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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, and MICHAEL DUPUY; and JIM JOCHIM, Defendant-Intervenors.	Case No. CV2014-009114 CV2014-008711 (Consolidated) **INTERVENORS' CONSOLIDATED RESPONSE TO THERESA CLARK'S, ET AL. CROSS MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF INTERVENORS' MOTION FOR SUMMARY JUDGMENT** *Honorable Robert Oberbillig*

Pursuant to Rule 56, Ariz. R. Civ. P., Intervenors, Michael Dupuy and Jim Jochim, who are Phoenix taxpayers ("Taxpayers"), submit this consolidated Response to Plaintiffs Theresa Clark's ("Clark"), et al., Cross Motion for Summary Judgment and Reply to Clark's Response to Intervenors' Motion for Summary Judgment.

PRELIMINARY STATEMENT

Like their co-plaintiffs in this litigation, Plaintiff Clark asserts that the law does not say what it

clearly says and that the legislature did not intend what the legislature clearly intended when enacting that law.

Several arguments raised by Plaintiff Clark were also raised by Plaintiffs Phoenix Law Enforcement Association ("PLEA"), et al. To the extent a response is warranted to duplicative arguments, Taxpayers incorporate by reference their Consolidated Response to PLEA's Cross Motion for Summary Judgment and Reply to PLEA's Response to Intervenors' Motion for Summary Judgment ("Taxpayers' Response to PLEA MSJ"). Clark's remaining arguments, and the reasons why they should be rejected by the Court, are addressed herein.

LEGAL ANALYSIS

I. STATE LAW PROHIBITS THE PENSION PAYMENTS AT ISSUE IN THIS CASE.

Plaintiff Clark argues that the payments at issue in this case are not excluded from the definition of pensionable compensation under A.R.S. § 38-842(12) for essentially two reasons: (1) the payments at issue were not made in a lump sum, and (2) contributions to the PSPRS pension fund were made on the payments (Pls.' Resp. Summ. J. and Cross Mot. Summ. J. at 8) ("Clark MSJ"). The first argument is irrelevant and unsupported by the plain language of A.R.S. § 38-842(12). The second argument was recently and directly rejected by the Arizona Court of Appeals. *Cross v. Elected Officials Ret. Plan*, 234 Ariz. 595, 605, 325 P.3d 1001, 1011 (App. 2014).

A. The definition of "compensation" under A.R.S. § 38-842(12) does not distinguish between lump sum pension payments and regular pension payments.

Clark first asserts the "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 MSJ at 14-15). 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 benefit 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. In other words, payments for "base salary, overtime pay, shift differential pay, military differential wage pay, compensatory time used by an employee in lieu of overtime not otherwise paid by an employer and holiday pay" made on a "regular monthly, semimonthly or biweekly" basis or "longevity pay paid to an employee at least every six months" are pensionable compensation. If any of those forms of compensation are not paid on a "regular monthly, semimonthly or biweekly" basis, presumably they would not be pensionable compensation. "[P]ayment for unused sick leave, payment in lieu of vacation…or payment for any fringe benefits," on the other hand, are not pensionable compensation whether they are paid "regularly" or in one lump sum. The portion of A.R.S. § 38-842(12) that applies a "regular" payment element to types of pay that are pensionable compensation does not appear in the portion of that statute defining what types of pay are *not* pensionable compensation. 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 *excluded* from the definition of pensionable compensation to pensionable pay.

As outlined in Taxpayers' Response to PLEA's Motion for Summary Judgment ("PLEA Response" at 2-5), since the components of compensation at issue in this case are obviously not "base salary," "longevity pay," or any other specific type of pay *included in* the definition of compensation at A.R.S. § 38-842(12), and because they are specifically *excluded from* that definition, they are not

pensionable.

B. The collection of pension contributions for the payments at issue in this case have no bearing on whether those payments are pensionable under state law.

