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**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' APPLICATION FOR
PRELIMINARY INJUNCTION**

Hon. John Rea

Pursuant to Ariz. R. Civ. P. 7.1(a) and 65(a), Plaintiffs Jennifer Wright, Eric Wnuck, and Jim Jochim, who are Phoenix taxpayers ("Taxpayers"), move to preliminarily enjoin sections 3-1D, 3-4(B)(5), and 5-5(L) of the 2012-14 Memorandum of Understanding ("MOU") between Defendants City of Phoenix ("City") and the Phoenix Police Sergeants and Lieutenants Association ("PPSLA"). Plaintiffs further move to preliminarily enjoin Defendant City from classifying, Defendant Phoenix Police Pension Board ("Local Board") from approving, and Defendant Public Safety Personnel Retirement System ("PSPRS") from remitting pension payments that include payment in lieu of vacation, payment for unused sick leave, and payment for uniform allowances.

This Application 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

This lawsuit seeks to prevent the unlawful expenditure of public funds by the largest employer in PSPRS. The liabilities that result from these unlawful expenditures must be funded by all Phoenix taxpayers for decades. 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. An injunction would prevent irreparable injury to Taxpayers and promote the vital public interest in having tax dollars lawfully spent, while ensuring the fair and equitable administration of a huge, statewide retirement plan. It is clear that if Defendants are not enjoined they will continue to expend public funds in direct violation of state law.

II. STATEMENT OF FACTS

The Public Safety Personnel Retirement System (“PSPRS”) is a statewide pension program for eligible public safety personnel. ARIZ. REV. STAT. § 38-841 *et seq.* 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. *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, are bound by state rules. *Id.* Likewise, the terms of participation, pension contributions, and pension benefits for employees, or PSPRS “members,” are governed by state statute. *Id.*

To direct municipalities in pension determinations, Arizona law defines what payments count as pensionable “compensation” for PSPRS members. ARIZ. REV. STAT. § 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, on April 24, 2012, Defendants City and PPSLA signed a contract (MOU, attached as Exhibit A) that permits Phoenix Police Department Sergeants and Lieutenants to include payment in lieu of vacation (*id.* at § 5-5(L)), payment for unused sick leave (*id.* at § 3-4(B)(5)), and payment for a fringe benefit uniform allowance (*id.* at § 3-1D) as pensionable compensation items.

Moreover, Defendant City has independently classified payments these components of compensation as pensionable, and incorporated these payments into the City’s payroll processes and procedures. Specifically, Defendant City assigns “earnings codes” to particular components of compensation, and then classifies certain earnings codes as pensionable. (Local Board Tr. Excerpt 10:23-11:5, Feb. 14, 2014, attached as Exhibit B). Every component of compensation “has its own pay code.” (*Id.* at 11:1-2). When new components of compensation are negotiated, personnel from Defendant City, including payroll personnel, human resources staff, and IT staff, meet to identify which components of pay are pensionable and then “flag” them in the system as pensionable earnings codes. (*Id.* at 10:6-11:5). The pensionable earnings codes associated with the payments challenged in this case are: “SR” (“Uniform Conversion Pay” pursuant to MOU § 3-1D), “ZI” (“Accrued Sick Leave Payout” pursuant to MOU § 3-4(B)(5), and “ZQ” (“Accrued Vacation Payout-Hours” pursuant to MOU § 5-5(L)).¹ *See* (Exhibit C). Therefore, Defendant City “initially designates which items count as

¹ A list of all Phoenix Police Department pensionable earnings codes was admitted as an exhibit at the Local Board hearing of February 14, 2014, and is attached here as Exhibit C.

pensionable salary for its PSPRS participants.” (Def. Local Board Ans. ¶ 40).

For each component of compensation that is identified as pensionable pay, Defendant City will make employer contributions based on the payment amount to PSPRS each pay period. ARIZ. REV. STAT. § 38-843(B). The employer contribution rate for fiscal year 2013-2014 for the Phoenix Police Department is 34.5% of the member’s compensation amount.² These pension contribution payments by Defendant City are currently ongoing for Phoenix Police Sergeants and Lieutenants.³ Defendant City then reports total pensionable compensation figures to the Local Board. (Def. Local Board Ans. ¶ 42).

Each employer that participates in PSPRS, including Defendant City, is required to establish a local board that is responsible for deciding “all questions of eligibility for membership, service credits and benefits and determine the amount, manner and time of payment of any benefits under the system,” among other powers. ARIZ. REV. STAT. § 38-847(D)(1). Defendant Local Board oversees participation in PSPRS for Phoenix Police Sergeants and Lieutenants. The Local Board has previously approved pension payments that include the components of compensation challenged in this case.⁴ The Local Board then forwards approved pension amounts and payment information to PSPRS. (Hacking Decl. ¶

² Public Safety Personnel Retirement System, *Contribution Rates for Fiscal Year 2013/2014*, available at http://www.psprs.com/sys_psprs/employers/PS%20Employer%20Rates/PS%20FY2014%20ER%20Rates.pdf.

