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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' 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"), move this Court for an order granting summary judgment in their favor, and dismissing Plaintiff Phoenix Law Enforcement Association's ("PLEA"), et al., First Amended Complaint and Plaintiff Theresa Clark's, et al. ("Supervisors"), Verified Complaint with prejudice. There is no genuine issue as to any material fact and Taxpayers are entitled to judgment as a matter of law.

PRELIMINARY STATEMENT

If granted, Plaintiffs' request for relief in this case would result in the immediate, unlawful expenditure of taxpayer funds by the largest employer in the Public Safety Personnel Retirement System ("PSPRS"). All Phoenix taxpayers, including Intervenors, would be responsible for funding these extensive liabilities for decades. State law prohibits that result. The governing statute in this case is clear and unequivocal – the interpretation of which requires only giving the law's language its plain and obvious meaning. The intent and purpose of the PSPRS statutory scheme likewise supports the simple conclusion that state law prohibits the relief Plaintiffs request in this case. Plaintiffs' case must be dismissed.

BACKGROUND

PSPRS is a statewide pension program for eligible public safety personnel. (A.R.S. § 38-841 *et seq.*; Separate Statement of Facts ("SOF") ¶ 1). 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 of Phoenix ("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.*

Under state law, pensions for members of PSPRS hired before January 1, 2012 are calculated

based on an average of the highest three years of salary preceding retirement ("final average salary").[1] A.R.S. § 38-842(7). Therefore, the higher a PSPRS member's salary in the years preceding retirement, the higher the member's pension.

Additionally, 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, Plaintiff PLEA is now asking this Court, *inter alia*, for "an order preliminarily and permanently enjoining the Defendant City of Phoenix from eliminating the conversion rights for sick leave and vacation leave…." (PLEA's Amend. Complaint at 21, ¶ 2). Similarly, Plaintiff Supervisors is seeking "[a]n order enjoining the City Manager's unilateral termination of Plaintiffs' rights to pensionable Exchange Salary" (Supervisors' Ver. Complaint at 38, ¶ 3). "Exchange Salary" includes payments in lieu of vacation leave, payments for unused sick leave, and payments for the fringe benefit uniform allowance. *See* Supervisors' Ver. Complaint at 6-9, ¶¶ 25-33.

The most recent Memorandum of Understanding between Plaintiff PLEA and the City that permitted these payments was operative from July 1, 2012 until June 30, 2014 ("2012-2014 MOU"). (SOF ¶ 16). That document allowed Phoenix Police Department officers below the rank of sergeant to include payment in lieu of vacation (SOF ¶ 17), payment for unused sick leave (SOF ¶ 18), and payment for a fringe benefit uniform allowance (SOF ¶ 19) as pensionable compensation items.

[1] For employees who join the PSPRS after January 1, 2012, an average of the highest five years of salary is used to calculate pension benefits. A.R.S. § 38-842(7).

The most recent Memorandum of Agreement between Plaintiff Supervisors and the City that permitted these payments was operative from on or about July 1, 2012 until June 30, 2014 ("2012-2014 MOA"). (SOF ¶ 11). That document allowed Phoenix Police Department officers in the ranks of sergeant and lieutenant to include payment in lieu of vacation (SOF ¶ 12), payment for unused sick leave (SOF ¶ 13), and payment for a fringe benefit uniform allowance (SOF ¶ 14) as pensionable compensation items.

Every type of compensation paid by the City to its employees has earnings codes assigned to it by the City. (SOF ¶ 20). Certain earning codes are designated as "pensionable," while other earning codes are designated as "not pensionable," meaning that the City makes pension contributions on the former but not on the latter (SOF ¶ 21). The components of compensation for each of the above-described salary exchange payments in the 2012-2014 MOA and 2012-2014 MOU and predecessor agreements paid to Supervisors and PLEA members were coded by the City as pensionable compensation. (SOF ¶ 23).