Plaintiff Clark next contends that the payments at issue in this case should be considered pensionable compensation because Unit 6 members made pension contributions on those payments (Clark MSJ at 12-13) ("The problem, then, was not that employees were being paid for vacation leave, sick leave, or other benefits, but that PSPRS did not receive regular contributions for those payments."). Remarkably, Clark does not rely on the specific language of A.R.S. § 38-842(12) or the actual legislative history of that statute to establish that claim, but rather on statements made at an administrative hearing by a former PSPRS administrator and lobbyist who was himself the subject of litigation for attempting to spike his pension with vacation leave and sick leave. (Clark MSJ at 13-14.) What's more, the Arizona Court of Appeals squarely rejected the contention that a pension plan's collection of contributions from individual beneficiaries should inform the courts regarding a proper interpretation of state law. *Cross*, 234 Ariz. at 605, 325 P.3d at 1011. *Cross* is dispositive on this issue.

Clark principally relies on an hearsay interpretation of whether vacation leave and sick leave are pensionable compensation from Jack Cross (Clark MSJ at 13), a former PSPRS administrator who inflated his *own* pension by tens of thousands of dollars *a year* through cashing in vacation leave and sick leave at the end of his career at PSPRS. *Cross*, 234 Ariz. at 598, 325 P.3d at 1004. As the administrator of PSPRS, Mr. Cross was eligible to participate in the Elected Officials Retirement Plan ("EORP"). In 2002, he purportedly retired from PSPRS and began to receive a pension from EORP, but remained on the job in the same position for an additional two years. Mr. Cross's base salary in fiscal years 2000, 2001, and 2002 was $133,452, $141,136 and $164,633, respectively. [1] However, his

[1] Despite his purported retirement, Mr. Cross continued his employment as plan administrator for two

"average annual salary" was increased to of $205,580 based on additional pay for "bonuses and payments for unused vacation and sick time." *Id.* At 80 percent of his "annual average salary," this resulted in a monthly pension of $13,705. *Id.* When Mr. Cross later asked EORP to recalculate his pension to include the years he was "retired" but continued his employment as PSPRS administrator, EORP examined and recalculated his "annual average salary." After this review, EORP "explained it should not have included his bonuses and payments for unused vacation and sick pay in calculating his pension." *Id*. Mr. Cross then sued EORP. *Id.* at 599, 325 P.3d at 1005.

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, 325 P.3d at 1010. 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] As a threshold issue, 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). For example, the definition of "average annual salary" does not include specific components of compensation, such as "base salary, overtime pay, shift differential pay, military differential wage pay," etc., that are included in the definition of "compensation" under A.R.S. § 38-842(12). More importantly, unlike the definition of "compensation" under A.R.S. § 38-842(12), the definition of "average yearly salary" does not specifically exclude

years where he earned $175,000 in fiscal year 2003, and $325,691 in fiscal year 2004, an amount that also included "bonus and pay for unused vacation and sick time." *Cross*, 234 Ariz. at 598, 325 P.3d at 1005.

[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."

"payment for unused sick leave, payment in lieu of vacation…or payment for any fringe benefits." Yet the Court of Appeals 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, 325 P.3d at 1011. 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), they are certainly not pensionable under A.R.S. § 38-842(12), a statute that specifically excludes such payments.

Cross also forecloses Clark's argument that pension contributions on payments for unused vacation and sick leave are a factor in determining whether such payments are pensionable under state statute. 234 Ariz. at 605, 325 P.3d at 1011. Like Clark argues here (Clark MSJ at 13), 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" should include payments for vacation leave and sick leave. *Id.* at 604-605, 325 P.3d at 1010-1011. 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, 325 P.3d at 1011. On the issue of whether member contributions inform a reasoned interpretation of statute, *Cross* is dispositive. Clark's attempt to make the same argument in this litigation, therefore, fails.

