

**Scharf-Norton Center for Constitutional Litigation at the
GOLDWATER INSTITUTE**
Clint Bolick (021684)
Jonathan Riches (025712)
Taylor Earl (028179)
500 E. Coronado Rd., Phoenix, AZ 85004
(602) 462-5000; litigation@goldwaterinstitute.org
Attorneys for Plaintiffs

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

JENNIFER WRIGHT, *et. al.*,

Plaintiffs,

vs.

GREGORY J. STANTON, in his official capacity as
Mayor of the City of Phoenix; *et. al.*,

Defendants.

Case No. CV2013-010915

**PLAINTIFFS' RESPONSE TO
DEFENDANT PUBLIC
SAFETY PERSONNEL
RETIREMENT STSTEM'S
MOTION TO DISMISS**

Hon. John Rea

(Oral Argument Requested)

Plaintiffs Jennifer Wright, Eric Wnuck, and Jim Jochim, who are Phoenix taxpayers ("Taxpayers"), hereby respond to Defendant Public Safety Personnel Retirement System's ("PSPRS") Motion to Dismiss. PSPRS, a statewide retirement system for eligible public safety personnel, is obligated to protect the pension fund and ensure that payments are made in a manner that is "uniform, consistent, and equitable" for all members in the system. ARIZ. REV. STAT. §§ 38-841, 38-848(H)(7),(9); (FAC ¶¶ 22, 54, 97, 100, 102, 103). By issuing pension payments to Phoenix Police Department Sergeants and Lieutenants that include payment in lieu of vacation, payment for unused sick leave and compensatory time, and payment for fringe benefits, PSPRS has failed to protect the fund and has engaged in an unlawful expenditure of Taxpayers' dollars. Taxpayers have a right to challenge these illegal expenditures that have been issued and continue to be issued by PSPRS.

For the reasons set forth below, Taxpayers respectfully request that Defendant's Motion to Dismiss be DENIED. This Response is supported by the following Memorandum of Points and Authorities and pleadings and matters of record filed with the Court, all of which are incorporated by reference.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Preliminary Statement

On October 8, 2013, Taxpayers filed an Amended Complaint seeking injunctive relief to prevent PSPRS from issuing pension payments to Phoenix Police Department Sergeants and Lieutenants that include components of compensation that are not pensionable under state law. (FAC).

Prior to the establishment of PSPRS in 1968, there were a wide variety of heterogeneous retirement programs providing disparate benefits for the hundreds of public safety agencies throughout Arizona. ARIZ. REV. STAT. § 38-841(A-B). Responding to the inequitable treatment of public safety retirement provisions among different municipalities and departments, the Arizona Legislature created PSPRS "to provide a uniform, consistent and equitable statewide [retirement] program for public safety personnel." *Id.* Presently, there are between 240-250 local public agencies that participate in PSPRS. (FAC ¶ 25); (Hacking Decl. ¶ 9). The City of Phoenix Police Department is a participating employer in PSPRS. (FAC ¶ 26); (Hacking Decl. ¶ 10). All employers in PSPRS are bound by state law defining the terms of participation and system administration, including what components of pay constitute "compensation" for pension calculation purposes. ARIZ. REV. STAT. § 38-842(12). The City of Phoenix is one of the only municipalities of the hundreds of agencies in PSPRS that permits its public safety personnel to include the components of compensation at issue in this case as pensionable pay (FAC ¶ 48), resulting in treatment that is not "uniform, consistent and equitable" for PSPRS members.

State statute more specifically defines PSPRS's authority in the system. Namely, 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). Additionally, PSPRS

has discretion to review the actions of local boards, including Defendant Phoenix Police Pension Board. *Id.* at (H)(7). PSPRS issues pension payments directly to PSPRS members, including Phoenix Police Department Sergeants and Lieutenants. (FAC ¶ 99); (Hacking Decl. ¶ 32). Despite clear notice that Defendant City of Phoenix (“City”) included provisions in its Memorandum of Agreement (“MOA”) with the Phoenix Police Sergeants and Lieutenants Association (“PPSLA”) that permitted retirement pay that is not pensionable under state law, and despite direct knowledge that the Phoenix Police Pension Board (“Local Board”) has approved and continues to approve pension amounts that include unlawful components of compensation, PSPRS has nonetheless issued and continues to issue pension payments that include these components. Taxpayers have a right to challenge these unlawful payments in this action.