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); SOF ¶ 24). Set by actuarial evaluation, the employer contribution rate for fiscal year 2013-2014 for the Phoenix Police Department was 34.5% of the member's compensation amount.[2] (SOF ¶ 6). In other words, for each $100.00 dollars a Phoenix Police Department employee and member of PSPRS earns in pensionable compensation, the City contributes $34.50 to PSPRS. More precisely, if a PSPRS member, including Plaintiffs, elected to receive payment in lieu of vacation leave, payment for sick leave, or payment for a uniform allowance conversion, then the City would contribute 34.5% of those total payments to PSPRS.

[2] Based on actuarial valuation for fiscal year 2014-2015, the Phoenix Police Department employer contribution rate rises to 37.62%. (SOF ¶ 7).

Plaintiffs' final average salary would also be increased to reflect that payment amount for purposes of computing pension benefits. Should Plaintiffs be successful in this litigation, these pension contributions would immediately resume (SOF ¶ 25), at great cost to the Taxpayers.

On or about May 30, 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. (SOF ¶ 31). 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." (SOF ¶ 32). The effective date for the 2014-2016 TCE was July 1, 2014. (SOF ¶ 35).

On or about May 30, 2014, after failure to agree on the terms of a 2014-2016 MOA, pursuant to Phoenix, Ariz., City Code, § 2-233(B)(2)(b), the Phoenix City Manager imposed a "Salaries and Fringe Benefits" document ("2014-2016 SFB") on PPSLA and Unit 6 employees. (SOF ¶ 26). The 2014-2016 SFB eliminated § 3-1D of the 2012-2014 MOA and revised payments made for vacation and sick leave conversions under 3-4(B)(5) and 5-5(L) of the 2012-2014 MOA, pronouncing that such payments are no longer "considered part of Final Average Salary for purposes of pension calculations." (SOF ¶ 27). The effective date for the 2014-2016 SFB was July 1, 2014. (SOF ¶ 30).

As a result, effective July 1, 2014, for all compensation earned from that date forward, the City no longer offered the components of compensation at issue to officers as pensionable payment items and the City ceased making pension contributions to PSPRS for those components of compensation pursuant to the terms of the 2014-2016 TCE and the 2014-2016 SFB.[3] (SOF ¶¶ 29, 34).

[3] The City's prior policy of allowing the conversion of these benefits to pensionable compensation was the subject of a taxpayer challenge that was dismissed at the request of the parties following adoption of this new policy. *See Wright v.*

Plaintiffs challenge those changes to their pensionable compensation in this action.

LEGAL ANALYSIS

I. THE RELIEF REQUESTED BY PLAINTIFFS IS PROHIBITED BY STATE LAW.

A. The plain and obvious language of A.R.S. § 38-842(12) prohibits the pension payments at issue in this case and the relief requested by Plaintiffs.

In their prayer for relief, Plaintiffs are demanding that the Court order the City to remit pension contribution payments that violate the plain language of state law. Arizona law is clear and unequivocal that the payments in question do not count as pensionable compensation: "Compensation does not include, for the purpose of computing retirement benefits, payment for unused sick leave, payment in lieu of vacation . . . or payment for any fringe benefits." A.R.S. § 38-842(12). It is a principle of black letter law that when courts interpret a statue, they "seek to give effect to the plain and obvious meaning of its terms." *State v. Wilson*, 200 Ariz. 390, 397, 26 P.3d 1161, 1168 (App. 2001). "If the language of the statute is plain, the court looks no further." *State v. Jones*, 188 Ariz. 388, 392, 937 P.2d 310, 314 (1997). Moreover, "[w]hen a statutory scheme expressly defines certain terms, we are bound by those definitions in construing a statute within that scheme." *Wilson*, 200 Ariz. at 397, 26 P.3d at 1168.

In this case, the governing statute expressly defines "compensation" for purposes of computing retirement benefits for PSPRS members. That definition explicitly excludes "payment for unused sick leave, payment in lieu of vacation . . . or payment for any fringe benefits." A.R.S. § 38-842(12).