³ For illustrative purposes, Taxpayers have attached (Exhibit D) payroll records for a Phoenix Police Department Sergeant (“Sergeant Rowe”) from August 9, 2009 to August 19, 2012 that includes pensionable payments for earning codes SR, ZI, and ZQ under the 2012-14 MOU. Taxpayers have numerous pay records for other Phoenix Police Sergeants and Lieutenants that include these components of compensation and would anticipate many more during discovery.

⁴ For illustrative purposes, Taxpayers have attached (Exhibit E), Notice of Public Meeting for the Local Board on October 5, 2012. At this meeting, Sergeant Rowe had the amount of her pension benefit, including the components of compensation challenged in this case, examined as an action item and later approved by the Local Board in the amount reported to the Local Board. See (Exhibit G).

26, attached as Exhibit F).⁵ On March 26, 2014, the Local Board voted to continue to include the challenged components of compensation as pensionable pay for Phoenix Police Department members. (Local Board Tr. Excerpt 33:9, 36:15, 39:22, March 26, 2014, attached as Exhibit H).⁶

PSPRS issues pension checks to PSPRS members, including Phoenix Police Sergeants and Lieutenants. (Def. PSPRS Ans. ¶ 44). 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 Local Board. *Id.* at (H)(7). Despite this broad authority, it appears PSPRS has not performed audits on the Local Board based on the payments challenged in this case and has issued pension payments that include payment in lieu of vacation, payment for unused sick leave, and payment for uniform allowances. *See* (June 11, 2013 Response to Public Records Request attached as Exhibit I, markings added).

III. LEGAL ANALYSIS

A. Standard of review.

The criteria for granting a preliminary injunction are: (1) likelihood of success on the merits; (2)

⁵ For illustrative purposes, Taxpayers have attached (Exhibit G), a standard form P11 for Sergeant Rowe, which the Local Board used to report pensionable compensation and the approved pension amount for Sergeant Rowe to PSPRS. *See also* (Hacking Decl. ¶¶ 27-29, Exhibit F).

⁶ Exhibit H is a draft transcript of the March 26, 2014 Local Board hearing. According to counsel for the Local Board, the members have yet to review the transcript for accuracy; as such, this draft may not represent the complete, final transcript. The undersigned also attended the hearing. By a vote of 4-1, the Local Board determined to continue payments in lieu of vacation leave, payments for unused sick leave, and payments for uniform allowances as pensionable items. (Exhibit H at 33:9, 36:15, 39:22). The dissenting vote, Ms. Toni Maccarone, is the Local Board’s chairperson and the Public Information Director and chief spokesperson for Defendant City. She explained her “no” vote based on the language of A.R.S. § 38-842(12). (*Id.* at 31:12-25, 32:1-2).

possibility of irreparable harm without an injunction; (3) balance of hardships; and (4) public policy favors the injunction. *Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1990). A court applying this criteria may apply a sliding scale. *Smith v. Ariz. Citizens Clean Elections Comm’n*, 212 Ariz. 407, 410, 132 P.3d 1187, 1190 (2006). That is, an injunction is warranted if there is either: (1) a probability of success on the merits and the possibility of irreparable injury; or (2) serious legal questions are presented and the balance of hardships weighs strongly in favor of an injunction. *Id.* (citing *Shoen*, 167 Ariz. at 63, 804 P.2d at 792). Taxpayers satisfy all criteria for a preliminary injunction to be granted against Defendants.

B. Taxpayers are likely to succeed on the merits in this case.

Taxpayers’ likelihood of success on the merits is strong. Arizona law is clear that the payments challenged in this case 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.” ARIZ. REV. STAT. § 38-842(12). It is a principle of black letter law that when courts interpret a statute, 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); *see also State v. Jones*, 188 Ariz. 388, 392, 937 P.2d 310, 314 (1997) (“If the language of the statute is plain, the court looks no further.”). 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.” ARIZ. REV. STAT. § 38-842(12).

When Police Sergeants and Lieutenants “with seventeen years of credited service in PSPRS” are paid “additional vacation leave for a one-time, three year period” (MOU, § 5-5(L)) as pensionable salary, they are receiving “payment in lieu of vacation.” ARIZ. REV. STAT. § 38-842(12). The plain and obvious meaning of “in lieu of” is “instead of.” *See* MERRIAM-WEBSTER Dictionary (Encyclopedia Britannica Company, online ed., 2014); *see also Jones*, 188 Ariz. at 392, 937 P.2d at 314 (“A dictionary may define a word’s natural and obvious meaning.”). Thus, any pensionable payment received as additional salary in exchange for vacation leave is *by definition* “payment in lieu of [or instead of] vacation.”