II. Legal Analysis

A. Taxpayers Have Stated a Claim to Enjoin Unlawful Pension Payments Made by PSPRS

In assessing the sufficiency of a claim for relief, “Arizona follows a notice pleading standard, the purpose of which is to ‘give the opponent fair notice of the nature and basis of the claim and indicate generally the type of litigation involved.’ ” *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, 189 P.3d 344, 346 (2008) (*quoting Mackey v. Spangler*, 81 Ariz. 113, 115, 301 P.2d 1026, 1027–28 (1956)). When testing a complaint for failure to state a claim, “the question is whether enough is stated which would entitle the plaintiff to relief upon some theory to be developed at trial. The purpose of the rule is to avoid technicalities and give the other party notice of the basis for the claim and its general nature.” *Guerrero v. Copper Queen Hospital*, 112 Ariz. 104, 106, 537 P.2d 1329, 1331 (1975). Moreover, when reviewing a Motion to Dismiss for failure to state a claim, the construction of pleadings favors the plaintiff. *Maldonado v. Southern Pac. Transp. Co.*, 129 Ariz. 165, 166-67, 629 P.2d 1001, 1002-03 (App. 1981) (“The test to be applied...is whether the complaint, taken in the light most favorable to appellant, is sufficient to constitute a valid claim.”) “To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6) a complaint generally must satisfy only the minimal notice pleading requirements of Rule 8(a)(2). [That rule] requires only that the complaint include ‘a short and plain statement of the claim showing that the

pleader is entitled to relief.’ ” *Rowland v. Kellogg Brown and Root, Inc.*, 210 Ariz. 530, 534, 115 P.3d 124, 128 (App. 2005) (*quoting Porter v. Jones*, 319 F.3d 483, 494 (9th Cir.2003)). In *Mackey*, the Arizona Supreme Court cautioned, “The court should not grant a motion to dismiss unless it appears certain that the plaintiff would be entitled to no relief under any state of facts which is susceptible of proof under the claim as stated.” 81 Ariz. at 114, 301 P.2d at 1027. As a general rule, “motions to dismiss for failure to state a claim are not favored under Arizona law.” *Sensing v. Harris*, 217 Ariz. 261, 262 172 P.3d 856, 857 (App. 2007).

In this case, Taxpayers have stated a claim challenging both the MOA and its effect, as well as payments approved by the Local Board and remitted by Defendant PSPRS. In its Motion to Dismiss, PSPRS essentially rehashes the City of Phoenix’s same failed argument: The FAC should be dismissed because “none of the enumerated sections of the MOA classify the payments as ‘compensation’ for pension calculation purposes.” (Def.’s Mot. 4). As a threshold matter, even if assuming this were true (as described *infra*, it is not), the argument cannot prevail under a Motion to Dismiss because Taxpayers have also challenged the City’s payroll processes and pension contributions (FAC ¶¶ 41, 45, 66, 75, 87, 95) and the unlawful pension payments themselves (FAC ¶¶ 42, 50-51, 68, 76, 88, 96, 103). *See also* (Hacking Decl. ¶¶ 11, 13-16); ARIZ. REV. STAT. § 38-843.

As described in Taxpayers’ Response to the City’s Motion to Dismiss, the clear intent and effect of the MOA is to ensure the components of compensation at issue count as pensionable pay. First, payment in lieu of vacation leave and uniform allowance are both available only after seventeen years of service in PSPRS and for a consecutive three-year period¹ Given that Phoenix Police Sergeants and Lieutenants are retirement eligible at twenty years, and that their pension is based on their highest average salary over three years, this is a not-so-discreet attempt to ensure

¹See MOA, § 5-4(L) (“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, § 3-1D (“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.”)

these payments are counted as pensionable pay, regardless of how the payments are “classified” in the MOA. Second, the text of the MOA itself specifically classifies which payments are not pensionable.² Classification of certain items of remuneration as “not pensionable” indicates that items not so classified, including those challenged in this case, *are pensionable*. This is particularly true when viewed in light of policies that implement the intent of labor agreements.³ Finally, the MOA itself creates contractual obligations for the City. PHOENIX, ARIZ., CODE § 2-209. If the MOA creates a new pension benefit, *no matter how it “classifies” that benefit*, the City will be obligated to provide it, and Taxpayers are obligated to finance it. As a result, it is completely and entirely irrelevant whether the MOA itself labels or “classi[fies] payments as pensionable,” when the clear intent and effect of the provisions at issue is for payments made under them to count as pensionable pay. *See Merryweather v. Pendleton*, 90 Ariz. 219, 230, 367 P.2d 251, 258 (1961) (*citing* “universally applicable rule that equity looks to the substance rather than the form. Equity will go behind the form of a transaction to impose liability against evasion by a concealment of the instrument’s true character.”)

