

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

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

JENNIFER WRIGHT; ERIC WNUCK; and JIM
JOCHIM,

Plaintiffs,

vs.

GREGORY J. STANTON, in his official capacity as
Mayor of the City of Phoenix; BILL GATES, in his
official capacity as member of the Phoenix City
Council and Vice Mayor; THELDA WILLIAMS, in
her official capacity as member of the Phoenix City
Council; JIM WARING, in his official capacity as
member of the Phoenix City Council; TOM
SIMPLIT, in his official capacity as member of the
Phoenix City Council; DANIEL VALENZUELA, in
his official capacity as member of the Phoenix City
Council; SAL DICICCIO, in his official capacity as
member of the Phoenix City Council; MICHAEL
NOWAKOWSKI, in his official capacity as member
of the Phoenix City Council; MICHAEL JOHNSON,
in his official capacity as member of the Phoenix City
Council; and DAVID CAVAZOS, in his official
capacity as City Manager of the City of Phoenix;
CITY OF PHOENIX; CITY OF PHOENIX POLICE
PENSION BOARD; PHOENIX POLICE
SERGEANTS AND LIEUTENANTS
ASSOCIATION; and the PUBLIC SAFETY
PERSONNEL RETIREMENT SYSTEM.

Defendants.

Case No. CV2013-010915

**FIRST AMENDED
COMPLAINT¹ for
Declaratory and Injunctive
Relief**

Honorable John Rea

¹ Pursuant to Ariz. R. Civ. P. 15(a), this Amended Complaint is filed as matter of course prior to October 10, 2013, the date on which a response must be filed in opposition to Defendant's Rule 12(b) Motion to Dismiss.

For their First Amended Complaint for Declaratory and Injunctive Relief, Plaintiffs allege:

Introduction

1. While Arizona's Public Safety and Personnel Retirement System ("PSPRS") is rushing toward insolvency, the City of Phoenix is permitting senior police officers to inflate their pensions in blatant violation of state law. City of Phoenix police, along with public safety employees from nearly 250 other local agencies, participate in PSPRS. The State of Arizona administers PSPRS, and sets the rules for system administration and participation by statute. *See* ARIZ. REV. STAT. § 38-841 *et seq.* Employers in PSPRS, including the City of Phoenix, and local boards in PSPRS, including the City of Phoenix Police Pension Board, however, determine the amount, manner, and time of payment of pension benefits. *Id.* at § 38-847(D)(1). The City of Phoenix also directly finances pension payments of its employees who participate in PSPRS through contributions to the City's independent and separate account in PSPRS. To direct municipalities in pension determinations, Arizona law defines what payments count as "compensation" for pension purposes for PSPRS members. Arizona law specifically prohibits employers in PSPRS from permitting their employees to include "unused sick leave, payment in lieu of vacation, payment for unused compensatory time or payment for any fringe benefits" to increase compensation for pension calculations. *Id.* at § 38-842(12).

2. Despite this explicit statutory mandate, the City of Phoenix entered into a contract with the Police Sergeants and Lieutenants Association ("PPSLA") that permits senior police officers to "cash in" unused sick leave, vacation leave, compensatory time, and other fringe benefits to increase compensation for pension calculations. In other words, the City of Phoenix is permitting senior police officers to "spike" their pensions in clear violation of state law. Plaintiffs in this case seek to enforce the clear statutory language of A.R.S. § 38-842(12) and prevent Phoenix from approving payments to its employees that are not pensionable under state law - a practice that is both unlawful and harmful to Phoenix taxpayers.

Parties, Jurisdiction, and Venue

3. Plaintiff Jennifer Wright is a citizen of the United States and a resident of the City of Phoenix and Maricopa County in the State of Arizona. Plaintiff Wright pays property tax and sales tax in Phoenix. Plaintiff Wright pays income tax to the State of Arizona.

4. Plaintiff Eric Wnuck is a citizen of the United States and a resident of the City of Phoenix and Maricopa County in the State of Arizona. Plaintiff Wnuck pays property tax and sales tax in Phoenix. Plaintiff Wnuck pays income tax to the State of Arizona.

