

CAUSE NO. D-1-GN-16-004307

MARK PULLIAM; AND JAY WILEY,	§	IN THE DISTRICT COURT OF
<i>Plaintiffs,</i>	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
CITY OF AUSTIN, TEXAS; MARC A.	§	
OTT, IN HIS OFFICIAL CAPACITY	§	
AS CITY MANAGER OF THE CITY	§	
OF AUSTIN; AND AUSTIN	§	
FIREFIGHTERS ASSOCIATION,	§	419TH
LOCAL 975,	§	
<i>Defendants.</i>	§	____ JUDICIAL DISTRICT

**ORIGINAL PETITION, APPLICATION FOR INJUNCTIVE RELIEF,
AND REQUEST FOR DISCLOSURE**

City of Austin Taxpayer Plaintiffs Jay Wiley and Mark Pulliam file this Original Petition, Application for Injunctive Relief, and Request for Disclosure. Defendants are the City of Austin, Austin City Manager Marc. A. Ott, in his official capacity, and the Austin Firefighters' Association, Local 975. Plaintiffs seek a declaration that the collective bargaining agreement between Austin and the Firefighters Association constitutes an unlawful transfer of taxpayer funds to a private entity in violation of the "gift clause" provision of Article III, §§ 50, 51, 52(a), and Article XVI, § 6(a) of the Constitution of the State of Texas.

Introduction

1. The City of Austin ("Austin") is engaged in a taxpayer-funded practice that diverts firefighters away from some of the most crucial services Austin provides, and instead places them under the direction and control of a private labor organization for its own use and benefit. No significant limit, control, or accountability is placed on the union's use of these public safety resources. Indeed, not only do the majority of release time activities not advance a public purpose, they are often directly opposed to the interests of Austin and Austin taxpayers. For this public expenditure, Austin does not receive adequate consideration.

2. Firefighter unions in Austin, as elsewhere in Texas and throughout the country, have negotiated deals in labor contracts that allow for “release time,” also known as “association business leave,” “union leave,” and other similar terms (“release time”). Under release time practices, first responders perform the union’s own private business at taxpayer expense.

3. The cost to taxpayers of these subsidies is in the millions of dollars. According to the Collective Bargaining Agreement Between City of Austin and Austin Firefighters Association, Local 975 (hereafter “Agreement”), the City of Austin contributes 5,600 hours of release time “to a pool of leave time which may be used” “to conduct [Austin Firefighters] Association, [Local 975] business.” *Id.* at 14–15. Exhibit 1 is a true and correct copy of the Agreement. Because the taxpayers receive nothing in return, this grant and others like it represent a plain violation of the Texas Constitution. Plaintiffs seek to enforce the Texas Constitution’s guarantees that limit the exercise of government power to truly public purposes and that prevent unjust enrichment of favored interests to the detriment of the taxpaying public.

Discovery Control Plan

4. Plaintiffs intend to conduct Level 3 discovery under Rule 190 of the Texas Rules of Civil Procedure.

Parties

5. Plaintiff Jay Wiley is a citizen of the United States and resident of the City of Austin in the state of Texas. Mr. Wiley pays property tax and sales tax in Austin, and pays sales tax to the state of Texas.

6. Plaintiff Mark Pulliam is a citizen of the United States and a resident of the City of Austin in the state of Texas. Mr. Pulliam pays property tax and sales tax in Austin, and pays sales tax to the state of Texas.

7. Defendant City of Austin is a body politic and a home rule municipality in Travis County in the state of Texas. The City of Austin entered into an agreement with the Austin Firefighters Association, Local 975 (“AFA”), certain provisions of which are at issue in this

case. The city of Austin has previously paid and continues to pay “Association Business Leave” or “ABL” to the AFA in violation of the Texas Constitution.

8. Defendant Marc A. Ott is City Manager of the City of Austin. He is sued in his official capacity only.

9. Pursuant to Texas Civil Practice and Remedies Code 17.024(b), Defendants the City of Austin and Austin City Manager Ott may be served by serving the mayor, clerk, secretary, or treasurer of the City at 301 West 2nd Street; Austin, Texas 78701.

10. Defendant Austin Firefighters Association, Local 975, is a professional association and local firefighters’ union. AFA may be served by serving its registered agent, Robert Nicks at 7537 Caberon Rd., Austin, TX 78752.