B. A Justiciable Controversy Exists Because Taxpayers Challenge Unlawful Pension Payments that are Currently Ongoing.

Taxpayers have asserted a justiciable claim because pension contributions and payments have been and are *currently* being made by defendants, including Defendant PSPRS, in direct violation of state law.

A justiciable controversy must exist for a court to grant declaratory relief. *Original Apartment Movers, Inc. v. Waddell*, 179 Ariz. 419, 420, 880 P.2d 639, 640 (App. 1993). A justiciable controversy exists if there is “an assertion of a right, status, or legal relation in which the plaintiff has a definite interest and a denial of it by the opposing party.” *Keggi v. Northbrook Prop.*

² See MOA, § 3-4(B)(4) (“The payments described in numbers 1 through 3 above are not considered Final Average Salary for purposes of pension calculations.”)

³ See, e.g., City of Phoenix Administrative Regulation 2.30 Revised, *City Leave Policies*, July 1, 2012 (“City employees are allowed to accrue sick leave without limit, and are encouraged to save their sick leave. The benefits of accumulating time include...increased retirement benefits.”)

& *Cas. Ins. Co.*, 199 Ariz. 43, 45, 13 P.3d 785, 787 (App. 2000). The controversy must be real, and not merely theoretical. *Planned Parenthood Ctr. of Tucson, Inc. v. Marks*, 17 Ariz.App. 308, 310, 497 P.2d 534, 536 (1972). “Declaratory judgment relief is an appropriate vehicle for resolving controversies as to the legality of acts of public officials.” *Riley v. Cochise County*, 10 Ariz.App. 55, 59, 455 P.2d 1005, 1009 (App. 1969). Public officials “may be enjoined from acts which are beyond their power.” *Williams v. Superior Court*, 108 Ariz. 154, 158, 494 P.2d 26, 30 (1972).

In this case, there is a real, current, and ongoing violation of Taxpayers’ rights as a result of unlawful actions perpetrated by PSPRS (and other defendants) for which Taxpayers may seek declaratory and injunctive relief. Defendant PSPRS contends, “Plaintiffs do not rely upon real and existing facts, but rather upon hypothetical issues which may or may not arise in the future.” (Def.’s Mot. 5-6). In fact, Taxpayers are challenging acts by public officials that are *currently ongoing*. Specifically, Taxpayers are currently making pension contributions to PSPRS based on unlawful pension calculations (FAC ¶¶ 41, 53), Defendant Local Board has approved and continues to approve unlawful pension amounts (FAC ¶¶ 42, 50), and Defendant PSPRS has made and continues to make pension payments that include components of compensation that are not pensionable under state law. (FAC ¶¶ 44, 102-03). These are not hypothetical ifs, ands, or buts, but represent the *presently existing* state of affairs that Taxpayers have an absolute right to challenge.

As indicated in Taxpayers’ Response to Defendant Local Board’s Motion to Dismiss, Plaintiffs’ right to bring this action derives from their status as taxpayers. Defendant PSPRS contends, “In the instant case, the Amended Complaint lacks any allegation that the Local Board or the System denied Plaintiffs some legal right in which they have a definite interest.” This is patently false. “It is now the almost universal rule that taxpayers of a municipality may enjoin the illegal expenditure of municipal funds.” *Ethington v. Wright*, 66 Ariz. 382, 386, 189 P.2d 209, 212 (1948). Moreover, “[t]he *right* to maintain such suits is based upon the taxpayers’ equitable ownership of such funds and their liability to replenish the public treasury for the deficiency which would be caused by the misappropriation.” *Id.* at 386, 189 P.2d at 212. (emphasis added). Contrary to PSPRS’s claim, the FAC alleges a deprivation of this right throughout. *See, e.g.*, (FAC ¶ 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.”); *See also* (FAC, ¶¶ 50-51, 55, 68, 76, 88, 96, 102, 103). In this case, PSPRS (and other defendants) are acting beyond their power by approving and issuing pension payments that are denying Taxpayers the right to have their public funds lawfully spent. Taxpayers have a right to challenge that misappropriation in this action.

