

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-021634

04/08/2013

HONORABLE KATHERINE COOPER

CLERK OF THE COURT
D. Harding
Deputy

WILLIAM R CHEATHAM, et al.

CLINT BOLICK

v.

SAL DICICCIO, et al.

JOHN A DORAN

KATHRYN RUTH ELIZABETH
BAILLIE
MICHAEL J PETITTI

UNDER ADVISEMENT RULING

On January 5, 2013, the Court conducted an evidentiary hearing on Plaintiffs' Application for Preliminary Injunction of the 2012-14 Memorandum of Understanding ("2012 MOU") between Defendants City of Phoenix ("The City") and the Phoenix Law Enforcement Association ("PLEA"). The Court has considered the evidence, counsels' arguments, and the applicable law. The Court has also considered evidence presented at the May 25, 2012 preliminary injunction hearing on Plaintiffs' Application for Preliminary Injunction of the predecessor 2010-2012 MOU. The parties submitted proposed Findings of Fact and Conclusions of Law. As explained below, Plaintiffs' Application is **GRANTED**, the release time provisions at issue are enjoined, and Plaintiffs shall post a bond in the amount of \$1,000 no later than May 6, 2013.

BACKGROUND

For the second time, this Court is asked to determine whether funds that PLEA receives from the City for "release time" violate Arizona's Gift Clause. Release time is the practice of relieving police officers from police duties to perform PLEA activities and conduct PLEA business. In June 2012, the Court enjoined release time provisions in the 2010 MOU. The Court

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-021634

04/08/2013

found that the Gift Clause of the Arizona Constitution, Ariz. Const. Art. 9, § 7, precluded the City from allocating public funds to the exclusive use and control of PLEA, a private association representing police officers.

On June 30, 2012, the 2010 MOU expired, and on July 1, PLEA and the City resumed paid release time under the successor MOU for 2012-14. As a result, Plaintiffs returned to the Court, seeking an injunction to apply to the 2012 MOU.

The 2012 MOU contains essentially the same contested provisions as those in the 2010 MOU. Like the 2010 MOU, the 2012 MOU authorizes six full-time paid PLEA positions, a bank of approximately 1,900 hours for PLEA business, nearly 1,000 hours of paid overtime for the full-time positions, and 500 hours for a PLEA lobbyist. The 2012 MOU also authorizes unlimited time for 42 part-time officer representatives (up from 37 in 2010) to represent members in grievance and disciplinary meetings.

In negotiating the 2012 MOU, the City and PLEA discussed an addendum that would have alleviated at least some of the constitutional problems with the release time section of the MOU. The main change would have been that PLEA would reimburse the City for any release time that did not fall within a list of public purpose activities. PLEA rejected this proposal and refused to consider any fundamental changes to the release time arrangement.

FINDINGS OF FACT

PARTIES

1. Plaintiffs are Phoenix taxpayers and residents.
2. Defendant PLEA is a labor organization that represents City of Phoenix police officers below the rank of sergeant who pay dues in exchange for membership in and representation by PLEA. PLEA's mission is to represent the interests of its members. PLEA has a duty to act in the best interests of its members.
3. Defendant City of Phoenix is a municipal corporation. Its mission is to provide services to, and to manage the resources of, its citizens. City employees have a duty to act in the best interests of the public.
4. Defendant Sal Diciccio is a sitting member of the City of Phoenix City Council.
5. Interveners are five City of Phoenix police officers. Some interveners are members of PLEA and others are not.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-021634

04/08/2013

2012 MOU

Release Time Provisions at Issue

6. Plaintiffs seek to enjoin Sections 1-3.B, 1-3.C and 1-3.Q of the 2012 MOU:

a. Subsection 1-3.B.1 – authorizes six full-time paid PLEA positions.

b. Subsection 1-3.B.2 -- authorizes paid time off from regular duties for 42 part-time representatives to represent unit members in grievance and disciplinary meetings.

c. Subsection 1-3.B.2.b – allows PLEA to add representatives as new units or precincts are created.

d. Subsection 1-3.B.3 – creates a bank of 1,859 annual release-time hours for “Association business” and permits unused hours to be carried over to a new contract up to a maximum bank total of 2,789 hours.

e. Subsection 1-3.C – provides PLEA may appoint a lobbyist who can use 500 additional release-time hours.

f. Subsection 1-3.Q – grants 960 overtime hours to the full-time release officers.

