COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

WILLIAM R CHEATHAM and MAARCUS HUEY,
Plaintiffs/Appellees

v.

SAL DICICCIIO, CITY OF PHOENIX, and PHOIENX LAW ENFORCEMENT ASSOCIATION,

Defendants/Appellants

and

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

Intervenors/Appellants.

Case No. 1 CA-CV 13-0364

(Maricopa County Superior Court
Case No. CV 2011-021634
Hon. Katherine M. Cooper)

AMICUS CURIAE BRIEF OF
National Association of Police Organizations

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Arizona Constitution

Cases

Other Authorities

I. STATEMENT OF INTEREST

Upon obtaining the written consent of the parties to file, Amicus National Association of Police Organizations (NAPO) urges reversal of the trial court's decision enjoining defendants City of Phoenix and the Phoenix Law Enforcement Association (PLEA) from use of the release time provision. See, Appendix. We address three points critical to resolution of this dispute and in establishing prudent precedent guiding public employees and employers when negotiating for release time, a common place benefit for police officers. TR 5/25/12 pp. 32-33, 47-48. (1) In concluding release time is not compensation, the trial court ignored uncontroverted decisive evidence and engaged in form-over-substance analysis. (2) Release time serves a public purpose. (3) The specific, limited purpose of the Gift Clause, Arizona Constitution, Article IX, § 7, precludes the trial court's expansive interpretation that will empower disgruntled "taxpayers" to have courts second-guess a municipality's labor relations decisions.

NAPO is a coalition of police units 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 courts of appeal on behalf of law enforcement officers from across the control to protect officers' legal and constitutional rights.

II. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Amicus NAPO adopts the Statement of the Case and Statement of Facts in each of Appellants' opening briefs.

III. STATEMENT OF THE ISSUES

1. By enabling police officers, both collectively and individually, to have adequate representation to provide information on employment related issues, including raising grievances, does "release time" serve a public purpose?

2. Is the trial court's conclusion that release time does not constitute compensation for services rendered supported by the facts and the purpose of the Gift Clause?

3. Does the limited purpose of the Gift Clause preclude an expansive interpretation empowering disgruntled "taxpayers" from having courts second-guess a municipality's labor relations decisions?

IV. SUMMARY OF THE ARGUMENT

By exalting form over substance, the trial court concluded that funds used for release time are a gift and not simply, as the record demonstrates, a small part of the appropriately calculated total compensation paid to officers

redirected to PLEA. IR 400 (1/24/14 ME) at COL 8. The trial court's conclusion that the City *gifted* money to PLEA is counter intuitive and contrary to both the parties' undisputed testimony and the memorandum of understanding's clear text. *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.") quoting *Wistuber v. Paradise Valley Unified School Distric*t, 141 Ariz. 346, 349, 687 P.2d 354, 357 (1984). Money used for release time reduced the amount of total amount available to be to the officers as wages or to another benefit provider. The lack of a mechanism by which an individual officer can opt-out of this allocation is the proverbial red herring. Whatever any other implication, the lack of an opt-out feature does not reconvert compensation into public dollars. Finally, even assuming funds devoted to release time were not part of the total compensation package, the amounts paid to officers when serving a public interest plainly is not "so inequitable and unreasonable that it amounts to an abuse of discretion." *Turken*, ¶ 30.

To the extent analysis under the Gift Clause is warranted, the release time provision, within the framework of the City of Phoenix personal system, serves a public purpose by assuring ongoing communication between the City and its employees. In concluding release time does not serve a public purpose because

of the "adversarial nature of PLEA's mission", the trial court erred in two respects. IR 400 (1/24/14 ME) at COL 2. First, the trial court improperly substituted its judgment for that of the City as to the critical importance of the free flow of communication, both complementarily and critical of City management, to the public's interest in the efficient and effective provision of police protection. *Turken,* ¶ 28. Second, as a matter of law, 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.

Finally, the decided cases teach the Gift Clause was never intended as a vehicle for disgruntled taxpayers to petition courts to second guess a municipality's labor relations decisions. 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. In short, NAPO urges this Court to clearly reiterate 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.

V. ARGUMENT

A. Under the facts and circumstances of the case, analysis under the Gift Clause should start and end with the conclusion that release time is part of the total compensation package.

1. The trial court's conclusion that release time does not constitute compensation for services is not supported by the record.

There was no gift. The record unambiguously demonstrates funds used to pay for release time are simply a small part of the appropriately calculated total compensation paid to officers. Nothing in the Gift Clause restricts public employers and employees from agreeing to such allocation.

