IN THE SUPREME COURT OF ARIZONA

WILLIAM R. CHEATHAM and MARCUS HUEY,

Respondents/Plaintiffs

v.

SAL DICICCIIO, in his official capacity as a member of the Phoenix City Council; CITY OF PHOENIX; and PHOIENX LAW ENFORCEMENT ASSOCIATION,

Petitioners/Defendants

THOMAS COX; VICTOR ESCOTO; RICHARD V. HARTSON; VYVIAN REQUE; and DAVID WILSON,

Petitioners/Intervenors.

No. CV-15-0287-PR

Arizona Court of Appeals
Case Nos. 1 CA-CV 13-0364
1 CA-CV 14-0135
(Consolidated)

Maricopa County Superior Court
No. CV 2011-021634

AMICUS CURIAE BRIEF OF National Association of Police Organizations

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I. STATEMENT OF INTEREST

Upon obtaining the written consent of the parties to file to appear before this Court, Amicus National Association of Police Organizations (NAPO) urges reversal of the decision below enjoining the City of Phoenix (City) and the Phoenix Law Enforcement Association (PLEA) from use of the release time provision.

NAPO is a coalition of police unions and associations from across the United States. NAPO was organized and exists for the purpose of advancing the interests of America's law enforcement officers through legislative advocacy, political action, and education. NAPO represents more than 1,000 police units and associations, over 241,000 sworn law enforcement officers, and more than 100,000 citizens who share a common dedication to fair and effective crime control and law enforcement. NAPO, in its own name or an affiliated entity, has filed numerous amicus curiae briefs in the U.S. Supreme Court and other appellate courts on behalf of law enforcement officers to protect officers' legal and constitutional rights.

II. SUMMARY OF THE ARGUMENT

This is an important case for sworn law enforcement officers. Release time is a long standing, prevailing practice throughout the United States that assures not only amicable labor relations, but fosters better service to the

community. Release time allows sworn officers to effectively communicate with their department superiors, assures them prompt and effective representation when facing the daily challenges of their work and provides a means to address matters of public concern.

While many, if not most, state constitutions have a gift clause or similar provision, challenges to release time are almost non-existent despite its common use. Other than *Wistuber v. Paradise Valley Unified School Distric*t, 141 Ariz. 346, 687 P.2d 354, (1984), the only other published decisions that we can find are from Washington holding release time permissible. *State of Washington*, 99 Wash. 2d 232, 662 P. 2d 38, 45 (Wash. 1983), *Green River Community College District No. 10*, 107 Wash. 2d 427, 730 P. 2d 653, 659 (Wash. 1986).

Given the extensive briefing from both the parties and anticipated other amicus, we limit our discussion on the Arizona Gift Clause to the following: [1]

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[1] Respondent Taxpayers' supplemental brief belatedly raises new statutory and constitutionally based arguments they claim render the MOU's release time provision unlawful even if it survives scrutiny under the Gift Clause. Respondents' Supplemental Brief, pages 17 – 18. We disagree. But, for two interrelated reasons, NAPO urges this Court to not consider either new argument.

First, Respondent Taxpayers waived these arguments. The complaint alleged only a violation of the Gift Clause and resulting injury to taxpayers. PLEA developed a factual record in response to that specific claim. Plainly, Respondent Taxpayers are not privileged to expand the scope of the case on

A. The Court of Appeals erred in resolving this matter based on drafting niceties. It rendered illusory MOU provisions describing the responsibilities and tasks incumbent upon PLEA as being "permissive" and "non-binding." Nothing in the language of the Gift Clause or in the case law compels such a cramped analysis. *Turken v. Gordon*, 223 Ariz. 342, ¶ 14, 224 P.3d 158 (2010) ("Courts must not be overly technical and must give appropriate deference to the findings of the governmental body.") Measured by the parties' intent, the broad nature of PLEA's responsibilities and tasks under

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appeal. *Harris v. Cochise Health Sys.,* 215 Ariz. 344, 350, 160 P.3d 223, 229, ¶¶ 17 – 23. (Ariz. Ct. App. 2007). See, *State v. Bible*, 175 Ariz. 549, 572, 858 P.2d 1152, 1175 (1993), cert. denied, 128 L. Ed. 2d 221, 114 S. Ct. 1578 (1994)("This waiver principle applies to alleged constitutional issues . . .".)