Taxpayers also note that Clark's heavy reliance on hearsay statements from Mr. Cross before the Local Police Pension Board is misplaced and ill-timed. In an apparent effort to establish that the legislative history of A.R.S. § 38-842(12) shows that the payments at issue in this case are actually included in the definition of "compensation," Clark cites several hearsay statements from Mr. Cross provided by Ron Snodgrass at the February 14, 2014 hearing of the Phoenix Police Pension Board "Local Board") (Clark MSJ at 13). According to Clark, because Mr. Cross apparently wanted pension

contributions to PSPRS on certain payments on a regular basis, the legislature also intended that those payments be pensionable (Clark MSJ at 13) ("Jack doesn't want lump sums once [a] year, he wants at least twice a year or more, and that was one of Jack's rules, his interpretation of the language that he helped create."). Of course, when it comes to determining legislative intent, the desires of a former lobbyist are completely and entirely irrelevant. Mr. Cross very well could have wanted twice the pension contributions from every employer and employee in PSPRS when he lobbied the legislature, but that does not mean the legislature acquiesced to his wishes in passing the law, nor does it mean the legislature shared his interpretation of the statute. More to the point, however, Mr. Cross's interpretation of certain payments being pensionable if contributions were made on those payments, apparently expressed to Mr. Snodgrass in 1983, and reiterated to the Phoenix Police Pension Board in February 2014, was expressly rejected by the Arizona Court of Appeals in May 2014. *Cross*, 234 Ariz. at 605, 325 P.3d at 1011. Even assuming Mr. Cross's argument was compelling in 1983, or even in February 2014, which Taxpayers do not assume, that argument was foreclosed by the Court of Appeals in May 2014.

III. NO DEFERENCE IS OWED TO AN ADMINISTRATIVE BODY'S STATUTORY INTERPRETATION THAT IS IN DIRECT CONFLICT WITH STATE LAW.

Like PLEA, Clark contends that this Court should give deference to an administrative interpretation of the definition of compensation set out in A.R.S. § 38-842(12) by the Local Board as well as PSPRS's apparent acquiescence to that interpretation. (Clark MSJ at 17-18.) Of course, no deference is owed to an administrative interpretation at odds with the plain language of the statute the agency is interpreting. *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). Moreover, judicial deference to administrative action is particularly unwarranted when the question is one of pure statutory

interpretation in which the agency has no special expertise. *See McMurren v. JMC Builders, Inc.*, 204 Ariz. 345, 348, 63 P.3d 1082, 1085 (App. 2003). This is especially true when an administrative interpretation was developed during litigation, such as the Phoenix Police Pension Board's interpretation developed when that entity was a defendant in *Wright v. Stanton*, CV2013-010915. *McKesson Corp. v. Arizona Health Care Cost Containment Sys.*, 230 Ariz. 440, 443, 286 P.3d 784, 787 (App. 2012). *See also* Taxpayer Response PLEA MSJ at 10-14.

Clark adds another argument, however, that is simply not supported by the record. Clark contends "the City, the Local Board, and PSPRS have always interpreted A.R.S. § 38-842(12) to include the additional salary payments provided by Provisions 5-5(L), 3-4(B)(5), and 3-1D in the definition of 'compensation…' " (Clark MSJ at 18). As a threshold matter, this litigation was brought by Clark specifically because the City reevaluated its position regarding the pensionability of the contract provisions at issue and subsequently revised or removed those provisions. Moreover, apart from hearsay statements from a PSPRS administrator who has long since retired and who has had his own interpretation of the pensionability of unused vacation leave and sick leave rebuffed by the Court of Appeals, there is no evidence PSPRS currently supports the view that the payments at issue in this case were pensionable. On the contrary, 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. (Intervenors' Supplemental Statement of Facts to Intervenors' Consolidated Response to Clark, et al.'s Cross Motion for Summary Judgment ("SSOF") ¶ 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.

Thus, contrary to Clark's assertions, it is simply not accurate that "[s]ince [1990], the City, the Local Board, and PSPRS have considered those additional salary payments as 'compensation.' " (Clark MSJ at 16.) The City eliminated the pensionability of those payments, and, at the very least, PSPRS "has concerns" about them. 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] that 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).

IV. INCLUDING THE PENSION PAYMENTS AT ISSUE IN THE DEFINITION OF "COMPENSATION" UNDER A.R.S. § 38-842(12) RESULTS IN INCREASED COSTS TO THE CITY.

Clark's final assertion that including the pension payments at issue in this litigation "in the definition of 'compensation' actually *saves* the City money" (Clark MSJ at 19) is entirely unsupported by the record and the law.