Similarly, when Phoenix Police Sergeants and Lieutenants “who ha[ve] accrued 1,714 hours or more of *unused* sick leave” (MOU, § 3-4(B)(5) (emphasis added)) are paid additional sick leave as pensionable salary, they are receiving “payment for unused sick leave.” ARIZ. REV. STAT. § 38-842(12). It is, of course, obvious that “unused” means “not having been used before.” MERRIAM-WEBSTER, Dictionary (Encyclopedia Britannica Company, online ed., 2014). When Phoenix Police Sergeants exchange leave that has not been used before for pensionable salary, they are receiving pensionable compensation for unused sick leave.

Finally, 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 a specific fringe benefit. A.R.S. § 38-842(12) does not permit pensionable payment for “*any* fringe benefits” not enumerated in the statute. *Id.* Receipt of pensionable payment in lieu of a uniform allowance, likewise, violates A.R.S. § 38-842(12).

Therefore, when Defendant City classifies (in its MOU with PPSLA and in its payroll processes and procedures), when Defendant Local Board approves, and when Defendant PSPRS remits

pensionable payments in lieu of vacation leave, payment for unused sick leave, and payment for the fringe benefit uniform allowance, Defendants are violating the plain language of A.R.S. § 38-842(12).

Defendant City's conversion of vacation and sick leave payments and uniform allowance into a bi-weekly payment is a not-so-subtle attempt to make items that are excluded from the statutory definition of compensation look more like "regular" salary. Unfortunately for Defendants, the law makes no distinction between whether payments 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 (NY App. 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, "But 'the parties to a contract may not decide for themselves the meaning of terms used by the Legislature.' And the City does not have the authority to adopt its own definition of a statutory term by ordinance." *Id.* (citing *Grabicki v. Dep't of Ret. Sys.*, 916 P.2d 452, 456 (Wash. App. 1996)).

Similarly, in this case, Defendant City, in its MOU with Defendant PPSLA, has attempted to redefine state law in a manner that is contrary to the plain language of that law. In approving and remitting the pension payments at issue in this case, Defendants Local Board and PSPRS likewise exceed their legal authority. As a result, Defendants' unlawful actions in authorizing the pension payments at issue must be enjoined.

Davies is also illustrative. 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.* at 913.

Similarly, the pension payments approved and made by Defendants here "are nothing more than an attempt to circumvent" the prohibition against those payments under A.R.S. § 38-842(12).

A.R.S. § 38-842(12) is clear and unequivocal. The plain language of that statute prohibits the pensionable payments challenged by Taxpayers. Because A.R.S. § 38-842(12) must be interpreted according to its plain and obvious terms, Taxpayers are highly likely to succeed on the merits in this case.

B. Taxpayers will suffer irreparable injury without an injunction.

If this Court does not preliminarily enjoin Defendants from making unlawful pension payments, Taxpayers will be irreparably harmed, and the funds expended will likely never be recoverable. A court may find irreparable harm justifying an injunction when the harm is imminent and an award of money damages would not adequately compensate for the harm. *Berry v. Foster*, 180 Ariz. 233, 236, 883 P.2d 470, 473 (App. 1994). Pension contributions that include the components of compensation at issue are currently being paid by Defendant City (and thus Taxpayers), and Defendant Local Board and Defendant PSPRS are approving and remitting payments that include these components of compensation. Once the payments are approved, and pension funds expended, Taxpayers will be unable to recoup those funds. *See* ARIZ. CONST. ART. XXIX, § 1(C). Thus, the harm to Taxpayers is imminent, and the damages unrecoverable in the absence of a preliminary injunction.

C. The balance of hardship favors granting an injunction.

The balance of hardship strongly favors Taxpayers. If money is expended before this litigation is finally resolved, Taxpayers will be unable to recover the funds, and will be responsible for financing unlawful pension payments for the entirety of the pensioners' retirements. These can be enormous sums of money that should never have been expended and cannot be recovered. Taxpayers' injury is truly irreparable.

By contrast, Defendants will not suffer irreparable harm. In fact, Defendant City and Defendant PSPRS would suffer no harm if a preliminary injunction is granted. On the contrary, Defendant City

would save taxpayer dollars that never should have been spent in the first place. Defendant City could then put these dollars to lawful use. Defendant PSPRS would experience fewer liabilities on an already underfunded pension system as well as greater equities among all PSPRS members – the specifically-stated, primary purpose establishing the PSPRS system. *See* ARIZ. REV. STAT § 38-841(B) (The purpose in creating PSPRS was “to provide a uniform, consistent and equitable statewide [retirement] program for public safety personnel”). Moreover, if a preliminary injunction is granted but Defendants ultimately succeed on the merits, individual PSPRS members could petition the Local Board to have their benefits recalculated to include the challenged components of compensation. Therefore, even individual Sergeants and Lieutenants would suffer no harm if a preliminary injunction is entered.