When Phoenix police officers below the rank of sergeant, including members of Plaintiff PLEA, "who ha[ve] attained a minimum of seventeen (17) years of credited service in PSPRS" elect to have additional vacation leave paid to the member "for the upcoming three (3) consecutive years" (SOF ¶ 17,

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Stanton, Maricopa County Superior Court Cause No. CV2013-010915 filed Aug. 15, 2013. The City's changed policy regarding conversion of benefits to pensionable compensation conforms to state law. The relief sought by Plaintiffs would create an illegal system, and therefore should be rejected.

Ex. 5 at 44), they are receiving "payment in lieu of vacation." A.R.S. § 38-842(12). Similarly, when Phoenix police officers in the ranks of sergeant and lieutenant, including Plaintiff Supervisors, "with seventeen years of credited service in PSPRS" are paid "additional vacation leave for a one-time, three year period" (SOF ¶ 12, Ex. 4 at 24) as pensionable salary, they are also receiving "payment in lieu of vacation." A.R.S. § 38-842(12). The plain and obvious meaning of "in lieu of" is "instead of." MERIAM-WEBSTER, Dictionary (Online ed., 2014). "A dictionary may define a word's natural and obvious meaning." *Jones*, 188 Ariz. at 392, 937 P.2d at 314. No matter how this arrangement is characterized, it is indisputably true that employees electing payments made pursuant to these provisions are receiving salary payments "in lieu of" or "instead of" vacation leave. Thus, any pensionable payment received as additional salary in exchange for vacation leave is *by definition* "payment in lieu of [or instead of] vacation."

Additionally, when Plaintiffs "who ha[ve] accumulated a minimum of 1,714 hours or more of *unused* sick leave" (SOF ¶ 18, Ex. 5 at 33; SOF ¶ 13, Ex. 4 at 16 (emphasis added)) are paid additional sick leave as pensionable salary, they are receiving "payment for unused sick leave." A.R.S. § 38-842(12). The text in both the 2012-2014 MOU and 2012-2014 MOA is identical, and both provisions permit pensionable payment for unused sick leave. It is, of course, obvious that "unused" means "not having been used before." MERIAM-WEBSTER, Dictionary (Online ed., 2014). When Plaintiffs exchange sick leave that has not been used before for pensionable salary, they are receiving pensionable payment for unused sick leave.

Finally, "[a]fter 17 years of credited service in PSPRS," Phoenix police officers, including Plaintiffs, may exchange their annual uniform allowance for recurring salary payments "for a consecutive three year period" (SOF ¶ 19, Ex. 5 at 34; SOF ¶ 14, Ex. 5 at 12). The uniform conversion payments made pursuant to these provisions permits pensionable compensation for members who elect

the conversion. A fringe benefit is a "benefit (other than direct salary or compensation) received by an employee from an employer, such as insurance, a company car, or a tuition allowance." BLACK'S LAW DICTIONARY 64 (Bryan Garner, 2d. Ed. 2001). A uniform allowance is an individual fringe benefit. A.R.S. § 38-842(12) does not permit pensionable payment for "*any* fringe benefits" not enumerated in the statute. *Id.* (emphasis added). As a result, receipt of pensionable payment in lieu of a uniform allowance, likewise, violates A.R.S. § 38-842(12).

The plain language of A.R.S. § 38-842(12) is clear and unambiguous. "Where a statute expressly defines certain words and terms used in the statute, the court is bound by the legislative definition in all cases where rights of parties litigant are based upon statute." *Walker v. City of Scottsdale*, 163 Ariz. 206, 209, 786 P.2d 1057, 1060 (App. 1989); *see also Mail Boxes v. Industrial Comm'n of Ariz.*, 181 Ariz. 119, 121, 888 P.2d 777, 779 (1995) ("Where language is unambiguous, it is normally conclusive, absent a clearly expressed legislative intent to the contrary."). It is clear from the language used in A.R.S. § 38-842(12) that the legislature both expressly *included* certain items of compensation as pensionable pay and expressly *excluded* other items of compensation as pensionable pay. The payments at issue in this case were expressly excluded as pensionable. As a result, Plaintiffs' request to have this Court order the City to remit pension contributions for these items of compensation fails *as a matter of law*.

B. The clear intent of the Arizona Legislature was to exclude the payments at issue in this case from pensionable compensation.