According to Clark's hypothetical, if an officer takes a sick day or goes on vacation, a substitute must be identified and paid one-and-a-half times the substitute's salary pursuant to the City's minimum staffing policies. (*Id.*) The City must then make pension contributions for both the employee who is off

[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)(1) (the Local Board has two members "employed by the appropriate employer"). At the time the Board made its interpretation, Board members that could have taken advantage of the provisions at issue in this case had a clear pecuniary interest in the outcome of that interpretation. Under state law, such members should have been recused from the Board's interpretation. *See* ARIZ. REV. STAT. § 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.")

and for the substitute. (*Id.*) This fanciful circumstance first incorrectly assumes that anytime someone takes leave, the City does not "have enough people to man the squads." (Ex. D to Clark's Statement Identifying Disputed Facts at 77:11.) This is pure and utter conjecture that is not supported by the record or common sense. Nothing in the record indicates that the City suffers from manning shortages such that *anytime* an employee takes a leave day, another employee must be called in to cover at overtime costs. Instead, any logical departmental planning would ensure adequate staffing during periods of employee leave without necessitating overtime, except in rare or exceptional circumstances.

Clark goes on to contend that Taxpayers "fail to make any argument in their MSJ explaining how these payments result in any expenditure of taxpayer funds." (Clark MSJ at 18-19). In fact, Taxpayers established how the payments at issue result in an unlawful expenditure of taxpayer funds in both their Motion for Summary Judgment ("Taxpayers' MSJ" at 4-5) and their Motion to Intervene (Applicant Ints.' Mot. to Intervene at 4). To reiterate, for each of the components of compensation at issue, the City made employer contributions to PSPRS based on the payment amount each pay period. A.R.S. § 38-843(B); (SOF ¶ 24). The employer contribution rate for fiscal year 2014-2015 for the Phoenix Police Department is 37.62% of the member's total pensionable compensation. (SOF ¶ 7.) So, for each $100.00 a Phoenix Police Department employee earns in pensionable compensation, the City contributes $37.62 to PSPRS. If a PSPRS member, including Plaintiffs, elected to receive additional payment for any of the payments at issue, then the City would contribute 37.62% of that payment to PSPRS. That additional pension contribution is an unlawful expenditure of taxpayer funds that the City would not otherwise have to make but for the pension provisions at issue in this case. Moreover, an officer's "final average salary," and thus his total pension, are increased by receiving the pension payments at issue during retirement eligible years – the same timeframe in which these payments are available.

As a result, the additional cost to the City, and thus Taxpayers, does not end with the City's

increased direct pension contributions. Clark's misleading hypothetical completely ignores the *much* larger pension contributions the City must make to PSPRS *for the entirety of an employee's retirement* when an employee's pension is artificially inflated by cashing in the pension payments at issue. PSPRS is a "multiple employer" retirement plan. (SSOF ¶ 2.) As a result, each of the approximately 255 employers in PSPRS, including the City of Phoenix, maintains a separate account in PSPRS from which contributions are made and pension payments are drawn. (SSOF ¶ 2.) (SOF ¶¶ 2, 8.) Thus, when an employee exchanges a sick day or vacation day for pensionable payments, the City not only pays the direct 37.62% contribution rate on that payment, but is ultimately responsible for funding the increased liabilities on the City's account within PSPRS for the entirety of that employee's retirement. (SSOF ¶ 3, 5.)

Consequently, despite Clark's assertions, rather than "saving the City money," the pension payments at issue resulted in immediate and direct costs to the City in the form of increased pension contributions as well as substantial liabilities for the City over the lifetime of the retirees who elected those payments.

CONCLUSION

Based on the foregoing, Taxpayers respectfully request that their Motion for Summary Judgment be GRANTED, that Plaintiff Clark's Cross Motion for Summary Judgment be DENIED, and that PLEA's Amended Complaint and Plaintiff Clarks' Verified Complaint be dismissed with prejudice.

RESPECTFULLY SUBMITTED this 30th day of January, 2015 by:

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CERTIFICATE OF SERVICE

ORIGINAL E-FILED this 30th day of January, 2015, with a copy delivered via the ECF system to:

The Honorable Robert Oberbillig
Maricopa County Superior Court

Clerk of Court
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