C. Neither the Local Board nor PSPRS Have Original Jurisdiction Over This Case.

The Local Board does not have original jurisdiction in a taxpayer action filed to enjoin the unlawful expenditure of Taxpayer funds by defendants. “In determining whether an administrative agency has been granted original jurisdiction, the courts ask whether the agency ‘is *specifically empowered* to act by the Legislature.’ ” *Hamilton v. State*, 186 Ariz. 590, 593, 925 P.2d 731, 734 (App. 1996) (*quoting Minor v. Cochise*, 125 Ariz. 170, 172, 608 P.2d 309, 311 (1980) (emphasis added)). In other words, in order for an administrative agency or board to have original jurisdiction, the Legislature must specifically grant that agency original jurisdiction. *See, e.g.,* ARIZ. REV. STAT. § 41-148, *et seq.* (the Arizona Civil Rights Division has original jurisdiction over certain employment discrimination claims).

PSPRS asserts, “The Local Board has original jurisdiction of this action, not the Court.” (Def.’s Mot. 8). To establish that proposition, PSPRS relies on A.R.S. § 38-847(D)(1), the statutory provision that outlines the *specific, enumerated* powers and duties of local boards in PSPRS. Nowhere in the statutory provision cited, or in any other statutory provision, does state law grant the Local Board original jurisdiction to hear an action that the Local Board itself exceeded its statutorily defined powers. In fact, on the contrary, A.R.S. § 38-847(10) specifically provides that local boards may “sue and be sued to *effectuate the duties and responsibilities set forth in this article.*” (emphasis added). Taxpayers bring this action to prevent the unlawful expenditure of Taxpayer funds and effectuate the duties and responsibilities of the Local Board and PSPRS specifically set out in statute. *See* ARIZ. REV. STAT. §§ 38-841(A-B), 38-842(12), 38-847(E), 38-848(H)(7),(9).

PSPRS appears to further assert that the exhaustion of administrative remedies doctrine

applies in this case (Def.'s Mot. 10). Exhaustion of remedies is inapplicable, even nonsensical, here because neither the Local Board nor PSPRS have original jurisdiction in this action and because Taxpayers are not "claimants" under PSPRS. First, Arizona courts have repeatedly held that when an agency lacks original jurisdiction, the exhaustion of remedies doctrine does not apply. *See City of Bisbee v. Arizona Water Co.*, 214 Ariz. 368, 373, 153 P.3d 389, 394 (App. 2007); *Campbell v. Mountain State Tel. & Tel. Co.*, 120 Ariz. 426, 429, 586 P.2d 987, 990 (App. 1978) ("The doctrine [of exhaustion] applies only when an administrative agency has original jurisdiction."). For the reasons discussed, *supra*, neither the Local Board nor PSPRS have original jurisdiction in this case; therefore, the doctrine of exhaustion is inapplicable. Second, the statutory provision cited by PSPRS in support of its claim that exhaustion applies, A.R.S. § 38-847(D)(3), pertains to the process to determine the rights of *claimants* under PSPRS " 'Claimant' means any member or beneficiary who files an application for benefits pursuant to this article." ARIZ. REV. STAT. § 38-842(11). Taxpayers are obviously not "claimants" under PSPRS. Therefore, the process of review set forth for Local Board determinations is entirely inapplicable to this case. Exhaustion of remedies simply does not apply to this independent taxpayer action.

D. The Doctrine of Primary Jurisdiction Does Not Apply Because the Local Board and PSPRS Have Already Acted by Approving and Issuing Unlawful Pension Payments.

"[T]he doctrine of primary jurisdiction determines whether the courts or the [administrative] agency should make the initial decision in a particular case." *Campbell v. Mountain States Tel. & Tel. Co.*, 120 Ariz. 426, 429, 586 P.2d 987, 990 (App. 1978). The doctrine does not apply if the administrative agency has already acted or been given an opportunity to determine matters within its purview. *Coconino County v. Antco, Inc.*, 214 Ariz. 82, 89, 148 P.3d 1155, 1162 (App. 2006). Moreover, the doctrine is *discretionary*.⁴ *Campbell*, 120 Ariz. at 429, 586 P.2d at 990. It is applied

⁴ Taxpayers note that indulging PSPRS's request to make a determination that it has already made (as described *infra*) every time it makes a calculation regarding pension benefits would produce the necessary consequence of allowing the unlawful practice to continue; thus enlarging the amount of pension liability. Moreover, once an illegal pension calculation is made and approved by the Local Board, the money is likely never recoverable. *See* ARIZ. CONST. ART.

in cases raising “issues of fact not within the conventional experience of judges.” *Far East Conference v. United States*, 342 U.S. 570, 574 (1952).

