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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

AMERICAN FEDERATION OF STATE COUNTY
AND MUNICIPAL EMPLOYEES A F L-C I O LOCAL 2384, et al.,
Plaintiffs /Appellants,

v.

CITY OF PHOENIX, et al., *Defendants/Appellees.*

No. 1 CA-CV 18-0027
FILED 5-21-19
AMENDED PER ORDER FILED 5-21-19

Appeal from the Superior Court in Maricopa County
No. CV2014-011778
The Honorable Roger E. Brodman, Judge

AFFIRMED

COUNSEL

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AMERICAN FED v. PHOENIX
Decision of the Court

MEMORANDUM DECISION

Judge David D. Weinzweig delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Peter B. Swann joined.

WEINZWEIG, Judge:

¶1 This decision follows our recent opinion in *Piccioli v. City of Phoenix*, 1 CA-CV 16-0690, 2019 WL 1450073, __ Ariz. __ (App. Apr. 2, 2019), where a different panel of this court interpreted the same terms from the same pension plan to resolve many of the same arguments in connection with accrued sick leave benefits. At issue here is whether one-time payouts for accrued vacation leave at retirement count as pensionable compensation under the City of Phoenix Employees' Retirement Plan ("Plan"). The superior court held such lump-sum payments were neither annual nor regular and, therefore, did not count as pensionable compensation. It also held the City of Phoenix could modify its errant historical interpretation of pensionable compensation to conform with the Plan. We affirm.

FACTS AND PROCEDURAL BACKGROUND

A. The Charter and Retirement Plan

¶2 The material facts are undisputed. The City of Phoenix is a charter city organized under Article 13, Section 2 of the Arizona Constitution. The City's voters approved the Plan in 1953, which is memorialized in the City of Phoenix Charter, and vests administrative, management and operational authority in the City of Phoenix Employees' Retirement Board. Phoenix City Charter, ch. XXIV, art. II, §§ 3.1, 4.1 (2014).¹ The City, Plan and Retirement Board are collectively identified herein as the "City Defendants." Appellants are City employees and Plan members (specifically, Tier 1 Members from Units 2, 3 or 7), and the unions that represent them, collectively identified as "Members."

¶3 The Plan is a defined retirement benefit plan comprised of full-time City employees with continuous 12-month work schedules; it expressly excludes persons "who furnish[] personal services to the City on a contractual or fee basis." *Id.* art. II, § 2.5. The Plan is funded by

¹ We cite the version of the Charter in effect on July 1, 2014.

AMERICAN FED v. PHOENIX
Decision of the Court

contributions from Plan members and the City. *Id.* §§ 27.1, 28.1. It specifically directs that each member must pay “5 percent of his annual compensation” to fund “the actuarially-required pension reserves” needed to cover his or her future pension benefit. *Id.* § 28.1(b)(1), (2).

¶4 As relevant here, the Plan specifies a formula with three variables to determine a Plan member’s pension benefit at retirement:

$$\begin{aligned} & \text{Final Average Compensation} \times \\ & \text{Credited Service} \times \\ & \text{Defined Benefit Rate} \end{aligned}$$

Id. §§ 2.22, 19.1(a); *see also id.* § 2.17 (“[p]ension” is defined as the “annual amount payable by the Retirement Plan, in equal monthly installments, throughout the future life of a person”). The Plan defines “[f]inal average compensation” as the “average of the highest annual compensations paid a member” for a period of 3 consecutive years of credited service or the “average of his compensations for” total years of service if employed fewer than 3 years. *Id.* § 2.14(a). The term “[c]ompensation” is defined as “a member’s salary or wages paid him by the City for personal services rendered by him to the City.” *Id.* § 2.13. The City Council assigns a fixed value to non-monetary compensation. *Id.*

¶5 Phoenix voters passed an amendment to the Charter and Plan in a 1973 special election. The amendment expressly authorized the City to consider unused employment benefits in the pension calculus, but only unused *sick leave* benefits and only to increase the amount of *credited service*. The amendment distinguished between “final average compensation” and “unused sick leave” benefits. At present, the Plan thus provides:

The amount of a member’s straight life pension, payable upon retirement[,] . . . shall be calculated as . . . 2.0 percent of the member’s *final average compensation* multiplied by the sum of the member’s credited service, subject to a maximum of 32.5 years, *plus* the member’s *unused sick leave credited service*.

Id. § 19.1(a)(i) (emphasis added); *see id.* § 14.4.