11. Plaintiffs request the Clerk issue citation and service of process on Defendants.

Jurisdiction and Venue

12. Jurisdiction over this action and its claims is provided by Tex. Const. art. V, §§ 1, 8; V.T.C.A. Gov’t Code § 24.007; the Uniform Declaratory Judgments Act, V.T.C.A. Civ. Prac. & Rem. Code §§ 37.001–37.011; and Injunctions, V.T.C.A. Civ. Prac. & Rem. Code §§ 65.001, 65.011, 65.021.

13. Plaintiffs do not seek damages. TX R. Civ. P. 47(b).

14. Venue is proper in Travis County pursuant to V.T.C.A. Civ. Prac. & Rem. Code §§ 15.002(a), 15.005, 15.006, 65.023.

Facts Common to All Claims

15. AFA is a public labor union with complete organizational independence from Austin, including its own board of directors, staff, and mission statement.

16. AFA is the sole and exclusive bargaining agent for covered firefighters. *See* Agreement art. 2, § 12; art. 3.

17. On June 4, 2015, the Austin City Council ratified the Agreement and authorized the City Manager to execute that agreement by Resolution No. 20150604-015. *See* Ex. 1 p. 1.

18. The Agreement remains in full force and effect until September 30, 2017, and for up to six additional months if the parties are engaged in negotiations for a successor agreement. *See* Agreement art. 30, §§ 1(A), 2

19. Under the Agreement, Austin bestows benefits on AFA, which constitute an unconstitutional subsidy and gift under the Texas Constitution as defined and in the manner described below.

20. Austin finances the benefits of AFA under the Agreement through city tax revenue, including local property tax revenue.

21. Because Plaintiffs' taxes finance the Agreement, they are directly harmed by Austin's grant of illegal subsidies and gifts to AFA in the Agreement.

Association Business Leave

22. The Agreement creates a bank of "paid time off" hours designated as Association Business Leave ("ABL") (also commonly called "release time") that permits "Authorized Association Representatives" "to conduct Association business." *See* Agreement art. 10, § 1(A); art. 2, § 3.

23. For calendar year 2016 "and each subsequent year during the term" of the Agreement, Austin contributes 5,600 hours of ABL release time. *See* Agreement art. 10, § 2(A). For the period between the effective date of the Agreement and December 31, 2015, Austin "fund[ed] a pro rata number of hours of" ABL release time to the pool. *See id.*

24. The ABL release time pool cannot exceed 6,600 hours, but up to 1,000 hours remaining at the end of the calendar year can be carried forward to the next year. *See* Agreement art. 10, § 2(B).

25. ABL release time must be requested in writing at least 3 business days in advance for approval by the Fire Chief or the Fire Chief's designee. *See* Agreement art. 10, §§ 1(C)–(D). Austin and AFA track utilization of ABL release time. *See* Agreement art. 10, §§ 2(A)–(C).

26. Under the Agreement, Austin permits the President of AFA to use up to 2,080 hours of ABL release time per year, beginning January 1, 2015, to conduct “any lawful Association business activities consistent with the Association’s purposes,” thereby permitting him to devote all of his time and efforts to AFA union business and affairs. *See* Agreement art. 10, §§ 1(B)(1), 2(C).

27. Under the Agreement, Authorized Association Representatives can use ABL release time for “Association business.” “Association business” is defined as “time spent in Collective Bargaining negotiations; adjusting grievances, attending dispute resolution proceedings, addressing cadet classes during cadet training (with prior approval of the time and content by the Fire Chief, or his/her designee), and attending union conferences and meetings.” *See* Agreement art. 10, § 1(B)(2).

28. ABL release time can be used for limited “legislative and/or political activities,” including those activities that relate to the wages, rates of pay, hours of employment, or conditions of work affecting the members of the bargaining unit.” *See* Agreement art. 10, § 1(B)(2).

29. Use of ABL predominately benefits the AFA and its members.

30. Because of the limited duration of the Agreement, the situation presented here is capable of repetition yet evading review.

Accountability for Use of ABL Release Time

31. Neither the AFA, its President, nor any of its members are contractually required to provide an accounting to Austin for *how* they use ABL release time.

32. Austin is not contractually granted permission to audit the AFA or its use of ABL release time.

33. Apart from the Agreement, upon information and belief, Austin has no additional policies, procedures, rules, regulations, or details regarding how ABL release time may be used.

