

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

ROGER McLEMORE, CHARLES McLEMORE
and MIKE HALL, Individually, and on behalf of
a class consisting of members of the Arkansas
State Police Retirement System

PLAINTIFFS

VS.

CASE NO. CV 2005-14869

RICHARD WEISS, Director, Arkansas Department
of Finance and Administration; J.R. HOWARD,
Director, Department of Arkansas State Police;
GAIL H. STONE, Executive Secretary, Arkansas
State Police Retirement System; JOHN W. ALLISON,
KIRK BRADSHAW, JOE MILES, BRANT TOSH,
DONNIE UNDERWOOD, BLAKE WILSON and
JOHN SHELNUTT, Trustees, Arkansas State
Police Retirement System

DEFENDANTS

**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
AND RESPONSE IN OPPOSITION TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Defendants, Richard Weiss, J.R. Howard, Gail H. Stone, John W. Allison, Kirk Bradshaw, Joe Miles, Brant Tosh, Donnie Underwood, Blake Wilson and John Shelnett, move the Court to grant them summary judgment pursuant to Rule 56 of the Arkansas Rules of Civil Procedure, and to deny Plaintiffs' motion for summary judgment, on the following grounds:

1. There remain no genuine issues of material fact at issue in this case.
2. Plaintiffs have failed to state a claim against Defendant Richard Weiss, and cannot establish that Weiss played any role in the alleged miscalculation of their retirement contributions or benefits. As such, Weiss is entitled to judgment as a matter of law on all of Plaintiffs' claims.
3. Defendants are entitled to judgment as a matter of law on Plaintiffs' claim brought pursuant to Ark. Code Ann. § 24-6-205(a), allowing the Board of Trustees of the Arkansas State Police Retirement System (ASPRS or System) to correct errors and adjust payments, because

Plaintiffs cannot establish that Defendants miscalculated Plaintiffs' retirement contributions or benefits.

3. Defendants are entitled to judgment as a matter of law on Plaintiffs' claims brought pursuant to the contract clause of the Arkansas Constitution, Article 2, Section 17, and the contract clause of the United State Constitution, Article I, Section 10, because Plaintiffs cannot establish the impairment of a contractual obligation due to the passage of state law.

4. Further, Plaintiffs lack standing to assert claims on behalf of the System, and in any event, Plaintiffs have failed to allege facts upon which relief can be granted for the System.

5. Even if there were any merit to Plaintiffs' claims, Plaintiffs cannot recover for damages allegedly suffered prior to November 21, 2002, three years before Plaintiffs filed their original complaint, pursuant to the applicable statute of limitations.

6. Plaintiffs' request for attorney's fees and costs are barred by sovereign immunity.

7. As a matter of law, Plaintiffs cannot establish the essential elements of their claims and reasonable jurors could not differ in their determination that Defendants are entitled to judgment on Plaintiffs' claims as a matter of law. Therefore, there remain no issues for trial, and Defendants are entitled to summary judgment pursuant to Rule 56(c) of the Arkansas Rules of Civil Procedure. For these same reasons, Plaintiffs' motion for summary judgment should be denied.

8. The following Exhibits are offered in support of Defendants' motion, and in support of Defendants' response in opposition to Plaintiffs' motion for summary judgment:

Exhibit A – Affidavit of Bruce Waller;

Exhibit B – Affidavit of Gail Stone;

Exhibit C – Pertinent portion of Plaintiffs' Answers to Defendants' First Set of Interrogatories and Requests for Production of Documents; and

Exhibit D – Act 1609 of 2003.

9. This motion is supported by a brief in support, which more fully sets forth the grounds for the motion.

WHEREFORE, Defendants respectfully request that they be granted summary judgment; that Plaintiffs' motion for summary judgment be denied; and for such further relief to which they may be entitled.

Respectfully Submitted,

DUSTIN McDANIEL
Attorney General

By: *Patricia V. Bell*
PATRICIA VAN AUSDALL BELL
Ark. Bar No. 85159
Assistant Attorney General
323 Center Street, Suite 200
Little Rock, AR 72201
(501) 682-3663
Attorneys for Defendants

CERTIFICATE OF SERVICE

I, Patricia V. Bell, certify that on this 24th day of October, 2011, a copy of the foregoing document was served by first-class U.S. mail on the following:

C. Burt Newell
BACHELOR & NEWELL
211 Hobson Avenue
P.O. Box 1620
Hot Springs, AR 71902-1620

Patricia V. Bell
Patricia Van Ausdall Bell

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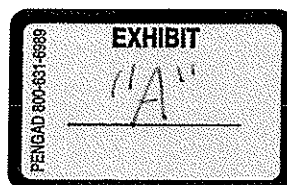
AFFIDAVIT OF BRUCE H. WALLER

I, Bruce H. Waller, after being sworn, state on oath as follows:

1. I was employed by the Department of Arkansas State Police (ASP or Department) from September of 1987 until March of 2001. During my tenure with the ASP I held the position of Fiscal Officer. In my capacity as ASP Fiscal Officer I was responsible for preparing the Department's annual and biannual budget plans. I was also responsible for all budgeting and accounting functions, including payroll, operating expenses, equipment inventory, purchasing, receivables, payables and all financial transactions of the agency.

2. From March 2001 until January 2003, I was one of the Assistant Administrators for Budget at the Department of Finance and Administration (DF&A), Office of Budget.

3. From January 2003 until the present I have been employed by the Department of Workforce Services as Deputy Assistant Director for Unemployment Insurance and DWS Program Administrator for Unemployment Insurance.



4. Prior to my employment with the ASP, I worked for DF&A. From September 1977 until July 1978, I worked in DF&A Revenue – Individual Income Tax, as the Audit Branch Supervisor; and from July 1978 until September 1987, I worked in the DF&A Office of Accounting.

5. I graduated from the University of Arkansas in 1971 with a Bachelors of Science Degree in Business Administration.

6. As the ASP Fiscal Officer, I was familiar with all laws and appropriations pertaining to payroll, accounting, budgeting, operations, special funds and all financial transactions for/of the Department. I was required to interpret, implement and comply with these laws and appropriations as authorized by the General Assembly and in accordance with the classifications stated in the various appropriation acts.

7. Pursuant to Act 540 of 1981, the legislature authorized a “uniform” allowance for commissioned officers in an amount not to exceed \$1,200 per year, and “special travel” allowance for commissioned officers in an amount not to exceed \$2,000 per year. *See* Act 540 of 1981 at § 7, attached as Exhibit A-1. In 1991, the legislature increased the uniform allowance to \$1,500. *See* Act 1099 of 1991 at § 17, attached as Exhibit A-5. These allowances were issued as two separate warrants, issued once a month. The special travel allowance was issued in the amount of \$166.66 per month and, after the increase in the uniform allowance in 1991, the warrant for the uniform allowance was issued in the amount of \$125 per month. These allowances were not included in the warrants issued for officers’ regular pay, which were issued every two weeks, because the allowances were never considered to be salary or payroll.

8. At the time I assumed the position of ASP Fiscal Officer, the law governing the Department's retirement contributions to the Arkansas State Police Retirement System (ASPRS) was found in Act 460 of 1977, which provided in pertinent part:

Effective July 1, 1977, and thereafter, the employee contribution to the State Police Retirement System is hereby increased by an additional one and one-half percent (1-1/2%) of *covered salary*, and the employer contribution to the State Police System is hereby increased by an additional one and one-half percent (1-1/2%) of *covered salary*."

Act 460 of 1977 at § 3 (emphasis added), attached as Exhibit A-2.

9. The term "covered salary" was not included in the definition section of the ASP retirement law. However, the term "salary" was defined as follows:

"Salary" means the compensation paid a member for services rendered by him as a state police officer. In no case shall the term 'salary' include reimbursement for lodging, meals or travel expenses.

See Act 484 of 1959 at § (k). The definition of "salary" has remained unchanged. Ark. Code Ann. § 24-6-204 (17)(A) and (B).

10. In my opinion, there was never any doubt that the phrase "covered salary" meant anything other than an officer's basic salary as identified and classified by the General Assembly in the applicable appropriation acts. (Appropriation acts by the General Assembly during the period of 1987 through 2003, cover two fiscal years, each running from July 1 to June 30 for the stated years.) The allowances were never classified as salary in the Department's appropriation acts. See Act 1037 of 1987 at § 4 (the ASP's Appropriation Act for fiscal years 1987-88 and 1988-89); Act 167 of 1989 at § 2 (the ASP's Appropriation Act for fiscal years 1989-90 and 1990-1991); Act 1099 of 1991 at § 2 (the ASP's Appropriation Act for fiscal years 1991-92 and 1992-93); Act 508 of 1993 at § 2 (the ASP's Appropriation Act for fiscal years 1993-94 and 1994-95); Act 1154 of 1995 at § 2 (the ASP's Appropriation Act for fiscal years 1995-96 and

1996-97); Act 853 of 1997 at § 2 (the ASP's Appropriation Act for fiscal years 1997-98 and 1998-99); Act 1378 of 1999 at § 2 (the ASP's Appropriation Act for fiscal years 1999-2000 2000-01) and Act 1422 of 2001 at § 2 (the ASP's Appropriation Act for fiscal years 2001-02 and 2002-03), attached hereto as Exhibits A-3 through A-10, respectively. The uniform allowance and special allowance were classified under the category "Maintenance & General Operations". *Id.* The allowances were never classified as "Regular Salaries" or "Personal Services" and therefore could never have qualified as "covered salary" for purposes of calculating retirement contributions.