Terms of the 2012 MOU

7. Like the 2010 MOU, the 2012 MOU:

a. provides that officers on release time receive their regular salary and benefits and maintain full eligibility in the Public Safety Personnel Retirement System ("PSPRS"). It requires that the City, as employer, make the employer's contributions to PSPRS in the same way that it does for officers doing regular police work.

b. states that the cost of release time is charged as part of the City's total compensation package contained in the MOU.

c. does not obligate PLEA to provide any services to the City in exchange for the compensation and benefits the City gives to PLEA for release time.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-021634

04/08/2013

8. The 2012 MOU lists “examples of work performed by the release positions.” It does not limit the use of release time to these “examples” or any other purposes. The list does not include recognized uses of release time as shown by the evidence, such as union management activities, lobbying, and support for ballot measures.

9. There is no language that obligates PLEA to perform any of the “examples” or do anything in exchange for release time with the possible exception of Section 1-3.Q. This section states that “[t]he full-time release positions agree to participate” in citywide committees and, in exchange, the City agrees “to provide” a bank of 960 hours of overtime.

10. The 2012 MOU requires the full-time officers to be qualified, but not necessarily to perform regular police work. The 2010 MOU defined the six full-time release positions as those “who are regularly assigned to hazardous duty, and *will at times perform* such duties as are normally expected and required of a municipal police officer in the City of Phoenix, Arizona.” Under the 2012 MOU, these positions “will at all times *remain qualified to perform* such duties as are normally expected and required of a municipal police officer in the City of Phoenix, Arizona.” (Emphasis added.)

11. The lobbyist provided for in 1.3.C represents PLEA, not the City. The 2012 MOU does not limit the activity in which the lobbyist may engage.

PLEA

12. PLEA operates autonomously within the Police Department. It performs various services for Unit 4. Full-time officers do not report to a higher-ranking officer. They supervise themselves and other officers while those officers are on release time. PLEA pays full-time release officers a financial stipend of approximately \$1,000 per month and a car allowance of \$500 per month as additional compensation to their City salary and benefits.

13. In negotiating the 2012 MOU, PLEA opposed “any fundamental changes in release time.” (Exh. 41 at 7454.) During the negotiations, PLEA’s lead negotiator stated, “[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.” (Exh. 41 at 7416). He further stated, “We can look at it, but we’re not going to change how it’s paid;” and “any fundamental changes are not going to happen.” (Exh. 41 at 7454.)

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-021634

04/08/2013

Cost

14. The stated cost of the challenged release time provisions is \$852,000 per year or \$1.7 million for the entire 2012 MOU. This cost does not include overtime incurred as a result of a release time activity. Nor does it appear to include the cost of paying for representatives to represent officers in grievances and disciplinary proceedings pursuant to A.R.S. §1-3.B.2.a.

15. With 2,647 Unit 4 positions, release time would cost each position \$322 per year (or \$27 per month) in dues.

16. Release time causes a direct reduction in the number of officers available for public safety protection. Officers on release time are pulled from their regular police work to do union business.

17. Release time is funded by taxpayers, not by union dues.

18. Defendants' expert acknowledges that it is "impossible to determine" or estimate the value of benefits of release time, if any, for the City. (Exh. 2 at p. 11.)

Evidence Regarding Activities on Release Time

19. PLEA uses release time for union management; to provide representation in grievance and disciplinary proceedings; to advocate for members' interests, including increased salary and benefits and public policy that favors PLEA; to lobby legislative issues on behalf of its members; and to engage in local and national politics that benefit PLEA; to facilitate communication between members and management; to provide training; and to participate in task forces and committees.

20. "The officers of Unit 4 entrust PLEA to use release time to represent them if they require representation and to protect their interests." (Defendants' Joint Proposed SOF, para. 19.)