5. Plaintiff Jim Jochim is a citizen of the United States and a resident of the City of Phoenix and Maricopa County in the State of Arizona. Plaintiff Jochim pays property tax and sales tax in Phoenix. Plaintiff Jochim pays income tax to the State of Arizona.

6. Defendant Greg Stanton is the Mayor of the City of Phoenix and its chief executive officer. He is sued in his official capacity only.

7. Defendant Bill Gates is a member of the Phoenix City Council, which is the legislative body for the City of Phoenix, and serves as Phoenix's Vice Mayor. He is sued in his official capacity only.

8. Defendant Jim Waring is a member of the Phoenix City Council. He is sued in his official capacity only.

9. Defendant Thelda Williams is a member of the Phoenix City Council. She is sued in her official capacity only.

10. Defendant Tom Simplot is a member of the Phoenix City Council. He is sued in his official capacity only.

11. Defendant Daniel Valenzuela is a member of the Phoenix City Council. He is sued in his official capacity only.

12. Defendant Sal DiCiccio is a member of the Phoenix City Council. He is sued in his official capacity only.

13. Defendant Michael Nowakowski is a member of the Phoenix City Council. He is sued in his official capacity only.

14. Defendant Michael Johnson is a member of the Phoenix City Council. He is sued

in his official capacity only.

15. Defendant David Cavazos is City Manager for the City of Phoenix, and is authorized to remit payments under certain contracts on behalf of the City of Phoenix. He is sued in his official capacity only.

16. Defendant City of Phoenix is a municipal corporation organized under the laws of the State of Arizona.

17. Defendant City of Phoenix Police Pension Board is a five-member local board authorized by law to administer participation in the Public Safety Personnel Retirement System (“PSPRS”) by Phoenix Police Department officers. The Phoenix Police Pension Board approves the amount, manner, and time of payment of benefits paid to Phoenix Police Department members in PSPRS, among other powers.

18. Defendant Phoenix Police Sergeants and Lieutenants Association (“PPSLA”) is a public labor union that represents Phoenix Police Department members in the ranks of Sergeant and Lieutenant.

19. Defendant PSPRS is a special retirement system created by the state legislature for certain full-time police officers and fire fighters in the State of Arizona. PSPRS pools contributions from separate employers in the system for investment purposes and issues checks from each employer’s separate account in PSPRS in an amount reported by each employer.

20. Jurisdiction over this action and its claims and parties is provided by A.R.S. §§ 12-123, 12-1801, 12-1831, 38-841(E), 38-847(D)(10); and 38-848(H)(1).

21. Venue is proper pursuant to A.R.S. § 12-401.

Facts Common to All Claims

22. The Public Safety Personnel Retirement System (“PSPRS”) is a retirement system created by the Legislature of the State of Arizona to provide “a uniform, consistent and equitable” statewide program for eligible public safety personnel. ARIZ. REV. STAT. § 38-841.

23. PSPRS is an “agent multiple-employer” retirement plan. As an agent multiple-employer plan, separate accounts are kept for each employer participating in PSPRS. Although

monies from employee and employer contributions are pooled for investment purposes, benefit payments are not shared by all employers in the system; instead, benefit payments are paid from each employer's separate account in PSPRS.

24. PSPRS is entirely funded by contributions from state, county, and city employers and employees, and any investment earnings on those contributions.

25. At any given time, there are between 240-250 participating employers in PSPRS.

26. The Phoenix Police Department is a participating employer in PSPRS.

27. Employer contributions rates are different for each employer in PSPRS and change every fiscal year based on actuarial valuation.

28. If more or higher pension benefits are paid by an employer, the employer contribution rate will increase.

29. Therefore, if the City of Phoenix Police Department has higher pension payments than anticipated, then the City of Phoenix's contributions to PSPRS, generated, *inter alia*, through taxation on Phoenix residents, will also increase.

30. The City of Phoenix is alone responsible for financing its separate employer accounts in PSPRS.

31. Each employer that participates in PSPRS is required to establish a local board that is responsible for deciding "all questions of eligibility and service credits, and to determine the amount, manner and time of payment of any benefits under the system," among other powers. ARIZ. REV. STAT. § 38-847(D)(1).

