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

WILLIAM R. CHEATHAM and MARCUS HUEY, Plaintiffs, vs. SAL DICICCIO, in his official capacity as member of the Phoenix City Council; CITY OF PHOENIX and PHOENIX LAW ENFORCEMENT ASSOCIATION, Defendants	Case No. CV2011-021634 **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** *Hon. Katherine Cooper* Oral Argument Requested

Pursuant to Arizona Rules of Civil Procedure 56, Plaintiffs move for summary judgment. Specifically, Plaintiffs seek (1) a declaration that sections 1-3(B), (C), and (Q) of the 2012-14 Memorandum of Understanding between Defendants City of Phoenix and Phoenix Law Enforcement Association violate Ariz. Const. Art. 9, § 7 (the Gift Clause); and (2) a permanent injunction barring the enforcement of those provisions.[1]

[1] We do not understand Defendants to be contesting the severability of those provisions from the remainder of the MOU, which would remain in effect. We reserve the issue of attorney fees until final disposition in this Court.

The motion is supported by the Memorandum of Points and Authorities and Plaintiffs' Statement of Undisputed Facts ("SUF").

MEMORANDUM OF POINTS AND AUTHORITIES

Although the parties have developed an extensive evidentiary record, to resolve this case the Court need recourse no further than to the MOU, which on its face demonstrates that the challenged provisions violate the Gift Clause.

The Gift Clause forbids the State and its subdivisions to "make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation. . . ." Ariz. Const Art. 9, § 7. As our Supreme Court recently explained, the Gift Clause "'represents the reaction of public opinion to the orgies of extravagant dissipation of public funds . . . and it was designed primarily to prevent the use of public funds raised by general taxation in aid of enterprises apparently devoted to quasi public purposes, but actually engaged in private business.'" *Turken v. Gordon*, 223 Ariz. 342, 346, 224 P.3d 158, 162 (2010). Specifically, the "constitutional prohibition was intended to prevent governmental bodies from depleting the public treasury by giving advantages to special interests." *Wistuber v. Paradise Valley Unif. Sch. Dist.*, 141 Ariz. 346, 349, 687 P.2d 354, 357 (1984). That is exactly what is happening here.

In *Wistuber*, the Court applied the Gift Clause analysis to the context of union release time. In stark contrast to the situation here, the release-time agreement set forth

ten specific obligations for the release-time position. *Id.*, 141 Ariz. at 348 n.3, 687 P.2d at 356 n.3. The Superintendent testified that the arrangement saved money because the release time position made it unnecessary for the district to hire personnel to fulfill the same functions. *Id.*, 141 Ariz. at 348, 687 P.2d at 354. The Court sustained the arrangement because "the duties imposed upon [the employee] by the proposal are substantial, and the relatively modest sums required to be paid by the District are not so disproportionate as to invoke the constitutional prohibition." *Id.*, 141 Ariz. at 350, 687 P.2d at 358.

Applying the constitutional benchmark to the provisions at issue here, the circumstances are flipped: the duties imposed are "relatively modest" and the sums required to be paid are "substantial."[2] Only a handful of release-time provisions, such as §§ 1-3(J) (career survival class) and (N) ("standby . . . to respond to critical incidents") impose specific duties, and Plaintiffs do not seek relief against those provisions. By contrast, the challenged provisions entail enormous costs and impose no duties whatsoever. See §§ 1-3(B) (six full-time release positions, up to 42 representatives, and

[2] Defendants argue that the cost of release-time amounts only to a small percentage of the overall police contract. In *Wistuber*, the Court looked to the cost of release-time, not to its cost relative to the overall contract. That is obviously the proper approach, for otherwise governmental entities easily could evade the Gift Clause by making subsidies part of a much larger transaction. Here the estimated cost is about $852,000 per year (SUF 121), which is hardly "modest." Nor does it appear to reflect all relevant costs (SUF 126-127).

an annual bank of 1,859 release-time hours), (C) (500 hours for a lobbyist), and (Q) (960 guaranteed overtime hours for full-time release positions). On their face, those provisions do not satisfy the *Wistuber* standard.