21. During negotiations for the 2012 MOU, the City's representative asked PLEA's negotiator how PLEA uses release time. He responded: "It's for union business. I think we've done a damn good job... We use it for reps' training, for representation of our members, we do fundraisers, but I guess raising money for widows is inappropriate now." (Exh. 41 at 7417.)

22. PLEA leadership has also used release time to openly and publicly criticize the Chief of Police, to solicit grievances filed by members regarding issues (such as the uniform issue)

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-021634

04/08/2013

with which PLEA disagrees, and to direct members not to comply with supervisors' orders with which PLEA disagrees.

23. PLEA used release time to lobby in favor of legislation that the City opposed, i.e. immigration bill SB 1070.

24. Release time has been shown to increase the quantity of grievances filed in a municipality. It may also decrease appeals of grievances.

25. PLEA determines who uses release time and for what.

26. Defendants' expert testified that union contracts (like the 2012 MOU) could limit the use of release time to certain defined activities and also require officers to report release hours worked. (Exh. 53 at 7-8.)

27. The City and PLEA rely on release time to carry out the purpose of the Meet and Confer Ordinance, Section 2-29 of the City Code, that is, to promote harmonious and cooperative relationships between the City and its employees, to enhance communication between employers and public employee organizations, and to assure the smooth and orderly operation of government.

28. According to Plaintiffs' expert, "One of the distinguishing characteristics of the release time PLEA has with the City of Phoenix is there is no accountability for the use of the time." (Exh. 40 at 7).

CONCLUSIONS OF LAW

Standards For Preliminary Injunction

1. The criteria for a preliminary injunction are (1) likelihood of success on the merits, (2) possibility of irreparable harm without an injunction, (3) balance of hardships, and (4) public policy. *Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1990). The factors for an injunction operate on a sliding scale. An injunction is warranted if either there is (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. *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410-11, 132 P.3d 1187, 1190-91 (2006).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-021634

04/08/2013

2. The Gift Clause, Ariz. Const. Art. IX, §7, provides in relevant part, “Neither the state, nor any...municipality...shall ever...make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation....”

3. The Gift Clause inquiry has two components. Both must be satisfied. First, the expenditure of public funds must have a public purpose. Second, there must be adequacy of consideration. *Turken v. Gordon*, 223 Ariz. 342, 347-350, 224 P.3d 158, 163-166 (2010). “Public funds are to be expended only for ‘public purposes’ and cannot be used to foster or promote . . . purely private or personal interests.” *Turken*, 223 Ariz. at 347, 224 P.3d at 163.

Public Purpose

4. It is undisputed that the 2012 MOU as a whole serves an important public purpose – to secure police services for the community. It is further undisputed that the City’s Meet and Confer Ordinance, Section 2-209, fulfills a public purpose by promoting positive labor relations within the City. Neither the MOU itself nor the Meet and Confer ordinance are at issue. The issue is whether the MOU contains an impermissible gift. The relevant inquiry is: does paid release time have a public purpose for which the City receives adequate consideration?

5. The Court finds that, in general, release time does not advance a public purpose. It diverts resources away from the mission of the Phoenix Police Department, which is the safety of the community. It applies those resources to the interests of a single group of City employees. This conclusion is supported by the following:

a. First and foremost, Defendants *acknowledge* that release time is for PLEA’s members. In paragraph 19 of their Joint Proposed Statement of Facts, which they ask this Court to adopt, Defendants state: “The officers of Unit 4 entrust PLEA to use release time *to represent them* if they require representation and *to protect their interests.*” (Emphasis added.) On page 2 of the Response in Opposition to Plaintiffs’ Application for Preliminary Injunction (filed 7/23/12), the City identifies release time as on-duty time “when the members are relieved from police duties to perform PLEA activities and conduct PLEA business.” In negotiating the 2012 MOU, PLEA’s lead negotiator, a full-time release officer, plainly stated that release time is for “union business.” In short, Defendants do not dispute that release time exists for one group of individuals, not the City or the general public.

b. Second, PLEA uses release time to meet its obligations to its members. It uses it to provide members with representation in disciplinary and grievance proceedings; to advocate for better pay, benefits, and policies; to lobby for favorable legislation; to engage in local and national politics that support PLEA’s interests; and to manage union