Second, Respondent Taxpayers lack standing. Taxpayer standing is limited to claims "based upon the taxpayers' equitable ownership of [tax generated] funds and their liability to replenish the public treasury for the deficiency which would be caused by the misappropriation." *Dail v. Phoenix*, 128 Ariz. 199, 201-02, 624 P.2d 877, 879-80 (Ariz. Ct. App. 1980) quoting *Ethington v. Wright*, 66 Ariz. 382, 386, 189 P.2d 209, 212 (1948)). Here, Respondent Taxpayers newly asserted arguments allege only potential injury to individual employees. *Cronin v. Sheldon*, 195 Ariz. 531, 542, 991 P.2d 231, 242, ¶54 (Ariz. 1999); (Party who is not injured by an unconstitutional provision of a statute may not raise an objection as to its constitutionality.)

Alternatively, if this Court decides to consider either new argument, NAPO urges this Court to allow PLEA and amici to fully brief these complex claims including whether Respondent Taxpayers have standing, the adequacy of the factual record to resolve these new arguments and the legal issue of whether Respondent Taxpayers' implied assumption that the small portion of the total compensation package paid to PLEA is somehow the functional equivalent of mandatory fees.

the MOU, the nature of the MOU and, most importantly, the uncontested fact of PLEA's performance, the record leaves no doubt that the City's funding of release time was not "grossly disproportionate" to what it received in return. Thus, even assuming *arguendo* as Respondent Taxpayers argue that funds devoted to release time were not part of the total compensation package, the amounts paid to PLEA for release time are not "so inequitable and unreasonable that it amounts to an abuse of discretion." *Turken*, ¶ 30.

B. Release time serves a public purpose. It assures important ongoing communication between the City and its employees. Likewise, it assures police officers receive prompt and effective representation when facing the daily challenges of their work. It assures officers the opportunity to speak to the public on law enforcement matters.

Contrary arguments raised by the Respondent Taxpayers (and accepted by the trial court) fail to demonstrate the City "unquestionably abused" its discretion in concluding release time serves a public purpose. *Turken,* ¶ 28. First, Respondent Taxpayers' ideologically derived belief that release time does not serve a public purpose because the City and PLEA are "adversaries" falls way short of demonstrating "unquestionable abuse" of discretion. Rather than "adversaries", rank and file officers are "partners" with the City in providing police protection. The fact that these "partners" may occasionally disagree does

not determine whether release time serves a "public purpose." The City's informed judgment as to the critical importance of the free flow of communication, both complementarily and critical of the Department, to the public's interest in the efficient and effective provision of police protection is entitled to great deference. *Turken,* ¶ 28. Second, that release time *also* promotes the interests of PLEA and its members is of no consequence in determining if release time serves a public interest. *Turken*, ¶ 21, 26 and 33.

C. The Gift Clause was never intended nor has it ever been interpreted as being an alternative to the ballot box for disgruntled taxpayers to petition courts to second guess a municipality's labor relations decisions. Respondent Taxpayers appear dissatisfied with the City Council's handling of labor negotiations and probably otherwise question budget decisions.

III. ARGUMENT

A. The Court of Appeals erred in resolving this matter based on drafting niceties.

The Court of Appeals reached only the question whether the City's expenditure was grossly disproportionate to what it received, holding:

> Because the release time provisions do not require PLEA to perform any specific duties, . . , any benefit the City received from the release time was grossly disproportionate to the City's $1.7 million payments to PLEA. . . . [W]e affirm the trial court's injunction . . . unless mandatory language obligates PLEA to

> perform specific duties in exchange for the release time.

Decision ¶ 1. The Court of Appeals reached this conclusion by reading the MOU as providing "examples" of activities for which release hours may be used, but failing to use "binding contractual language attached to these examples such as 'shall,' 'must,' 'promises,' otherwise obligating PLEA to perfume them in exchange for the release time." Decision, ¶ 21. We dare suggest one reading the Decision without reference to the record would be lead to conclude the MOU essentially stated "the City will provide $1.7 million dollars to PLEA for release time and PLEA can unilaterally decide whether to do anything in return." But, that plainly is not accurate.

The Court of Appeals' conclusion ignores the parties' intent, the broad nature of PLEA's responsibilities and tasks under the MOU, the nature of the MOU and, most importantly, the uncontested fact of PLEA's actual performance.

Nothing in the record remotely supports the notion that the parties ever intended the rather odd arrangement of the City funding release time, but leaving PLEA with complete discretion over whether to carry out any of the "examples" of its duties. If confronted in deposition with the "may" versus "shall" dichotomy, both City and PLEA witnesses undoubtedly would have testified that the MOU was not drafted in law firms, but was the product of the

"meet and confer" process between the City Manager and his human resource staff and PLEA's lay representatives.