B. Vacation Leave Benefits and the Pension Formula

¶6 The City has long furnished vacation leave benefits to its employees, which are outlined in City of Phoenix Administrative Regulation (“A.R.”) 2.18. Since 1979, the City has authorized its employees

AMERICAN FED v. PHOENIX
Decision of the Court

to accrue and carryforward their unused vacation hours from year-to-year. A.R. 2.18 has been amended at various points since first adopted to change the number of unused hours that City employees may accrue and carryforward.

¶7 The City has also paid cash to employees in exchange for unused vacation hours; employees can cash-out their unused leave hours at retirement or on an annual basis. A.R. 2.18, at 4-5 (2014). At retirement, employees can request a lump-sum cash payment for as many as 2.5 years of unused, accrued vacation leave, depending on their position and years of service. *See id.* at 2 (employees accrue between 8 to 15 hours per month and may cash out between 240 to 450 hours at retirement). Annual payments are available under the vacation sellback program (“VSP”), but payments are limited to the maximum hours a member can accrue in one year. *See id.* at 4-5 (employees in units applicable to Plan members here may sell back between 40 and 80 hours during the year). Employees may cash out their accrued benefits under either option but cannot recover compensation under both options for the same accrued hour. *See id.* at 5.

¶8 For many years before 2014, the City counted all one-time cash payouts for unused vacation leave at retirement as pensionable compensation under the pension formula. The City also counted annual payments under the VSP.

¶9 Phoenix voters never approved the practice, however, which had a profound effect on pension liabilities and facilitated disparate treatment of otherwise identical co-workers. The Plan has never authorized members to boost the sample-size of compensation used to determine their lifetime post-retirement pension benefit by counting a one-time cash infusion for 2.5 years of unused vacation leave benefits. The City’s formal administrative regulations broached the issue in 2014 to ban the practice for the employees in this lawsuit.

C. Pension Reform and Revised A.R. 2.18

¶10 The City revisited its pension practices in 2011, creating the Pension Reform Task Force. Among other proposals, the group recommended that retirement payouts to members for accrued sick and vacation leave should not count as “final average compensation” under the pension formula.

¶11 The City adopted the recommendation in steps. It first excluded the sick leave payments from pensionable compensation in 2012. Then, in October 2013, the Mayor and City Council voted to exclude

AMERICAN FED v. PHOENIX
Decision of the Court

accrued vacation leave payments based on recommendations of the Pension Fairness and Spiking Elimination Ad Hoc City Council Subcommittee. The City tried but could not reach an agreement with union representatives on the changes, leaving the issue unresolved in the collective bargaining agreements.

¶12 The City Manager revised A.R. 2.18 to implement the new vacation leave policy on July 1, 2014. The City adopted a “snapshot” approach that continued the former practice for benefits that accrued before June 30, 2014, meaning any retirement payments for such benefits still counted as “final average compensation” under the pension formula. The City’s changes did not, however, reach the VSP. To date, the City continues to count cash payments under that program as “final average compensation” if received during the designated period.

D. This Lawsuit

¶13 Members sued the City Defendants in September 2014 for declaratory, injunctive and mandamus relief. Styled as a class action, the lawsuit challenged the Plan’s calculation of pension benefits under revised A.R. 2.18, arguing the amended regulation violated the Plan’s express terms, the United States and Arizona Constitutions, and the common law because it diminished or impaired their pension benefits. The superior court denied class certification.

¶14 The parties cross-moved for summary judgment. The superior court granted summary judgment in favor of the City Defendants and against Members. The court found that pensionable compensation under the Plan was limited to regular, annual payments for services rendered. And it held that “[a] lump-sum payout at retirement for accrued vacation leave is not regular annual pay because an employee receives a payout only one time (if at all).” The court recognized that the payments compensated Plan members for up to 2.5 years of accrued vacation leave in reaching the conclusion they were neither “annual” nor “a payment made at regular intervals.” The court also held the City could end its errant historical practice and revise A.R. 2.18 to prospectively conform with the Charter’s express terms without violating the Arizona Constitution or common law.

¶15 The superior court awarded the City Defendants \$141,986.70 in attorneys’ fees under A.R.S. § 12-341.01 and \$338 in costs under A.R.S. § 12-341 after they had requested \$283,973.40 in fees and \$1008.50 in costs.