The factual record unambiguously demonstrates release time in not funded through public funds. Every fact witness agreed. Chief of Police Davis, TR 1/25/13 p. 59; Councilmen DiCiccio and Valenzuela, TR 1/25/13 pp, 161-66 and 171; City Chief Negotiator Steward, TR 5/25/12 pp. 34-38; PLEA Chief Negotiator Buividas, TR 1/25/13 pp 122-26, 285 and TR 5/25/12 pp. 62-65. The 2012-14 MOU unambiguously provides:

> The City and the Association have negotiated six full time release positions and release hours, as an efficient and readily available point of contact for addressing labor management concerns . . . . The cost to the City of these release time positions, including all benefits, has been charged as part of the total compensation contained in this agreement in lieu of wages and benefits.
>
> ***

> The cost to the City of these release hours, including fringe (sic), has been charged as part of the total compensation contained in this agreement in lieu of wages and benefits.

TR 1/25/13 Exhibit 1 at §§ 1-3B and 1-3B(3).

Nonetheless, the trial court found otherwise. IR 400 (1/24/14 ME) at COL 8. It offered *no* explanation for ignoring the negotiating parties' testimony. As discussed below, the trial court's articulated reasons in interpreting the memorandum of understanding is laden with error.

The trial court first noted the above quoted release time language "appears in the section titled 'Rights of Association.'" IR 400 (1/24/14 ME) at COL 8(a). By myopically focusing on the section heading and ignoring the contractual text, the trial court erred. *Employment Sec. Comm'n v. Amalgamated Meat Cutters & Butcher Workmen*, 22 Ariz. App. 54, 59, 523 P.2d 105, 109 (Ariz. Ct. App. 1974)(Cardinal rule in interpreting a contract is to ascertain, by the language employed by the parties, their intent.) Assuming *arguendo* contract headings are relevant in discerning the parties' intent, no authority supports the proposition that headings may serve to override the parties' uniform testimony and the plain meaning of the contractual text. *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 language should not be interpreted so as to render it illusory or meaningless is equally applicable to labor agreements.).

The trial court also noted: "There is no provision in the MOU that requires the City to increase the officer salary if release time is enjoined or removed.." IR 400 (1/24/14 ME) at COL 8(a). No authority exists for the proposition that plain contractual language plainly defining the parties' intent becomes meaningless absent additional language defining what is to happen upon the occurrence of an unforeseen event.

The trial court found release time was not funded out of the total compensation package because release time is not a mandatory subject of bargaining. IR 400 (1/24/14 ME) at COL 8(b). Given the parties long history of bargaining over release time and the prevalence of bargaining between other large cities and police associations, the trial court erred. TR 5/25/12, pp 32-33 and 47-48. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 211 (1964)(While not determinative, it is appropriate to look to industrial bargaining practices in appraising the propriety of including a particular subject within the scope of mandatory bargaining.) In any event, parties may elect to bargain over non-mandatory topics. No authority suggests such agreements are not enforceable or that their terms are not subject to ordinary rules of construction.

The trial court reasoned that the MOU language failed to establish funds used for release time were compensation because salaries were not adjusted during the pendency of the preliminary injunction. IR 400 (1/24/14 ME) at COL 8(c). The parties' cautious approach during the preliminary injunction hardly supports the trial court's conclusion. But, soon after entry of the permanent injunction, the parties effectively addressed the issue.

The trial court concluded "each item of the MOU was negotiated individually, not as a package offered to Unit 4 with those members being allowed to divide it as they wish." IR 400 (1/24/14 ME) at COL 8(c). The notion that the City committed to a compensation package and then separately gifted money to PLEA is not supported in the record. Employers typically, and by all appearances the City is no different, focus on the total cost of a compensation package, but afford some discretion to a union as to how to allocate available money between wages and benefits. For example, in negotiations for the 2012-14 MOU, PLEA proposed and City agreed to reduction in benefits, including release time, in order to restore a portion of a prior wage cut. TR 1/25/13 pp. 288-90. The critical point is every penny used to fund release time reduced the amount available for wages or other benefits. TR 5/25/12 pp. 34 – 38, 62 – 65 and 87 – 88; TR 1/25/13 pp 112, 122 – 26, 161 – 62, 177, 284.

The trial court found fund used for release time was compensation time because large amounts of release time not costed out by the City. IR 400 (1/24/14 ME) at COL 8(c). This again is contrary to the record evidence.