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-021634

04/08/2013

activities and elections. While Defendants maintain that PLEA communicates information and sits on committees for the City, there is scant evidence that this occurs on release time. PLEA does not charge release time for tasks it performs for the City, and the MOU provides overtime pay to the full-time positions for their City committee time. The weight of the evidence establishes that PLEA is using release time to do what it exists to do – to advance the interests of its members.

c. Third, there is no mechanism to determine how PLEA actually applies the funds or the value that release time returns to the City. In most instances where our courts have upheld an expenditure of public funds to a private entity, it has considered whether there is public ownership or control over how the money is spent. In *Wistuber v. Paradise Valley Unif. Sch. Dist.*, 141 Ariz. 346, 350, 687 P.2d 354, 358 (1984), the Court upheld a release time provision in a contract. There, the contract expressly stated that “The Association President *agrees [with the District] to,*” followed by a list of ten specific duties that the employee was required to perform and the amount of time that the employee was required to spend on District (as opposed to union) work. *See also Town of Gila Bend v. Walled Lake Door Co.*, 107 Ariz. 545, 549-50, 490 P.2d 551, 555-56 (1971); *City of Tempe v. Pilot Properties, Inc.*, 22 Ariz. App. 356, 361, 527 P.2d 515, 520 (App. 1974).

Here, PLEA decides who uses release time and for what. The City does not track release time other than the number of hours used from the bank of hours. PLEA has resisted providing basic documentation of what they are doing, even though their expert agrees that some level of documentation could be done without violating the unfair labor practices governing unions. Release time places public funds at the disposal of the union. While the City allowed this arrangement for years, it is one that lacks accountability and transparency, both concepts that serve the public.

d. Finally, release time has been used to foster an adversarial relationship with the City. PLEA leadership has used release time to openly and publicly criticize the Chief of Police, to solicit grievances filed by members regarding issues (such as the uniform issue) with which PLEA disagrees, to direct members not to comply with supervisors' orders with which PLEA disagrees, and to lobby in favor of legislation the City opposed. Such conduct undermines any public purpose that might be served.

6. The Court acknowledges that limited applications of release time may serve at least a dual private/public purpose. For example, time spent on communications between PLEA members and Police Department management regarding policies, members' concerns, and training on police matters arguably serves a public purpose. Participation in citywide task forces

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-021634

04/08/2013

and community projects *on release time* is another. Finally, there may also be a public purpose derived from PLEA's representation of officers involved in critical incidents (i.e. shootings). Plaintiffs do not seek to enjoin the critical incidents section (Section N) of the MOU.

Consideration

7. Consideration under the Gift Clause analysis mirror contract law. It is "the objective, fair market value of what the private party *has promised to provide* in return for the public entity's payment." *Turken v. Gordon*, 223 Ariz. 342, 349, 224 P.2d 158,165 (2010). (Emphasis added.) It is "what one party to a contract obligates itself to do . . . in return for the promise of the other contracting party." *Id.* It is a measurable, bargained-for asset. Our Supreme Court has expressly held that indirect benefits – no matter how attractive -- "when not bargained for as part of the contracting party's promised performance...are not consideration..."

8. *Wistuber* and *Turken* are guideposts on this issue. In *Wistuber*, the Court found the existence of measurable, adequate consideration. In *Turken*, it did not. In *Wistuber*, the Court upheld the contract on the basis that "the duties *imposed upon* [the release-time employee] 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.* at 350, 687 P.2d at 358. (Emphasis added.) By contrast, in *Turken*, the Court rejected the argument that indirect benefits, such as projected sales tax revenue, qualified as consideration when the contract did not obligate the developer to pay a penny of tax revenue to the City of Phoenix.