For the reasons discussed above, Taxpayers have a strong probability of success on the merits, and if pension payments that include the components of compensation at issue are approved and remitted, Taxpayers will be irreparably harmed. As a result, the balance of hardship tips sharply in favor of Taxpayers.

D. An injunction is in the public interest.

An injunction is in the public interest because taxpayers have a right to have their tax dollars lawfully spent, and this is an issue of statewide importance that furthers the purpose of PSPRS.

First, the Arizona Supreme Court has long recognized the right of taxpayers to enjoin the unlawful expenditure of taxpayer funds. *See Ethington v. Wright*, 66 Ariz. 382, 386, 189 P.2d 209, 212 (1948) (“It is now the almost universal rule that taxpayers of a municipality may enjoin the illegal expenditure of municipal funds”). Because all taxpayers are liable to replenish public coffers when funds are expended, it is by definition, in the public interest to prevent the *unlawful* expenditure of such funds. *Id.* at 386, 189 P.2d at 212. An injunction is the proper tool to prevent these unlawful public expenditures.

Second, this case presents significant legal issues of statewide importance. *Shoen*, 167 Ariz. at 63, 804 P.2d at 792. There are 236 participating employers in PSPRS. (Def. PSPRS Ans. ¶ 25). Public safety agencies from across the state are entitled to a system that is fair, consistent, and equitable. In fact, as described *supra*, the primary legislative purpose in establishing PSPRS was “to provide a uniform, consistent and equitable statewide [retirement] program for public safety personnel.” ARIZ. REV. STAT § 38-841(B). When Defendants classify, approve, and remit pension payments for only one employer that may not be available to the over 200 other agencies, they are thwarting the very purpose of the pension fund, and creating disparities and inequities within it. The same inequities, moreover, result even among individual PSPRS members in the same department. *See, e.g., City of Covington v. Bd. of Trustees of Policemen's & Firefighters' Ret. Fund of City of Covington*, 903 S.W.2d 517, 522 (Ky. 1995) (“It seems incongruous that where two employees working side by side making the same rate of pay and one is sick more than the other, for him or her to receive less pension for the rest of his or her life . . .”) Such inequities not only threaten fund solvency, but may, in fact, encourage other employers to attempt to ignore the plain language of state statute when participating in PSPRS, thus exacerbating the problem.

E. The Court should require only a nominal bond upon issuing a preliminary injunction.

Upon issuing a preliminary injunction, the Court should exercise its discretion and require Taxpayers to post only a nominal bond because Taxpayers advance significant statutory enforcement claims and Defendants are unlikely to suffer pecuniary harm as a result of the injunction. While Rule 65(e) of the Arizona Rules of Civil Procedure requires “giving of security by the applicant” before issuing a restraining order or preliminary injunction, it affords courts discretion to set the bond “in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or

suffered by any party who is found to have been wrongfully enjoined or restrained.” Ariz. R. Civ. P. 65(e). Arizona courts set bond at an amount that is reasonable for the given situation. *See Matter of Wilcox Revocable Trust*, 192 Ariz. 337, 341, 965 P.2d 71, 75 (App. 1998) (also noting that due to the elimination of Ariz. R. Civ. P. 65(f), “[t]here is no longer any basis for concluding that a preliminary injunction is unenforceable unless a security bond has been issued”). As set forth above, it is unlikely that Defendants would suffer harm from being wrongfully enjoined. Accordingly, Taxpayers respectfully request that this Court use its discretion and set bond at a nominal amount.

IV. CONCLUSION

An injunction in this case would prevent the unlawful expenditure of taxpayer dollars that may otherwise never be recoverable. Moreover, negotiations are underway on a successor MOU between Defendant City and Defendant PPSLA and other public union groups. An injunction would provide guidance to public officials so that the next MOU conforms to state statute.

For the foregoing reasons, Taxpayers have met all criteria for a preliminary injunction and respectfully request that their Application for a Preliminary Injunction be GRANTED.

Respectfully submitted on this 3rd day of April, 2014.

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CERTIFICATE OF SERVICE

ORIGINAL E-FILED this 3rd day of April, 2014, with a copy delivered via the ECF system to:

The Honorable John Rea
Maricopa County Superior Court

Clerk of Court
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COPY of the foregoing E-MAILED this 3rd day of April, 2014 to:

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