32. The local board that oversees participation in PSPRS for the Phoenix Police Department is the City of Phoenix Police Pension Board.

33. The Phoenix Police Sergeants and Lieutenants Association ("PPSLA") is a public labor union and the exclusive "meet and discuss" representative of Phoenix Police Department members in the ranks of Sergeant and Lieutenant. PHOENIX, ARIZ., CODE § 2-226.

34. City of Phoenix Police Department members in the ranks of Sergeant and Lieutenant are employees of the City of Phoenix and members of PSPRS. ARIZ. REV. STAT. §

38-842(27).

35. Retirement benefits for members of PSPRS are governed by state law as set forth in the Arizona Revised Statutes.

36. Under state law, pensions for members of PSPRS are calculated based on an average of the highest three years of salary preceding retirement (“final average salary”).² ARIZ. REV. STAT. § 38-842(7). Therefore, the higher an employee’s salary in the years preceding retirement, the higher the employee’s pension.

37. Retirement eligibility for Phoenix police officers begins at twenty (20) years of creditable service. A.R.S. § 38-842(32)(A).

38. Arizona law defines what types of payments are included as “compensation” for purposes of computing retirement benefits for members of PSPRS.

39. Under state statute, “[c]ompensation does not include, for purposes of computing retirement benefits, payment for unused sick leave, payment in lieu of vacation, payment for unused compensatory time or payment for any fringe benefit.” ARIZ. REV. STAT. § 38-842(12).

40. Based on these and other statutory mandates, the City of Phoenix determines which items count as pensionable salary for Phoenix employees who participate in PSPRS, including Phoenix Police Department Sergeants and Lieutenants.

41. The Phoenix Police Department assigns specific “earnings codes” to different types of pay, and determines which of these payments constitute pensionable salary. The City of Phoenix then withholds and makes pension contributions to PSPRS based on items the City determines constitute pensionable salary.

42. The City of Phoenix Police Pension Board then approves specific pension amounts for each Phoenix Police Department employee under PSPRS based on salary information received from the City of Phoenix.

² 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. ARIZ. REV. STAT. § 38-842(7).

43. The City of Phoenix Police Pension Board reports the pension amount it approves directly to PSPRS.

44. When PSPRS receives the pension amount approved by the Phoenix Police Pension Board, it issues a check to the identified beneficiary in that amount from the Phoenix Police Department's separate account in PSPRS.

45. Each employer in PSPRS, including the City of Phoenix, and each employer's local board, including the Phoenix Police Pension Board, is obligated to report pensionable compensation consistent with the mandates of state statute.

46. On April 24, 2012, Defendant David Cavazos, Phoenix City Manager, Lori Steward, Phoenix Labor Relations Administrator, and Dave Adams, then President of PPSLA, executed a "Memorandum of Agreement" ("MOA") between the City of Phoenix and PPSLA, a copy of which is attached as **Exhibit 1** and incorporated by reference. *Memorandum of Agreement*, City of Phoenix and Phoenix Police Sergeants and Lieutenants Association, 2012-2014 (May 3, 2012).

47. Despite the clear language of A.R.S. § 38-842(12), under the MOA, the City of Phoenix permits certain police personnel, including those retiring in the ranks of Sergeant and Lieutenant, to include sick leave, vacation leave, compensatory time, and other fringe benefits as "compensation" for purposes of computing pension benefits.

48. On information and belief, most other Arizona municipalities do not include such factors in computing compensation for purposes of calculating pension benefits.

49. The City of Phoenix does not have authority to include items of pensionable compensation prohibited by state law in its MOA with PPSLA.

50. On information and belief, the Phoenix Police Pension Board has approved and continues to approve pension payments for Phoenix Police Department Sergeants and Lieutenants that include payment in lieu of vacation leave, payment for unused sick leave and compensatory time, and payment for other fringe benefits.

51. The Phoenix Police Pension Board does not have authority to approve pension

payments that include items of pensionable compensation prohibited by state law.

52. The City of Phoenix directly finances contributions made to PSPRS pursuant to the MOA through city tax revenue in the Phoenix Police Department's separate account in PSPRS.