AMERICAN FED v. PHOENIX
Decision of the Court

Members timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

DISCUSSION

¶16 Members argue the superior court erred in several respects; first by misinterpreting “final average compensation” to exclude one-time payouts for accrued vacation leave, and again by concluding the City Defendants did not violate the United States Constitution, Arizona Constitution or common law by adopting revised A.R. 2.18. Members also contest the award of attorneys’ fees. Meanwhile, the City Defendants insist the court properly interpreted the Plan’s plain language to exclude the irregular payouts from the benefit formula, and correctly determined that Plan members have no common-law or constitutional right to compel the City Defendants to continue an errant historical practice.

¶17 Summary judgment is proper only when the moving party establishes “there is no genuine dispute as to any material fact,” and the party is “entitled to judgment as a matter of law.” Ariz. R. Civ. P. 56(a). We review the entry of summary judgment *de novo*, “viewing the facts in the light most favorable to the party against whom judgment was entered,” *First Am. Title Ins. Co. v. Johnson Bank*, 239 Ariz. 348, 350, ¶ 8 (2016), and “will affirm the judgment if it is correct for any reason,” *S & S Paving & Constr., Inc. v. Berkley Reg’l Ins. Co.*, 239 Ariz. 512, 514, ¶ 7 (App. 2016).

A. The Plan’s Plain Language

¶18 At issue is whether the Plan requires the City Defendants to include a one-time cash payout for accrued vacation leave at retirement in a Plan member’s “final average compensation.” The issue hinges on the term “compensation,” which is defined as “salary or wages.” Charter, ch. XXIV, art. II, § 2.13. The Plan provides no definition for “salary or wages.”

¶19 This court recently defined “compensation,” “salary” and “wages” under the Plan as regular and periodic pay for personal services rendered, and to exclude “a one-time payout at retirement for accrued sick leave” because “[a]n employee is eligible to receive this payout only once, and only during his or her retirement year.” *Piccioli*, 2019 WL 1450073, at *4, ¶ 21; *see also Wade v. Ariz. State Ret. Sys.*, 241 Ariz. 559, 562, ¶ 14 (2017) (defining the “common meaning” of salary as “fixed compensation paid regularly (as by the year, quarter, month, or week) for services”) (quoting Webster’s Third New International Dictionary 2003 (2002)).

AMERICAN FED v. PHOENIX
Decision of the Court

¶20 We see no difference for definitional purposes between one-time payouts for accrued sick leave and vacation leave benefits. Each represents a singular cash boost—irregular in time and amount—for as much as 2.5 years of accrued benefits. The Plan neither envisions nor defines either lump-sum payout as pensionable compensation. *Piccioli*, 2019 WL 1450073, at *4, ¶ 21; cf. *Cross v. Elected Officials Ret. Plan*, 234 Ariz. 595, 604, ¶ 31 (App. 2014) (“Almost all courts that have addressed the issue have held that payments for accrued sick leave may not be included in a pension calculation.”).

¶21 In reaching this conclusion, we emphasize the Plan and Charter have never mentioned, much less recognized, that Plan members are entitled to inject these irregular payouts into the “final average compensation” calculus, one of three variables that determine a Plan member’s fixed pension benefits for life. Absent an express legal command, we do not manufacture a provision that translates a missed vacation day into post-retirement compensation for life.

¶22 The Plan’s silence on the issue is particularly meaningful because Phoenix voters revisited the issue of pensionable compensation in 1973, and modified the Plan to expressly consider unused sick leave benefits in the pension calculus, but only to increase a member’s amount of credited service. Phoenix voters recognized no role for accrued vacation leave benefits in the pension calculus—neither to increase credited service nor inflate “final average compensation.” We can reasonably infer under the canon of *expressio unius* that if voters had intended for the pension formula to account for accrued vacation leave benefits, the 1973 amendment would have expressly said so. *City of Surprise v. Ariz. Corp. Comm’n*, No. CV-18-0137-SA, 2019 WL 1389031, at *3, ¶ 13 (Ariz. Mar. 28, 2019) (“*Expressio unius est exclusio alterius*—the expression of one item implies the exclusion of others”); *Amos v. Metro. Gov’t of Nashville & Davidson Cnty.*, 259 S.W.3d 705, 715 (Tenn. 2008) (citing *expressio unius est exclusio alterius*, the court inferred that “if the Metropolitan Council had intended for accrued vacation to be treated in a similar manner as sick leave, it would have expressed that intent explicitly”).