9. The Court again finds a lack of adequate consideration from PLEA in exchange for release time compensation and benefits. In addition to the reasons stated in the Court's 6/5/12 Order, the Court concludes:

a. First, like the 2010 MOU, the 2012 MOU does not obligate PLEA to do anything, to perform any specific service or give anything in return for \$1.7 million. The MOU simply provides an incomplete list of "examples of work performed by the release positions." However, there is no binding contractual language attached to these examples, such as "agrees to," "promises," or "will perform." As a result, there is no consideration given by PLEA in the 2012 MOU.

b. Second, PLEA and the City assert that the release-time provisions promote labor peace, improved communications, and cooperative union employees. These are intangible, indirect benefits, regardless whether they are sought for Meet and Confer purposes or common sense. "[S]uch benefits are not consideration under contract law." *Turken*, 223 Ariz. at 350, 224 P.3d at 166.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-021634

04/08/2013

c. Third, adequate consideration cannot be established under the City and PLEA's current practice. There are no reports, rules, obligations, or procedures for release time. In *Arizona Center for Law in the Pub. Int. v. Hassell*, 172 Ariz. 356, 369, 837 P.2d 158, 171 (App. 1991), "the legislature acted without particularized information, and established no mechanism to provide particularized information, to support even an estimate of the value" of the public benefits. The City Council did the same thing here. Defendants' own expert acknowledges testified that no mechanism exists to quantify or estimate the value of benefits of release time that supposedly accrue to the City. Pursuant to *Hassell*, Defendants have the burden to ensure that value can be ascertained so that benefits can be measured against the expenditure.

d. Finally, Defendants contend that release time is compensation owed to Unit 4 officers as consideration for police services provided. With a total cost of \$330 million per year, the 2012 MOU *as a whole* sets forth officers' compensation and benefits. Further, the issue is not the value of release time to the officers; it is the objective value of release time to the public. The question is whether the release time provisions in the MOU are a gift. While these funds are *budgeted* as part of Unit 4's total compensation, they are *disbursed* to PLEA, not paid to the officers. The fact that Unit 4 approves does not change the fact that it is still have an expenditure of public monies to a private entity.

Likelihood of Success on the Merits

10. The Court finds that Plaintiffs have demonstrated a likelihood of success on the merits of their claims because 1) PLEA uses the City's authorization of \$1.7 million for release time for private, not public, purposes, and 2) there is no legal consideration given by PLEA in exchange for the benefits it receives.

Irreparable Harm

11. Plaintiffs have shown the possibility of irreparable harm. First, they have established, more likely than not, a violation of the Gift Clause. A constitutional violation generally constitutes irreparable harm. *Collins v. Brewer*, 727 F.Supp. 2d 797, 812 (D. Ariz. 2010). Second, release time costs the City \$1.7 million for the 2012 MOU, not including representative's time in certain proceedings, overtime, and other incidental benefits. Third, release time diverts officers from their regular police duties, providing public safety for citizens. Public safety is a factor in determining injunctive relief. See, e.g., *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1307 (1976); *Harris v. Bd. of Supervisors*, 366 F.3d 754, 766 (9th Cir. 2004).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-021634

04/08/2013

Balance of Harms

12. The balance of harms favors an injunction. Officers retain their right to union representation under A.R.S. § 38-1101 which can be provided by PLEA.

Standby and call-out for representation in critical incidents, as provided in Section 1-3.N, will remain the same.

Funding for PLEA work may be provided through union dues. It would cost only \$322 per year per member (or \$27 per month) to cover the City's budget for release time. In some jurisdictions, members donate leave time to a bank of hours to fund release time.

Nothing precludes the City and PLEA from revising the MOU to comport with the Gift Clause. The City attempted as much after this Court's June 5, 2012 ruling but was rejected by PLEA. The proposed addendum ensured that PLEA operations would continue with PLEA reimbursing the City at a later date.

In addition, the City will see the return of six officers to law enforcement that it desperately needs.

Scheduling conflicts created by the bank of hours will be eliminated.

The Police Department can assign officers to carry out the tasks that, in fact, benefit the department and create a process for monitoring and supervising such assignments.

Public Policy

Public policy mandates compliance with Arizona's Constitution and law.

IT IS HEREBY ORDERED granting Plaintiffs' Application for Preliminary Injunction and enjoining Sections 1-3.B, 1-3.C and 1-3.Q of the 2012 MOU.

IT IS FURTHER ORDERED that, pursuant to Rule 65(e), Plaintiffs shall post a bond in the amount of \$1,000 no later than May 6, 2013.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.