In *Turken*, the Court provided additional guidance that further supports this conclusion. First, the Court repeatedly focused its analysis on what the party "*obligates* itself to do (or to forbear from doing) in return for the promise of the other contracting party." *Id.*, 223 Ariz. at 349, 224 P.3d at 165 (emphasis added). Hence, the MOU's recitation of "examples" of how release time might be used (§ 1-3(B)) is legally without consequence, because it does not limit release time to those purposes or even obligate PLEA to fulfill them (SUF 47). Second, any obligations must be such that arise "out of contract" rather than "from law." *Id.*, 223 Ariz. at 350, 224 P.3d at 166. Here, PLEA's obligation to provide representation to officers arises from the law, not from the contract (SUF 14, 280), as does its obligation not to strike (SUF 147). Thus, those obligations cannot be bargained-for consideration. Third, "indirect benefits," such as a kumbaya labor-relations environment, do not constitute consideration for Gift Clause purposes "when not bargained for as part of the contracting party's promised performance." *Id.* Although the MOU extols the virtues of labor harmony, nowhere does PLEA commit itself to any tangible obligations in that regard, nor by its conduct would it appear that PLEA considers itself bound to any such obligations. For all of those reasons, the

challenged provisions are unconstitutional on their face.

The undisputed facts only strengthen Plaintiffs' case. It is a "core Gift Clause principle" that "'[p]ublic funds are to be expended only for "public purposes" and cannot be used to foster or promote the purely private or personal interests of any individual.'" *Id.*, 223 Ariz. at 347-48, 224 P.3d at 163-64 (quoting *Kromko v. Ariz. Bd. of Regents*, 149 Ariz. 319, 321, 718 P.2d 478, 480 (1986)). By the City's very definition (SUF 69), release time does not meet that standard for it is "time taken by members of the represented unit, and authorized by the member's appropriate manager or supervisor,[3] when the members are relieved of police duties to perform PLEA activities and conduct PLEA business."

By its nature, release time diverts resources from the public safety mission of the Police Department (SUF 67-70, 72-76).[4] Release time directly reduces the number of release-time officers available to protect the public (SUF 72). If they were not on release

[3] For the full-time release positions, no supervisor authorization is necessary; they report to union headquarters and PLEA determines their activities (SUF 82-85, 143).

[4] Indeed, whereas there was some ambiguity over that fact in the 2010-12 MOU, the current MOU makes it crystal clear. The 2010-12 MOU specified that the six full-time release officers are those "who are regularly assigned to hazardous duty, and will at all times perform such duties as are normally expected and required of a municipal police officer." Apparently recognizing that the quoted language did not at all reflect reality, the 2012-14 MOU provides in § 1-3.B.1 that the full-time release officers "will at all times *remain qualified to perform* such duties as are normally expected and required of a municipal police officer" (SUF 53 (emphasis added)).

time, the officers would be assigned to crime investigations, patrols, making arrests, etc. (SUF 68). As Police Chief Daniel Garcia testified, "they would be in uniform. They would be serving the citizens of Phoenix, the Phoenix Police Department, . . . fighting crime" (SUF 74).[5] For that reason, Chief Garcia concludes that the full-time release officers would better advance the mission of the Phoenix Police Department by performing the law-enforcement duties for which they were hired rather than working for PLEA (SUF 73). Indeed, the Police Department has stated that PLEA release time "decrease[s] the efficiency of City government," and that a "reduction in cost of City funded PLEA operations will have the effect of increasing funds available for mission critical functions" (SUF 70). That is especially salient given that the Department has endured a hiring freeze because of budget shortages (SUF 76). The *Arizona Republic* reports that Phoenix has about 300 fewer police officers than it did in 2009. Amy B. Wang, "The Issue: Drop in Number of Phoenix Police," *Arizona Republic* (N.E. Phoenix edition) (Mar. 22 2013), p.3.

Here, not only are the interests served "purely private," but in many instances they are overtly antagonistic to the City's. As PLEA itself states, "Although most officers might not view PLEA as a political organization, that is exactly what it is" (SUF 5). The

[5] That is exactly what the full-time release officers did while this Court's injunction was in effect, after reporting to police academy because they had not seen street duty for quite some time (SUF 18).

release-time activities funded by taxpayer dollars include lobbying, sometimes against the City's own positions (SUF 90-94, 211-216); generating and prosecuting grievances against the Police Department (SUF 107, 111, 114-117); making political endorsements and contributions (SUF 193-210); and negotiating for higher salaries and benefits (SUF 95-98). As the City's representative aptly described it during the negotiations over the current MOU, "We're talking about spending a normal work day, being paid by the City, doing things at the legislature that work against the City" (SUF 215). It strains credulity to suggest it is a public purpose for the City to pay someone to negotiate higher wages and benefits or to file and prosecute complaints against it, much less to endorse candidates or lobby against the City's interests.