34. Upon information and belief, Austin has no mechanism to determine or confirm how ABL release time is in fact being used.

35. AFA officials and employees using ABL release time are not required to account to Austin, its City Manager, City Council, Mayor, Fire Chief, or any other governmental official for how ABL release time is in fact used.

36. Austin does not control or direct the activities of AFA members on ABL.

37. The AFA President who occupies a full-time ABL release time position with a “40 hour work week,” Agreement art. 10, § 2(C), does not have to account for his ABL release time in any fashion other than tracking its deduction from the ABL pool. Upon information and belief, the AFA President ordinarily reports to AFA headquarters rather than to his office or duty station except when performing union business that, by its nature, requires his presence on city or county property.

Count 1 – Gift Clause

38. Plaintiffs incorporate by reference the preceding paragraphs as though fully set forth herein.

39. As taxpayers, Plaintiffs are responsible for paying property and other taxes, and will bear a share of the burden for replenishing Austin revenue for expenditures made that benefit AFA pursuant to its Agreement with Austin.

40. Article III, §§ 50, 51, 52(a), and Article XVI, § 6(a) of the Constitution of the State of Texas are collectively referred to herein as the “Gift Clause.”

41. A payment by a political subdivision, including a municipality, of the state of Texas is proper under the Gift Clause only if: first, the expenditure serves a public purpose, and second, the expenditure affords a clear public benefit in return.

42. To constitute a “public purpose,” the activity must be one whose predominate purpose is to accomplish a public purpose, and not to benefit private parties; public control must

be retained over the expenditures to ensure the public purpose is accomplished; and the municipality must receive a return benefit constituting sufficient consideration.

43. The ABL release time provisions benefit AFA under its Agreement with Austin, are used in a discretionary manner as permitted to support the mission of the AFA, serve to promote the AFA's exclusive union purposes, and do not serve a public purpose because activities performed on ABL predominately benefit the AFA, a private party.

44. The ABL release time provisions of the Agreement lack sufficient public control to ensure a public purpose is being accomplished.

45. The ABL release time provisions fail to provide Austin a clear public benefit in return, and are unsupported by sufficient consideration.

46. The AFA is not obligated to provide any direct benefits to Austin in return for the grant of ABL hours.

47. For all these reasons pursuant to the Texas Uniform Declaratory Judgment Act, Plaintiffs ask this Court declare that the benefits Austin has granted to AFA under the Agreement, including ABL release time to directly support and further the mission and organizational existence of AFA, fail to meet the standards Texas public entities must meet under the Gift Clause. Furthermore, Plaintiffs request the Court declare that those benefits therefore constitute impermissible subsidies and gifts to private associations, exceeding Defendants' lawful powers in violation of the Texas Constitution art. III, §§ 50, 51, 52; art. XVI, § 6.

Attorney Fees

48. Under the Uniform Declaratory Act, Plaintiffs are entitled to recover "costs and reasonable and equitable attorney's fees as are equitable and just." Tex. Civ. Prac. & Rem. Code Ann. §37.009.

49. Plaintiffs seek award of their reasonable attorney fees for the preparation of this suit, prosecution of this suit, and all appeals.

Request for Disclosure

50. Plaintiffs request that Defendants disclose the information and materials described in Rule 194.2 of the Texas Rules of Civil Procedure.

Request for Relief

Consequently, in order to serve the interests of equity and justice, Plaintiffs respectfully request that this Court award the following relief:

A. Declare that Article 10 of the Agreement between AFA and Austin is unconstitutional in accordance with and pursuant to the Uniform Declaratory Judgments Act, V.T.C.A. Civ. Prac. & Rem. Code §§ 37.001–37.011.

B. Preliminarily and permanently enjoin Article 10 of the Agreement between AFA and Austin from having any further or continuing effect in accordance with and pursuant to V.T.C.A. Civ. Prac. & Rem. Code §§ 65.001, 65.011, 65.021; and TX R. Civ. P. 693.

C. Award Plaintiffs costs and attorneys' fees in accordance with and pursuant to V.T.C.A. Civ. Prac. & Rem. Code § 37.009 and common law doctrine.

D. Award Plaintiffs such other and further relief as may be just, equitable, and proper.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,



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