature, the Local Board is *local* in nature, and its decisions have no effect whatsoever on either other employers in PSPRS or other members that do not fall under the Board's auspices. The Local Board is charged with administering benefits and resolving claims for employees of the Phoenix Police Department. Its authority ends there, and does not extend to issues of statewide or system-wide concern. Allowing each local board in the PSPRS system to interpret a statute in a statewide retirement program differently would be directly contrary to the purpose of PSPRS, which was created "to provide a uniform, consistent and equitable statewide program." A.R.S. § 38-841(B).

C. There has been no long-standing or consistent interpretation of A.R.S. § 38-842(12) by either PSPRS or the City.

Appellee PLEA contends that both the Local Board and PSPRS have consistently interpreted the definition of compensation under A.R.S. § 38-842(12). (PLEA Ans. Br. at 21). As described *supra*, the Local Board's interpretation is limited in scope and was made during the pendency of litigation, and PSPRS's interpretation of A.R.S. § 38-842(12) has been anything but consistent. In fact, after the Local Board provided its interpretation of A.R.S. § 38-842(12) during the *Wright* litigation, PSPRS specifically directed the Local Board to reevaluate its interpretation. (IR 70 ¶ 1). In a letter addressed to the Local Board, PSPRS wrote:

> The System has concerns about the decision reached at this Local Board meeting. Therefore, pursuant to Arizona Revised Statute § 38-847, the System respectfully requests that the Local Board conduct a rehearing to reconsider and to clarify the matter of employee vacation, sick leave and uniform allowance matters as these relate to pensionable compensation.

IR 71 at 2.

Thus, contrary to Appellee PLEA's assertions, it is simply not accurate that "both PSPRS and the local board have interpreted the compensation definition to include the salary payments since 1988 and reaffirmed that interpretation as recently as March 26, 2014." (PLEA Ans. Br. at 21.). To the extent PSPRS has provided any guidance on the pensionability of the payments at issue in this case, it has been to express "concerns" about them. To the extent PSPRS has taken no definitive position of the pensionability of the payments at issue, the agency is afforded no deference. *See Scenic Ariz. v. City of Phx. Bd. of Adjustment*, 228 Ariz. 419, 431 ¶ 37 (App. 2011) (no deference owed to agency interpretation that is inconsistent and inconclusive).

Moreover, this litigation was brought by Appellees specifically because the City reevaluated its position regarding the pensionability of the contract provisions at issue and subsequently revised or removed those provisions. The City has, in fact, eliminated those payments.

As a result, we are left with an interpretation of statute from one administrative entity made during litigation where the Local Board was a

defendant, in which two of that agency's members likely had a conflict of interest,[3] which is directly at odds with the plain language of state law. Under such circumstances, no deference is owed to the Local Board's interpretation, or any administrative action that is contrary to the clear definition of "compensation" under A.R.S. § 38-842(12).

CONCLUSION

Based on the foregoing, Appellants respectfully request that this Court reverse the decision of the court below, declare that payments for vacation leave, sick leave, and uniform allowances for PSPRS members are not pensionable, and dismiss Appellees' case with prejudice.

Respectfully submitted November 3, 2015 by:

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[3] During the Local Board hearing, at least two of the Local Board members were also active PSPRS beneficiaries. *See* A.R.S. § 38-847(A)(2) (the Local Board has two members "employed by the appropriate employer"). Under state law, any members who could take advantage of the payments at issue in this case have a clear pecuniary interest in the outcome of the Local Board's interpretation; as such, those members should have been recused from the Board's interpretation. *See* A.R.S. § 38-503(B) ("Any public officer or employee who has . . . a substantial interest in any decision of a public agency shall make known such interest in the official records of such public agency and shall refrain from participating in any manner as an officer or employee in such decision.")