The only two public purposes for release time suggested by the Defendants are (1) representation of police officers in critical incidents and (2) labor harmony. The City is under no obligation to provide representation. A.R.S. § 38-1101 guarantees police officers the right to have a representative present during certain disciplinary proceedings "at no cost to the employer" (SUF 241). Assuming it is a public purpose for the City to provide such representation, it is impossible to assess the value of such services without records of how much representation is provided and by whom. Moreover, as the Court recognized in *Turken*, 223 Ariz. at 350, 224 P.3d at 166, "The potential for a subsidy is heightened when, as occurred here, a public entity enters into the contract without the

benefit of competitive proposals."[6] We do know that during the pendency of the injunction, PLEA continued to provide such representation (SUF 244-245). Moreover, Plaintiffs do not seek relief against § 1-3(N) of the MOU, which provides for two PLEA officials to be on continuous paid standby to respond to critical incidents. The Phoenix Chief of Police testified that these two PLEA officials are adequate to deal with critical incidents (SUF 248).

As previously discussed, labor harmony is an indirect benefit that, as a matter of law, does not qualify as consideration for Gift Clause purposes. Nor does it seem that the City succeeded in purchasing much labor harmony in light of such PLEA niceties as threatening to (illegally) strike, engage in work slowdowns, and "torch this place" in the context of MOU negotiations (SUF 96); meeting with a candidate for the Phoenix City Council and encouraging him to support the ouster of the police chief (SUF 100); discussing hiring a private investigator to follow Chief Garcia and to "break it off in his ass" if he met with other unions to discuss a dispute over police uniforms (SUF 106); soliciting as many as 100 grievances against the uniform policy (SUF 107); publicly opposing the Chief's invitation for police officers to retake their oaths (SUF 108-109); urging officers to "refuse to wear the Tasercam system if asked to do so by a supervisor"

[6] Indeed, to the extent that the City is "purchasing" representation services from PLEA, it is doing so outside of the competitive bidding process that ordinarily would apply (SUF 135-138). As a result, the City cannot determine the market value of those services nor whether they could secure them at less cost (SUF 145).

and to file a grievance if ordered to do so (SUF 110-111); and referring to Chief Garcia as "Danny" because "he needs to know we r equal partners and he is not above PLEA!" (SUF 218).

Defendants valiantly attempt to defend such conduct as a valuable public benefit, but Defendants' own witnesses concede that the alleged indirect benefits of release time are "subjective" and "necessarily impossible to quantify" (SUF 219). That fact underscores another "central defect" in the release-time scheme: the City "acted without particularized information, and established no particularized information, to support even an estimate of the value" of the public benefits. *Ariz. Cent. for Law in the Pub. Int. v. Hassell*, 172 Ariz. 356, 369, 837 P.2d 158, 171 (App. 1991). No mechanism exists to quantify the supposed benefits of release time (SUF 165). That failure is understandable given that the City has no idea where police officers are or what they are doing when they are on release time (SUF 61). Nor do officers need to account for how they use release time, other than writing "PW" (union time) on their leave slips (SUF 160-163).

Nor, fatally, does the City retain any meaningful control over release-time employees. In *Kromko, supra*, the Court sustained against a Gift Clause challenge the state university's contractual relationship with a nonprofit hospital. The Court noted that no private interests were served because the hospital's "operations are still subject to the control and supervision of public officials." *Id.*, 149 Ariz. at 321, 718 P.2d at 480. For

instance, the Board of Regents had power to approve the hospital's internal organization and appoint its board of directors, and retained "the right of approval before the nonprofit corporation may enter into any business transaction that could adversely affect the interests of the state." Further, the hospital was required to provide audited financial reports to the state. *Id.* "Hence, we believe the fear of private gain or exploitation of public funds envisioned by the drafters of our constitution is absent." *Id.*

The situation here is literally 180 degrees from the contract approved in *Kromko*. Not only does the City have no direct control over PLEA, it retains no control whatsoever over its own employees, who are placed completely at the disposal of the union. PLEA directs the activities of the six full-time release officers, who do not even report to the Police Department (SUF 84-85). Likewise, PLEA determines which officers will use the bank of hours and how they will use their time (SUF 88). Outside of the context of release time, no circumstances exist in which control over on-duty City employees is delegated to a private entity (SUF 154-159, 166). Chief Garcia testified that it is important to the mission of the Police Department to maintain the sole and exclusive authority over personnel and for supervisors to know where their officers are at all times (SUF 150-153). But release time removes this essential control, rendering the practice impermissible under the Gift Clause.