In order to give meaningful operation to the PSPRS statute, and the intent of the legislature in enacting the entire statutory scheme, A.R.S. § 38-842(12) must be read to exclude the payments at issue from pensionable compensation. A.R.S. § 38-841, *et seq.* "The primary rule of statutory construction is to find and give effect to legislative intent." *Mail Boxes*, 181 Ariz. at 121, 888 P.2d at 779. "When

construing statutes, we must read the statute as a whole and give meaningful operation to each of its provisions." *Ruiz v. Hull*, 191 Ariz. 441, 450, 957 P.2d 984, 993 (1998). Additionally, statutes must be interpreted "in a way that avoids absurdity and fulfills the legislature's purpose." *Mail Boxes*, 181 Ariz. at 122, 888 P.2d at 780. In doing so, courts may consider "context, subject matter, historical background, effects, consequences, spirit, and purpose." *Id.*

In this case, under A.R.S. § 38-842(12), the legislature defined certain components of pay as pensionable "compensation," and defined other components as not pensionable "compensation." The structure of A.R.S. § 38-842(12) shows that the legislature created two separate categories of compensation – those components of compensation that are pensionable and those that are not. The payments at issue in this case were plainly and intentionally placed in the "not pensionable" category by state lawmakers. Had the legislature intended to include vacation leave, unused sick leave, and uniform allowances as pensionable compensation, the legislature would simply have included those items under its definition of pensionable compensation, rather than expressly exclude them from that definition. It is absurd to argue that the legislature intended the components of compensation at issue in this case to count as compensation when they expressly listed those specific items as *not* pensionable compensation.

Moreover, at the time the PSPRS statute was enacted there were "wide and significant differentials in employee contribution rates, benefit eligibility provisions, types of benefit protection and *benefit formulas*." A.R.S. § 38-841(A) (emphasis added). Thus, the legislature's stated intent in establishing PSPRS was "to provide a uniform, consistent and equitable statewide [retirement] program for public safety personnel." *Id.* at § 38-841(B). To achieve uniformity and consistency of pension formulas for public safety personnel, the PSPRS statute specifically defines its material terms, including the definition of pensionable "compensation." Attempts to end-around the plain language of A.R.S. § 38-842(12), therefore, flout the legislature's intent in creating a uniform and consistent statewide

pension system. Had the legislature intended the payments at issue in this case to count as pensionable compensation, it would have defined them as such, rather than expressly defining them as not pensionable, so that *all* public safety personnel statewide could enjoy this added benefit consistently and uniformly.

The history of the definition of "compensation" under A.R.S. § 38-842(12) and pension contributions for vacation leave, sick leave, and uniform allowances made pursuant to memoranda of understanding is also illustrative. The exclusion of "payment for unused sick leave, payment in lieu of vacation . . . [and] payment for fringe benefits" from the definition of compensation under the PSPRS statute was added in 1983. H.B. 2356, 36th Leg., 1st Reg. Sess. (Ariz. 1983); (SOF ¶ 9). Provisions in the memoranda of understanding that provided for City pension contributions were enacted after that date, including up to the most recent 2012-2014 MOU and 2012-2014 MOA. (SOF ¶¶ 11, 16). Thus, it appears that the conversion of vacation and sick leave payments and uniform allowance into monthly or bi-weekly payments was a not-so-subtle attempt to make items that are excluded from the statutory definition of compensation look more like "regular" salary. However, the law makes no distinction between payments that occur each pay period or in a lump sum: all payments in lieu of vacation, for unused sick leave, and for any fringe benefit are excluded from the definition of pensionable compensation. Likewise, the law makes no distinction between receipt of payment for *future* leave or *past* leave. Payment in lieu of *any* vacation leave, unused sick leave, or fringe benefit is not pensionable under state law. Calling a duck a goose does not make it so.