53. When the City of Phoenix makes contributions to PSPRS for pension payments that include unused sick leave, payment in lieu of vacation, payment for unused compensatory time or payment for any fringe benefit, it engages in an unlawful expenditure of Phoenix taxpayer dollars.

54. PSPRS is authorized to take any and all actions necessary to protect the investments held by the fund. In its discretion, PSPRS may review the actions of local boards, including the Phoenix Police Pension Board. ARIZ. REV. STAT. §§ 38-848(H)(7-10).

55. Plaintiffs Jennifer Wright, Eric Wnuck, and Jim Jochim pay property tax and sales tax in the City of Phoenix. Because their taxes finance Phoenix's contributions to and pension payments made under the Phoenix Police Department's separate account in PSPRS, Plaintiffs are directly harmed by the city's illegal approval of pension payments for unused sick leave, payments in lieu of vacation, payments for unused compensatory time, and payments for any fringe benefit.

Count One—Statutory Violation

56. All previous paragraphs of the Amended Complaint for Declaratory and Injunctive Relief are incorporated by reference.

Payment in Lieu of Vacation

57. Under the terms of Phoenix's MOA with PPSLA, Phoenix Police Department Sergeants and Lieutenants may receive payment in lieu of vacation as additional compensation for pension calculation purposes in direct violation of A.R.S. § 38-842(12).

58. Under state law, compensation "does not include, for purposes of computing retirement benefits . . . payment in lieu of vacation" ARIZ. REV. STAT. § 38-842 (12).

59. Pursuant to the MOA, "The City and PPSLA agree that unit members who have

accrued maximum vacation carryover, with seventeen years of credited service in PSPRS and 10 years of City of Phoenix service, can be paid for additional vacation leave for a one-time, three-year period.” MOA § 5-5(L).

60. This provision permits an increased “final average salary” for pension calculation purposes.

61. Therefore, MOA § 5-5(L), which explicitly permits payment in lieu of vacation, allows for such payments precisely during the timeframe in which the payments will count as pensionable earnings.

62. This provision violates A.R.S. § 38-842(12) on its face and in its effect permit payment in lieu of vacation as compensation for pension calculation purposes.

63. Additionally, under MOA § 5-5(M)(1), “Effective July 1, 1998, unit members may sell back up to 40 hours of vacation each year” There is no prohibition in the MOA regarding *when* these vacation hours may be sold back.

64. If vacation hours were sold back pursuant to MOA § 5-5(M)(1) during the period preceding retirement such that the sale would count towards an employee’s “final average salary,” then the additional salary would also count for pension calculation purposes.

65. Such a sale of accumulated vacation leave for additional salary would also constitute payment in lieu of vacation in violation of A.R.S. § 38-842(12).

66. The City of Phoenix does not have authority to permit members of the Phoenix Police Department to receive pensionable compensation in lieu of vacation leave or for unused vacation leave in its MOA with PPSLA. §§ 5-5(L) and 5-5(M)(1) of the MOA are unlawful because they permit Phoenix Police Sergeants and Lieutenants to receive payment in lieu of vacation leave.

67. City of Phoenix accounting and payment procedures that classify payment in lieu of vacation leave as pensionable salary also violate A.R.S. § 38-842(12).

68. The Phoenix Police Pension Board violates state law when it approves and authorizes pension payments that include payment in lieu of vacation leave as pensionable

compensation.

Payment for Unused Sick Leave

69. Phoenix Police Department Sergeants and Lieutenants also receive payment for unused sick leave as compensation that counts toward retirement benefits.

70. Pursuant to state statute, compensation “does not include, for purposes of computing retirement benefits, payment for unused sick leave . . .” ARIZ. REV. STAT. § 38-842(12).

71. Under MOA § 3-4(B)(5), “A unit member who has accrued 1,714 hours or more of unused sick leave may elect to have the additional sick leave that he earns paid to him as salary on a monthly basis.”

72. This sell-back provision constitutes payment for unused sick leave during a timeframe when such payment would count as compensation for pension calculation purposes.

73. Therefore, MOA § 3-4(B)(5) permits payment for unused sick leave included as compensation for pension calculations in direct violation of A.R.S. § 38-842(12).