The City loses another crucial aspect of control with release time as well: the

fiduciary duty that all public employees owe to the taxpayers (SUF 275). Phoenix Administrative Regulation ("A.R.") 2.62 limits the practice of City employees working for third-parties (SUF 175). City employees are prohibited from taking outside employment that adversely affects their ability to perform the jobs for which they were hired (SUF 177); they may not receive compensation from outside entities while engaged in City work (SUF 179); and they are prohibited from accepting outside employment that creates a "conflict of interest, or the appearance of a conflict of interest, with the employee's City job or the mission of the employee's assigned department" (SUF 183). PLEA's release time scores a perfect trifecta by violating all three rules. As previously discussed, release time diverts officers from the jobs for which they were hired. At the same time they are collecting full pay, benefits, and pension from the City, the full-time release positions also receive a monthly stipend and vehicle allowance from PLEA (SUF 81). And the PLEA bylaws themselves impose a duty of undivided loyalty upon their representatives that makes fealty to PLEA first and foremost for release-time officers who are employed and paid by the City of Phoenix (SUF 184-186).

Moreover, City employees ordinarily are prohibited from working for firms that provide services to the City directly or indirectly without a competitive bidding process (SUF 187), and must seek approval from supervisors before taking on outside employment (SUF 189). But competitive bidding was not required for the "services"

PLEA provides (SUF 188), nor is supervisor approval required for the full-time release positions (SUF 190).

Similarly, the City Charter and A.R. 2.16 limit political activities by City employees (SUF 191-192); but as discussed previously, release-time officers are deeply involved in political activities (SUF 193-210). In all of those ways, release time eviscerates control that the City otherwise would exercise over its employees, in violation of the Gift Clause.

The City attempted to extricate itself from this unconstitutional scheme, but without success. Prior to negotiations over the current MOU, the Council instructed the City's negotiating team to eliminate paid release time (SUF 32). The City proposed tracking the amount of release time used and billing PLEA for it (SUF 33). Unsurprisingly, PLEA opposed the proposal (SUF 35), along with the lesser proposal to reduce the number of full-time release positions (SUF 36). PLEA also said it was "not open" to any restrictions on the use of release time, including for legislative activity (SUF 38-40). PLEA's lead negotiator said, "[W]e're not at this point willing to change anything about the way release time works. We might be willing to talk about language to clarify how it's used, to appease the Council. But restrictions, we're not open to at all" (SUF 48). And indeed, the new MOU imposes no such restrictions. Because PLEA's negotiators were on full-time release, the City was paying them to oppose its

proposals (SUF 43). The Council approved the new MOU by a 4-4-1 vote (SUF 44).

Thereafter, the City and PLEA negotiated an addendum to the 2012-14 MOU (SUF 59). It would have limited the use of release time to specifically enumerated purposes, required PLEA to reimburse the City for any use of release time for other purposes, eliminated PLEA's right to use unlimited hours to represent members in grievance meetings and disciplinary proceedings, and prohibited release time for political activity unless specifically requested by the City Manager (SUF 61-64). PLEA rejected the proposed addendum and it was not adopted (SUF 65-66).

There is no doubt that the tax dollars spent for release time are hard at work. Unfortunately, they are hard at work for PLEA, not for the City. Unbounded release time—controlled entirely by a labor union, unlimited in the uses to which it may be directed, applied in a manner that diverts resources from the Police Department's vital mission and often flatly at odds with it, unrecorded and unmonitored, rewarded with guaranteed overtime, and with no mechanism to ascertain its value to the City—constitutes a paradigmatic example of the type of abuse the Gift Clause was designed to prevent. That the practice has persisted for so long only magnifies the harm to the taxpayers and to the entire citizenry which looks to the Phoenix Police Department to protect it.

The challenged provisions' infirmity is established on the face of the MOU. A great deal of Police Department resources are made available to PLEA as its "Rights of Association," with little to nothing of tangible value to the City promised in return. As this Court previously ruled, "The Court finds that no public ownership or control exists over the benefits allocated to PLEA for release time" (SUF 16). The parties now having had extensive discovery, two evidentiary hearings, and multiple opportunities to present additional evidence, there are abundant undisputed facts to support the Court's prior conclusion that the challenged release-time provisions in the 2012-2014 MOU violate the Gift Clause.

Plaintiffs respectfully request that this Court grant their Motion for Summary Judgment, declare that sections 1-3(B), (C), and (Q) of the 2012-14 MOU violate the Gift Clause of the Arizona Constitution, and permanently enjoin the enforcement of those provisions.

Respectfully submitted,

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