Two points explain why the MOU did not use "binding contractual language" of the type one might find in a commercial contract, but instead quite properly relied on "examples." First, PLEA's responsibilities and tasks necessarily vary depending on the exigencies arising on a daily basis. The parties to the MOU obviously well understood that any attempt to anticipate and delineate with specificity PLEA's broad ranging duties would be an inefficient, if not futile, undertaking. Second, the parties understood the MOU as not being a commercial contract establishing rights and duties only to the extent expressly stated. Instead, the MOU is a collective bargaining agreement subject to interpretation based on the parties' intent, past practices and mutual obligation to act in good faith. [2] The undue emphasis placed by the Court of Appeals on the use of "may" instead of "shall" rendered illusory the commitments made by PLEA. See, *Arizona Laborers, Teamsters & Cement Masons Local 395 Health & Welfare Trust Fund v. Hatco, Inc.*, 142 Ariz. 364, 367, 690 P.2d 83, 86 (Ct. App. 1984)(The rule of contract construction that

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[2] See, Summers, Collective Agreements and the Law of Contracts, http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4907&context=fss_papers

language should not be interpreted so as to render it illusory or meaningless is equally applicable to labor agreements.)

Finally, the record is devoid of any suggestion the PLEA has not performed. The City, of course, was well aware of PLEA's activities. At any time PLEA did not perform, the City undoubtedly would have stopped funding the release time. Indeed, Respondent Taxpayers have never suggested that PLEA took the money, but did nothing in return. Instead, the gravamen of Respondent Taxpayers' claim is that PLEA did not perform acts in furtherance of a public purpose. As explained below, Respondent Taxpayers' claim fails.

B. Enabling police officers, both collectively and individually, to have adequate representation to provide information on employment related issues serves a public purpose.

Release time serves a public purpose. As urged in subpart 1, the City of Phoenix has determined that the free flow of information, both complimentarily *and critical*, between its employees and management serves the public's interest in the provision of vital services. As urged in subpart 2, the City's policy decision particularly serves the public's interest in obtaining efficient police protection. As urged in subpart 3, the fact that release time *also* benefits PLEA and the department officers is not relevant under the Gift Clause.

1. **The City of Phoenix has determined that the free flow of information between its employees and management generally serves the public's interest in the provision of vital services.**

City policy generally recognizes the public's interest in the free flow of communication between employees and management. This determination is entitled to great deference. *Turken ¶28* (We find a public purpose absent only in those rare cases in which the governmental body's discretion has been "unquestionably abused.") quoting *City of Glendale v. White,* 67 Ariz. 231, 237, 194 P.2d 435.

As set forth in the City Code, the City *through its employees* provides vital services for which "[t]he City, its employees and employee organizations have a basic obligation to the public to assure the orderly and continuous operations and functions of government." Phoenix Code § 209(3). Understanding the risk of labor strife, the City Council long ago concluded "[t]he people of Phoenix have a fundamental interest in the development of harmonious and cooperative relationships between the City government and its employees." Phoenix Code § 209(1). Specifically, the City has determined that the public's interest in efficient and productive labor relations is best achieved through "full communication between public employers and public employee organizations." Phoenix Code § 209 (2).

Nothing in the City's declaration of policy suggests the City concluded the public's interest in "full communication" excludes matters of disagreement. Employee-employer relations, of course, often involve matters in dispute.

While the Court of Appeals did not reach the issue of "public policy", the trial court's conclusions track Respondent Taxpayers' argument. In short, the trial court impermissibly substituted its judgment for that of the City as to the breath of needed communications. Accepting Respondent Taxpayers' argument, the trial court essentially concluded that employment communication that is "adversarial" in nature does not serve a public purpose. IR 400 (1/24/14 ME) at COL 2.

In finding no public purpose because of PLEA's "adversarial nature", however, the trial court failed to offer any reason why the City "unquestionably abused" its discretion in setting employment policy. Some may believe that a municipal employer should demand absolute loyalty from its employees and ignore them when setting policy. The City rejected that concept. Phoenix Code § 209 manifests the inherently sound determination that the City and its management staff are not infallible. Equally true, the City correctly determined that the public's "fundamental interest in the development of harmonious and cooperative relationships between the City government and its employees", like virtually every human dialogue, is best served with robust discussion of both

the good and the bad. Phoenix Code § 209(1). Others including Respondent Taxpayers may disagree, but plainly the City did not abuse its discretion establishing policy favoring "full communication".