Indeed, courts throughout the country that have addressed whether payments for vacation leave, sick leave, and uniform allowances are pensionable have held almost without exception that they are not – even in states where the statutory scheme is not nearly as clear as it is in Arizona. *See, e.g.*, *Chancellor v. Dep't of Ret. Sys.*, 12 P.3d 164, 169 (Wash. App. 2000) (holding that salary payments

made in exchange for waiver of vacation leave by senior public safety personnel are not part of "basic salary" for calculating pension benefits); *Davies v. New York State & Local Police & Fireman Ret. Sys*., 259 A.D.2d 912, (App. N.Y. 1999) (holding that unused sick leave converted to salary could not be included in final average salary for pension purposes); *Combs v. Cheek*, 671 S.W.2d 177, 178 (Ark. 1984) (holding that unused sick leave may not be included when calculating a final average salary for pension purposes); *Santa Monica Police Officers Assn. v. Bd. of Admin.*, 69 Cal. App. 3d 96, 101 (1977) (finding that the legislature intended to exclude payments for unused sick leave and vacation time from pension computations); *Lugar v. State ex rel. Lee*, 383 N.E.2d 287, 290 (Ind. 1978) (holding that uniform allowance was properly excluded from definition of salary for pension benefits).

The *Chancellor* case is particularly instructive. 12 P.3d 164. In *Chancellor*, the Washington State Court of Appeals invalidated a city's attempt to permit senior public safety personnel to convert vacation leave not yet accrued into additional pensionable salary. *Id.* The court found that state law prohibited such payments because they were not "basic salary" as defined under the state retirement statute. *Id*. at 169. In invalidating the city ordinance "authorizing" the vacation leave conversion, the court wrote, "'the parties to a contract may not decide for themselves the meaning of terms used by the Legislature.'" *Id.* (*citing Grabicki v. Dep't of Ret. Sys*., 916 P.2d 452, 456 (1996)).

Similarly, in this case, Plaintiffs are asking the Court to redefine state law in a manner that is contrary to the plain language of that law. Whether vacation leave, sick leave, and uniform allowances are already accrued, or yet-to-be accrued, state law prohibits pensionable payments for those components of compensation. This case takes the *Chancellor* situation a step further: here the parties are no longer attempting to contract away provisions of state law, but instead the Plaintiffs are asking the Court to *force* the City to violate state law.

Davies is also helpful. 259 A.D.2d 912. In that case, pursuant to the terms of a collective bargaining agreement between a municipality and a police union, senior officers converted sick leave into salary for pension purposes. Upholding the determination of the state comptroller that these payments could not be included in final average salary for pension purposes, the court wrote that the "senior officer" sick leave conversion program "was nothing more than an attempt to circumvent the prohibition contained in [state pension law] against using accumulated sick leave credits in calculating an applicant's final average salary." *Id.*

Similarly, the relief requested by Plaintiffs is "nothing more than an attempt to circumvent" the prohibition against those payments under A.R.S. § 38-842(12). This Court should not permit such an outcome. The purpose of the PSPRS statute was to prevent exactly what Plaintiffs are requesting here – the inconsistent and inequitable application of a statewide retirement program. Thus, Plaintiffs' request for relief not only violates the very plain language of the PSPRS statute, but patently defies the central purpose of that statute.

CONCLUSION

Both the language and intent of A.R.S. § 38-842(12) are clear and unequivocal. The plain language of that statute prohibits the payments at issue and the relief requested by Plaintiffs. Because A.R.S. § 38-842(12) must be interpreted according to its plain and obvious terms, Plaintiffs' demanded relief is unlawful. Likewise, the legislative intent in enacting the PSPRS statute was to create a uniform and consistent statewide pension program that would prohibit exactly the types of pension payments Plaintiffs are asking this Court to order. Therefore, Taxpayers respectfully request that their Motion for Summary Judgment be GRANTED, and that Plaintiff PLEA's Amended Complaint and Plaintiff Supervisors' Verified Complaint be dismissed with prejudice.

RESPECTFULLY SUBMITTED this 18th day of November, 2014 by:

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CERTIFICATE OF SERVICE

ORIGINAL E-FILED this 18th day of November, 2014, with a copy delivered via the ECF system to:

The Honorable Robert Oberbillig
Maricopa County Superior Court

Clerk of Court
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