B. The City’s Alternative Practices

¶23 Members argue we should look at the City’s historical and current practices to interpret the Charter and Plan, emphasizing the City long computed “final average compensation” to include one-time cash payments to retirees for unused vacation leave, and continues to count analogous cash payments under the kindred VSP alternative.

AMERICAN FED v. PHOENIX
Decision of the Court

¶24 We disagree. Our primary purpose in interpreting the Charter and Plan is to “effectuate the intent” of voters who adopted it. *Fields v. Elected Officials’ Ret. Plan*, 234 Ariz. 214, 219, ¶ 19 (2014) (interpreting constitutional amendment) (quotation omitted).² City administrators and officials cannot bend the will of voters and amend the Charter with decades of errant practices. Phoenix voters have never authorized these one-time, irregular cash payments for accrued vacation leave to be counted as pensionable compensation. Aside from the Plan terms, the only direction from voters came in 1973 when they voted to count accrued leave in determining a retiree’s pension, but only accrued *sick leave* and only toward *credited service*.

¶25 City administrators and officials are bound by the law, not their interpretation of the law. *Chancellor v. Dep’t of Ret. Sys.*, 12 P.3d 164, 169 (Wash. App. 2000) (holding that city and its employees “may not decide for themselves the meaning of terms used by the Legislature” and count vacation benefit payout as pensionable compensation). And Members’ reliance on *Long v. Dick*, 87 Ariz. 25 (1959), is misplaced. *Long* involved a statute where the literal interpretation led to “absurdity” and a uniform, uninterrupted contrary interpretation by government officials. *Id.* at 27-29. At issue here is the Charter, a local constitution, which was enacted and amended by Phoenix voters. The Plan’s express terms are plain and do not yield an absurd result. Nor does the record indicate that officials have uniformly interpreted “final average compensation” since adopted.

¶26 We must also acknowledge the real-world consequences of the historical practice, which sanctioned disparate treatment of Plan members with identical employment histories based on one member’s short-term decision. Thus, two members might have started and retired on the same date with identical positions and salaries, but one member receives greater lifetime pension benefits because she skipped vacation in the final three years before retirement, while the second member receives fewer lifetime benefits because she used her vacation time to refresh or care for a sick child. *Amos*, 259 S.W.3d at 714 (“Excluding accrued vacation payment from the pension calculation appears to treat all employees equally and promote uniformity as to vacations and pensions. Our research

² Arizona courts have described city charters as “a local constitution.” *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 598, ¶ 39 (2017). The charter “is itself of constitutional origin” because the Arizona Constitution creates the charter city alternative and authorizes adoption of charters. Ariz. Const. art. 13, § 2.

AMERICAN FED v. PHOENIX
Decision of the Court

indicates that many other jurisdictions have employed similar logic in assessing legislative intent.”).

¶27 Members also point to the City’s continued practice of counting VSP payouts as “final average compensation,” arguing these payments are no different in kind than cash payments for accrued vacation leave at retirement. The City Defendants counter that VSP payments are different because VSP is a regular program and employees have two options each year to cash-out a year’s worth of unused vacation leave. Although vacation leave benefits are cashed out in both instances, the City Defendants interpret payments under the VSP as “final average compensation” because those payments are annual, regular and “the employee receives no more money than she could have earned working full-time in an ordinary year.” Meanwhile, the City Defendants view one-time cash payouts at retirement for the same accrued leave hours as “extraordinary” and not included in “final average compensation.”

¶28 Although we are not persuaded by the City Defendants’ rationale in distinguishing between cash payments under the alternative programs, our conclusion remains unchanged. At issue is voter intent and City administrators cannot reshape the intent of voters with errant practices.³

C. Constitutions and Common Law

¶29 Members next argue the City Defendants violated the U.S. Constitution, Arizona Constitution and common law when revised A.R. 2.18 was adopted. They argue that revised A.R. 2.18 is unconstitutional because, even if accrued vacation leave payouts are excluded from “final average compensation,” the City Defendants cannot eliminate their vested contractual and constitutional rights to the “inclusion of accrued vacation pay in the pension benefit formula” because it was promised to them at the outset of their employment. We examine these arguments *de novo*. *Hall v. Elected Officials’ Ret. Plan*, 241 Ariz. 33, 38, ¶ 14 (2016).

¶30 Members offer various authorities for the argument, including the Pension and Contract Clauses of the Arizona Constitution, the Contract Clause of the U.S. Constitution, and *Yeazell v. Copins*, 98 Ariz. 109 (1965). As background, the Pension Clause prohibits the state from diminishing or impairing public retirement benefits and declares that

³ We also note that neither party has challenged the City’s continued recognition of unused vacation benefits under the VSP.