74. The City of Phoenix does not have authority to permit members of the Phoenix Police Department to receive pensionable compensation for unused sick leave in its MOA with PPSLA. § 3-4(B)(5) of the MOA is unlawful because that provision permits Phoenix Police Sergeants and Lieutenants to receive payment for unused sick leave.

75. City of Phoenix accounting and payment procedures that classify payment for unused sick leave as pensionable salary also violate A.R.S. § 38-842(12).

76. The Phoenix Police Pension Board violates state law when it approves and authorizes pension payments that include payment for unused sick leave as pensionable compensation.

Payment for Unused Compensatory Time

77. The City of Phoenix also permits payment for unused compensatory time to Phoenix Police Department Sergeants and Lieutenants for pension calculations in contravention of state law.

78. Under state statute, compensation “does not include, for purposes of computing retirement benefits . . . payment for unused compensatory time” ARIZ. REV. STAT. § 38-842(12).

79. Phoenix Police Department Sergeants and Lieutenants who work beyond their regularly scheduled workweek may receive overtime. MOA § 3-2.

80. Under the terms of the MOA, “Overtime work will be compensated in either cash or compensatory time at the rate of one and one-half times the regular rate of pay” MOA § 3-2(C).

81. Compensatory time is future time off for work performed beyond an employee’s regular work schedule.

82. Pursuant to the MOA, “A unit member may be paid for accumulated compensatory time by submitting a request on a standard overtime slip to the Fiscal Management Bureau requesting payment for any portion of the compensatory time. This may be done *at any time* upon the unit member’s request, and the Fiscal Management Bureau will make such payment in the pay period following receipt of the memorandum.” MOA § 3-2(D)(1) (emphasis added).

83. Additionally, “Unit members may accumulate up to two hundred and fifteen (215) hours of compensatory time.” MOA § 3-2(D)(2).

84. Since unit members may elect to receive payment for unused compensatory time “at any time,” that election may be made and payment received during the employee’s consecutive three year period when such payment would count as “final average salary” for pension calculations.

85. As a result, payment for unused compensatory time during this timeframe would be included as compensation for pension calculation purposes in violation of A.R.S. § 38-842(12).

86. The City of Phoenix does not have authority to permit members of the Phoenix Police Department to receive pensionable compensation for unused compensatory time in its

MOA with PPSLA. Insofar as § 3-2(D)(1) of the MOA permit Phoenix Police Sergeants and Lieutenants to receive payment for unused compensatory time, that provision is unlawful.

87. City of Phoenix accounting and payment procedures that classify payment for unused compensatory time as pensionable salary also violate A.R.S. § 38-842(12).

88. The Phoenix Police Pension Board violates state law when it approves and authorizes pension payments that include payment for unused compensatory time as pensionable compensation.

Payment for Fringe Benefits

89. Under their agreement with the City of Phoenix, Phoenix Police Department Sergeants and Lieutenants may also use payment for fringe benefits, including payment for an annual uniform allowance, as salary for pension calculation purposes.

90. Pursuant to § 3-1D of the MOA, “After 17 years of credited service in PSPRS and 10 years of City of Phoenix service, a unit member may elect to have their basic annual uniform allowance converted to a bi-weekly payment for a consecutive three year period.”

91. A fringe benefit is “an employment benefit (as a pension or a paid holiday) granted by an employer that has a monetary value but does not affect basic wage rates.” MERIAM-WEBSTER, Dictionary (Encyclopedia Britannica Company, online ed., 2013) (2013).

92. By definition, all payments for items other than base salary, including sick leave, vacation leave, and unused compensatory time, are fringe benefits, and should be excluded from pension calculations pursuant to A.R.S. § 38-842(12). A uniform allowance is a specific fringe benefit.

93. The uniform allowance conversion provision of the MOA deliberately permits payment in the years preceding retirement for a fringe benefit for pension calculation purposes in violation of A.R.S. § 38-842(12).