2. The lack of an opt out provision does not change the character of release time as compensation'

The trial court concluded that release time is not compensation under the Gift Clause because the agreement does not include an opt-out clause for individual officers. IR 400 (1/24/14 ME) at COL 8(d). The trial court's logic defies the nature of collective bargaining. The fact that a portion of the total compensation package is "pre-destined" to a third party does not implicate the Gift Clause if, as here, the redirected portion reduces the amount of compensation. The lack of an individual opt-out provision would not alter that conclusion.

Because PLEA is a union, the lack of an opt-out clause potentially raises an entirely different issue, one arising under the Right to Work Clause, Arizona Constitution, Article XXV. But, even assuming the lack of an opt-out clause was found to violate the Right to Work Clause, such ruling would *not* serve to change the fact that the money at issue was compensation for services rendered. Given the small amount at stake per officer, no presumption of the outcome of that potential dispute is warranted. As the plaintiff taxpayers have no particular interest in the outcome of that esoteric question and the parties have already

taken steps to provide individual officers with the ability to opt-out, this court should avoid ruling.

3. If the funds used for release time are not compensation, the trial court erred.

Assuming the funds were not part to the total compensation rendered for services, the trial court erred. If release time serves a public purpose, the amounts paid to experienced, respected officers when functioning on behalf of PLEA is not "so inequitable and unreasonable that it amounts to an abuse of discretion." *Turken*, ¶ 30. And, it does.

B. Enabling police officers, both collectively and individually, to have adequate representation to provide information on employment related issues, including raising grievances, 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 serves the public's interest in the provision of vital services.**

City policy 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.

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. In short, the trial court impermissibly substituted its judgment for that of the City as to the breath of needed communications. The trial court essentially concluded that employment communication that is "adversarial" in nature does not serve a public purpose. The trial court concluded:

> The testimony of PLEA's former President, Mark Spencer, revealed the adversarial nature of PLEA's mission. Mr. Spencer testified that PLEA's mission is to protect officers from management (i.e. the City) because the leadership allegedly makes poor decisions, does not consider officers' interests, and causes 95% of the stress that officers experience. This mission, also reflected in the PLEA publications in evidence, does not advance cooperation and harmony, nor does it serve the City or its citizens.

IR 400 (1/24/14 ME) at COL 2.

In finding no public purpose because of PLEA's "adversarial nature", the trial court erred by failing to consider whether the City "unquestionably abused" its discretion in setting employment policy. Neither the text of the Ordinance or City practice support the limitation imposed by the trial court. 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 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 over daily performance review. Police officers routinely face circumstances that require prompt representation over their performance. Beyond common place job related issues, police officers face situations resulting from the exercise of judgment within the context of volatile and dangerous conditions. They must act consistent within Constitutional, statutory and departmental standards. They face constant, rigid scrutiny from the Department. Their necessary spontaneous judgment decisions under these

conditions are subject to strict scrutiny and discipline from management as well as citizen complaints and lawsuits.

Given this daily work day environment, PLEA release time assures that officers have proper representation when needed. For the rank and file, "knowing "someone has their back" reduces the stress of the job and assists in the recruitment of competent officers. Department moral is served by affording an officer the opportunity to vent. Moreover, where grievance representation reveals a poor decision by management, the City gains valuable information positioning it to take prompt corrective action.

Meet and Confer. While the PERB ordinance is similar to the National Labor Relations Act, 29 U.S.C. § 151 et. seq., it varies in a critical respect as to how terms and conditions of employment are settled. The NLRA essentially leaves resolution to the relative economic strength of the parties and may turn on the impact of a threaten of actual strike or lockout.. See, *NLRB v. Ins. Agents' Int'l Union,* 361 U.S. 477 (1960)(NLRB may not regulate the choice of economic weapons that may be used as part of collective bargaining.) Given the vital nature of continuous City services, a much different system exists. Phoenix Code § 220. Under "meet and confer", issues are resolved by the government employer meeting with and exchanging information with employee representatives for the purpose of obtaining relevant information and advice in

order to make ultimately unilateral decisions. 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). Use of release time for this purpose aids the City Council in setting terms. Phoenix Code § 209.

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.

Thus, even the decided cases did not clearly hold the City's determination of public policy to great deference, "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).

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

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.

With due respect to the trial court, it reasoning and conclusions stray far from the limited scope of the Gift Clause.

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. Quite contrary to the evidence, plaintiff taxpayer's ultimate argument is more a manifestation of current political ideology that government employers need to crack down on unions that the evidence. 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.

VI. CONCLUSION

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

Respectfully submitted this 21st day of April 2014.

/s/Gerald Barrett
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