AMERICAN FED v. PHOENIX
Decision of the Court

members of public retirement systems are in a contractual relationship, Ariz. Const. art. 29, § 1; the Contract Clauses prohibit the state from passing laws that impair contractual obligations, *id.*, art. 2, § 25; U.S. Const. art. I, § 10, cl. 1; and *Yeazell* directs that public employees have a vested contractual right to receive pension benefits in accordance with legislation that existed at the time they entered into public employment, 98 Ariz. at 117.

¶31 Members gain no shelter from the Pension Clause, Contract Clauses or *Yeazell*. These authorities do not confer new or independent pension rights on Plan members, but instead protect the actual pension rights conferred on members under the Plan’s express terms. *Piccioli*, 2019 WL 1450073, at *5, ¶ 27; *Cross*, 234 Ariz. at 599, ¶ 9. As interpreted above, the Plan includes no right to count retirement payouts for accrued vacation leave as “final average compensation.” As such, the City can modify its historical practice to meet the Charter’s terms without penalty. “Because the City erroneously included such payouts, it was allowed to correct its error and harmonize Current Employees’ and Retirees’ pensions with the Plan, which itself contemplates such corrective action.” *Piccioli*, 2019 WL 1450073, at *6, ¶ 30; *see also Cross*, 234 Ariz. at 599, ¶ 9 (“Nothing in [the Pension Clause or *Yeazell*] prevents the Plan from correcting an erroneously calculated pension.”).

¶32 In sum, the Plan did not authorize the City to count one-time cash payouts for accrued vacation leave at retirement as pensionable compensation, and the City’s amendment to A.R. 2.18 to harmonize its practices with the Plan pass constitutional and common law muster. The superior court properly granted summary judgment in favor of the City Defendants.

D. Attorneys’ Fees and Costs

¶33 And last, Members contest the court’s award of attorneys’ fees and costs to the City Defendants. We review the award for an abuse of discretion and will uphold it if it is supported by any reasonable basis. *Peterson v. City of Surprise*, 244 Ariz. 247, 253, ¶ 25 (App. 2018).

¶34 The City Defendants prevailed in the superior court and were thus entitled to an award of attorneys’ fees under A.R.S. § 12-341.01. *See Hall*, 241 Ariz. at 45, ¶ 37 (§ 12-341.01 governs attorneys’ fees award in pension cases). Nonetheless, Members argue the award was improper “against the very modestly funded labor organizations” who pursued a constitutional challenge. They assert the court abused its discretion in awarding fees under *Wisturber v. Paradise Valley Unified School District*, 141

AMERICAN FED v. PHOENIX
Decision of the Court

Ariz. 346, 350 (1984), and *Associated Indemnity Corporation v. Warner*, 143 Ariz. 567, 570 (1985).

¶35 We find a reasonable basis for the court's award and thus affirm. The court recognized the fee award would "not run against the individual plaintiffs," but would instead be paid by "plaintiff labor organizations" and not cause an "extreme hardship." *Wisturber* is dissimilar because it involved a fee award against individual taxpayers rather than organized unions that collect regular dues. And the superior court carefully considered the *Warner* factors, none of which is necessarily determinative. *Wilcox v. Waldman*, 154 Ariz. 532, 538 (App. 1987)

¶36 Members otherwise point to alleged deficiencies in the City Defendants' application and more public policy concerns. But even assuming the arguments are persuasive, we find no error because the superior court substantially discounted the fee award. Indeed, the court awarded the City Defendants almost 50 percent less than they requested. We have no reason to believe the court did not account for Members' arguments in discounting the award. Nor do we substitute our judgment for that of the court, which considered several mitigating factors, including the lawsuit's constitutional significance and foundation, its merits, and the City's resources and past practices. The record includes a reasonable basis for the court's attorneys' fee award and we find no abuse of discretion.

¶37 We deny fees on appeal in our discretion. The City Defendants are, however, entitled to their taxable costs upon compliance with ARCAP 21.

CONCLUSION

¶38 The Plan does not compel the City Defendants to count lump-sum cash payouts to retirees for accrued vacation leave as "final average compensation," and the City Defendants did not offend constitutional or common law safeguards by revising A.R. 2.18 to conform with the Plan. We affirm.



AMY M. WOOD • Clerk of the Court
FILED: JT