94. The City of Phoenix does not have authority to permit members of the Phoenix Police Department to receive pensionable compensation for uniform allowances in its MOA with PPSLA. § 3-1(D) of the MOA is unlawful because that provision permits Phoenix Police

Sergeants and Lieutenants to receive payment for a fringe benefit, uniform allowance.

95. City of Phoenix accounting and payment procedures that classify payment for fringe benefits, including a uniform allowance, as pensionable salary also violate A.R.S. § 38-842(12).

96. The Phoenix Police Pension Board violates state law when it approves and authorizes pension payments that include payment for uniform allowances as pensionable compensation.

PSPRS

97. The PSPRS Board of Trustees is empowered to “[d]o all acts, whether or not expressly authorized, that may be deemed necessary or proper for the protection of the investments held in the fund or owned by other plans or trusts that the board administers.” ARIZ. REV. STAT. §§ 38-848(H)(9).

98. Monies contributed by employees and employers to PSPRS are deposited in a fund managed and overseen by PSPRS administrators. Employers have separate accounts in PSPRS, but contributions to PSPRS are pooled for investment purposes.

99. PSPRS issues pension payment checks directly to members of PSPRS, including Phoenix Police Department members in the ranks of Sergeant and Lieutenant, from the Phoenix Police Department’s separate account in PSPRS.

100. PSPRS has discretion to review the actions of local boards, including the Phoenix Police Pension Board. *Id.* at 38-848(H)(7).

101. On information and belief, PSPRS personnel and administrators have knowledge that the City of Phoenix is authorizing and approving pension payments to Phoenix Police Department employees that include payment in lieu of vacation, payment for unused sick leave and compensatory time, and payment for fringe benefits in violation of state law.

102. Although PSPRS receives contributions from each employer and makes payments of benefits to Phoenix Police Department Sergeants and Lieutenants at the direction of the Phoenix Police Pension Board, PSPRS must ensure that monies received and payments

disbursed are in accordance with state law.

103. In order to protect the fund, PSPRS must ensure that all pension checks it issues to Phoenix Police Department Sergeants and Lieutenants do not include payment for items that are specifically excluded from the definition of pensionable “compensation” under A.R.S. § 38-842(12).

Request for Relief

Plaintiffs respectfully request the following relief:

A. Declare that the extent to which Sections 5-5(L), 3-4(B)(5), and 3-1D of the City of Phoenix and PPSLA MOA permit pension payments in lieu of vacation leave, pension payments for unused sick leave, and pension payments for any fringe benefit those provisions violate state law and preliminarily and permanently enjoin their further effect.

B. Declare that the extent to which Sections 5-5(M)(1) and 3-2(D)(1) of the City of Phoenix and PPSLA MOA permit pension payments in lieu of vacation leave and pension payments for unused compensatory time those provisions violate state law and preliminarily and permanently enjoin their further effect.

C. Enjoin the City of Phoenix from classifying payment in lieu of vacation, payment for unused sick leave and compensatory time, and payment for any fringe benefits as pensionable salary when it computes and classifies salary information for Phoenix Police Department Sergeants and Lieutenants.

D. Declare that the Phoenix Police Pension Board lacks legal authority to approve those portions of pension payments that include payment in lieu of vacation, payment for unused sick leave and compensatory time, and payment for any fringe benefits, and enjoin the Phoenix Police Pension Board from approving pension payments that include those components of compensation.

E. Enjoin PSPRS from issuing those portions of pension payments that include payment in lieu of vacation, payment for unused sick leave and compensatory time, and payment for any fringe benefits.

F. Award costs and attorney fees pursuant to A.R.S. §§ 12-341, 12-348, and the private attorney general doctrine; and

G. Award such other and further relief as may be just and equitable.

RESPECTFULLY SUBMITTED this 8th day of October 2013 by:

/s/ Jonathan Riches

Clint Bolick (021684)

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Taylor Earl (028179)

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CERTIFICATE OF SERVICE

ORIGINAL E-FILED this 8th day of October, 2013, with a copy delivered to:

The Honorable John Rea
Maricopa County Superior Court

Clerk of Court
Maricopa County Superior Court
201 West Jefferson Street
Phoenix, AZ 85003

COPY of the foregoing MAILED this 8th day of October, 2013 to:

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