As urged below, the City's general judgment as to the value to the public from open discussion particularly fits police work.

2. The Efficient Running of a Large Urban Police Department Requires the Free Flow of Information From between Rank and File Officers and Management and Regulators.

The efficient running of a large urban police department requires the constant free flow of information between rank and file officers and management and government regulators.

Representation on daily performance . Police officers routinely face circumstances that require prompt representation over their performance. Beyond common place job related issues, police officers routinely face situations requiring the immediate exercise of judgment within the context of unexpected, volatile and dangerous conditions. They must act consistent within Constitutional, statutory and departmental standards. Not only must they make spontaneous judgment decisions under these conditions, officers are subject to strict scrutiny and discipline from management as well as citizen complaints and lawsuits.

Given this daily work day environment, PLEA's release time assures that officers have proper representation when needed. For incumbent rank and file officers, knowing "someone has their back" reduces the stress of the job. At the end of a shift, an officer knows an effective representative will be readily available to assist in responding to Department inquiry. Likewise, an officer knows he has an effective voice to report observations and raise concerns impacting the efficiency of the Department.

PLEA's representation is quite valuable to the City. It is vital to both recruitment and retention of qualified officers. Department moral is served by affording an officer the opportunity to vent. Moreover, effective grievance representation serves to provide Department management with vital information concerning the effectiveness of its strategies, deployment of resources and the effectiveness of its supervisors. For example, resolution of disciplinary charges against an officer under the existing system may reveal a poor decision by management, the need for redeployment of resources, gaps in training programs or other matters that will *improve* the quality of service to the community.

Meet and Confer Process for Establishing Terms and Conditions of Employment. The City Code calls for a "meet and confer" process for establishing that terms and conditions for City employees. Phoenix Code § 218, 219. Under "meet and confer", the City Council retains the ultimate authority

to set terms. However, the Code calls for meetings and the exchange of information between representatives of the City Manager and employee representatives for the purpose of mutually developing relevant information and advice for the City Council to set terms. Ariz. Att'y Gen. Op. 74-11 at 6. See, *Phoenix v. Phoenix Employment Relations Bd.*, 145 Ariz. 92, 94-95, 699 P.2d 1323, 1324-25 (Ariz. Ct. App. 1985).

Respondent Taxpayers may dislike in general this collaborative process or specifically PLEA's involvement in this process. But, the City, as is its right, has concluded that the City Council will be better prepared to set the terms and conditions of employment through this process.

Political process. Given the nature of law enforcement work, the public has a profound interest in hearing the views of rank and file officers. For example, staffing requirements are not simply a question of how many officers are working, but implicate the public's interest in being fully informed on issues going to their security. By enabling police officers to communicate on such issues, the public's interest is advanced. Indeed, daily headlines demonstrate the appropriateness of rank and file officers addressing in public forums their concerns and insights.

Thus, "release time" clearly serves a public purpose. It is the direct and natural result of the City's determination that: "The people of Phoenix have a

fundamental interest in the development of harmonious and cooperative relationships between the City government and its employees." Phoenix Code § 209(1). It reflects a viewpoint that the Department and rank and file officers are partners, not adversaries, in law enforcement.

3. That release time *also* benefits PLEA and the department officers is not relevant under the Gift Clause.

That PLEA and its members stand to gain from open, unfiltered dialogue is of no consequence in determining if release time serves a public interest. *Turken*, ¶ 21, 26 and 33.

C. The limited purpose of the Gift Clause does not grant license for taxpayer judicial activism.

Here, plaintiff taxpayers' concerns seem to derive not from any abuse in this time-honored system, but from their dissatisfaction with the City Council's handling of labor negotiations. Respondent Taxpayers' ultimate argument is more a manifestation of their political ideology that government employers need to crack down on unions than the record. The Gift Clause should not be expanded to allow courts to second guess the labor relations decision of government employers. In short, NAPO urges this Court to clearly reiterated that "although determining whether governmental expenditures serve a public purpose is ultimately the province of the judiciary, courts owe significant deference to the judgments of elected officials. *Turken,* ¶ 14.

IV. CONCLUSION

For these reasons and those expressed by PLEA and other amicus, NAPO urges reversal of the permanent injunction.

Respectfully submitted this 14th day of April 2016.

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