PSPRS argues that the doctrine of primary jurisdiction applies in this case because the Local Board has broad statutory powers in determining and approving pension payments for Phoenix Police Sergeants and Lieutenants. (Def.’s Mot. 10-11). This is undoubtedly true, but it misses the point. The Local Board and PSRPS are *independently obligated* to comply with state law in executing their respective duties. *See* ARIZ. REV. STAT. §§ 38-841(A-B), 38-842(12), 38-847(E), 38-848(H)(7),(9). They have failed to do so. Moreover, the statutes which grant the Local Board and PSPRS their authority also specifically permit an action in this Court to effectuate those duties and responsibilities. *Id.* at § 38-847(10); *see also id.* at § 38-841(E).

Additionally, as described in Taxpayers’ Response to the Local Board’s Motion to Dismiss, the doctrine of primary jurisdiction is inapplicable because the Local Board and PSPRS have already acted. Specifically, as PSPRS admits, the Local Board has already expressly determined that one component of compensation challenged in this action, pay increases in lieu of a uniform allowance, is pensionable pay. (Def.’s Mot. n. 2). Additionally, the Local Board has already determined that the other components of compensation at issue, *viz.*, payment in lieu of vacation and payment for unused sick leave and compensatory time, constitute pensionable pay by previously approving and continuing to approve pension payments that include them. (FAC ¶ 50). In other words, the Local Board cannot make a pension calculation without determining what constitutes compensation. In every instance in which pension payments are approved that include the components of compensation at issue, the determination has already been made that these components of compensation are pensionable. In making these initial determinations, the Local Board has already acted, and the doctrine of primary jurisdiction is, therefore, inapplicable. *Coconino County*, 214 Ariz. at 89, 148 P.3d at 1162. There is no requirement in the law that an administrative agency that has already failed in its statutory duties gets a second (or third, or fourth, or fifth...) bite at the apple before its unlawful acts may be properly challenged in this Court.

Finally, this case does not raise complex issues of fact, such as determining specific claims as envisioned in A.R.S. § 38-847(D)(3). Any “expertise” either the Local Board or PSPRS could purportedly bring (Def.’s Mot. 11) may apply in the fact-driven circumstances of an officer’s individual claim, but would not apply in a straightforward case of statutory interpretation.

For these reasons, this Court can and should hear the claims Taxpayers have properly brought for declaratory and injunctive relief against defendants engaged in the unlawful expenditure of Taxpayers’ funds.

III. Conclusion

For the foregoing reasons, Taxpayers respectfully request that PSPRS’s Motion to Dismiss and Request for Attorneys’ Fees be DENIED.

Respectfully submitted on this 27th Day of November, 2013.

/s/ Jonathan Riches
Clint Bolick (021684)
Jonathan Riches (025712)
Taylor Earl (028179)
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

ORIGINAL E-FILED this 27th day of November, 2013, with a copy delivered via the ECF system to:

The Honorable John Rea
Maricopa County Superior Court

Clerk of Court
Maricopa County Superior Court

COPY of the foregoing E-MAILED this 27th day of November, 2013 to:

John Alan Doran
Matthew Hesketh
SHERMAN & HOWARD LLC
201 E. Washington St., Suite 800
Phoenix, AZ 85004
jdoran@shermanhoward.com
mhesketh@shermanhoward.com
lhinkel@shermanhoward.com
Attorneys for Defendants City of Phoenix, et. al.

Caroline A. Pilch
YEN PILCH & LANDEEN
6017 North 15th St.
Phoenix, AZ 85014
pilch@ypllaw.com
summer.g@ypllaw.com
Attorney for Defendant Phoenix Police Sergeants and Lieutenants Association

David L. Niederdeppe
Polly S. Rapp
J. Kenny Kelley
RYAN RAPP & UNDERWOOD PLC
3200 N. Central Ave., Suite 1600
Phoenix, AZ 85012
dniederdeppe@rrulaw.com
prapp@rrulaw.com
kkelley@rrulaw.com
tmouat@rrulaw.com
Attorneys for Defendant Phoenix Police Pension Board

Paige Martin
Marc Lieberman
KUTAK ROCK LLP
8601 North Scottsdale Road, Suite 300
Scottsdale, AZ 85253
paige.martin@KutakRock.com
marc.lieberman@KutakRock.com
patrick.riedel@KutakRock.com
Attorneys for Defendant Public Safety Personnel Retirement System

/s/ Jonathan Riches