11. In 1997 the statute covering the Department's retirement contribution to ASPRS was changed to provide that "The Department of Arkansas State Police, as employer, shall make contributions to the State Police Retirement System of twenty-two percent (22%) of active member payroll." *See* Act 1071 of 1997 at § 3, codified as Ark. Code Ann. § 24-6-209(a). The term "payroll" was not included in the definition section of the act; however, the term "salary" remained unchanged. I viewed the use of the term "payroll" rather than "covered salary" to be a semantical difference of no substance. In my opinion, "payroll" as used in Act 1071 of 1997 is synonymous with "salary", and does not evidence an intent by the General Assembly to broaden the Department's retirement contributions. In fact, the appropriation acts continued to classify payments for services under the headings of "Regular Salaries" and "Overtime". See the Department's Appropriation Acts for the years 1997 through 2003¹, attached as Exhibits A-8, A-9 and A-10. In my opinion, the classifications included in the agency's appropriation acts always indicated quite clearly the intent of the General Assembly and that intent did not at any time contemplate the inclusion of the travel and uniform allowances as salary or payroll.

¹ Act 1071 of 1997 became effective April 3, 1997. Act 1609 of 2003, which repealed the uniform and special travel allowance, became effective July 1, 2003.

Furthermore, had the General Assembly intended that the travel and uniform allowances be considered as salary or payroll for retirement and retirement matching purposes, the General Assembly would have appropriated additional amounts in the line item "Personal Svc [Service] Matching" to cover the expenditures the agency would have been required to make when paying the 22% matching to the State Police Retirement System.

12. In sum, the General Assembly never appropriated either the uniform allowance or the special travel allowance as salary. Only the General Assembly can classify an appropriation and because the uniform and special travel allowances were never included in the salary line item, the allowances were not salary. The allowances were always classified as subsets of "General Maintenance and Operations". As such, the General Assembly made clear that it did not intend to treat officers' uniform and travel allowances as salary or "payroll".

13. Shortly after I assumed the position of ASP Fiscal Officer in 1987, the Internal Revenue Service advised that the ASP was not properly reporting the uniform and special travel allowances issued to all ASP commissioned officers and certain civilian ASP employees. The IRS considered these allowances to be taxable income under IRS rules and instructed the ASP to report them as income on the officers' W-2 Forms. As a result, the ASP began reporting the uniform and special travel allowances to the Internal Revenue Service via Form W-2 as income beginning in 1988, for payments made in 1987. On February 21, 1988 I sent a memo to all Commissioned Officers and Telecommunications Operators explaining that the Travel and/or Uniform Allowance paid in 1987 was included in the 1987 Form W-2s. A copy of my memo is attached as Exhibit A-11.

14. It is important to note that while the IRS classifications of income for tax purposes are quite broad, the classifications of salary and payroll by the General Assembly do not include

any items other than the line items specifically identified as “Regular Salaries” or “Overtime” in the individual appropriation acts for each biennium. As explained in my memo, under IRS rules and regulations, the travel and uniform allowances were taxable as income to the extent the individual officer could not or did not offset the taxable income by filing the required Employee Business Expense Form 2106 with his/her individual income tax return. The uniform allowance was a monthly disbursement for the cost of cleaning, replacing and maintaining an officer’s uniform and equipment, and the travel allowance was for costs incurred by an officer while on the road, such as cleaning the officer’s vehicle, eating while on the road, miscellaneous out of pocket expenses, etc. Each individual officer was responsible for his or her Federal Income Tax return and with the proper records could file the Employee Business Expense form 2106 to offset all or a portion of the Federal Income Tax on the allowances. At no time were either of these allowances classified as “wages”, “salary” or “payroll” for the purpose of determining income reportable to the Arkansas State Police retirement system or for calculating any retirement benefit(s). The IRS ruling that the allowances were reportable income, as other compensation, only applied to the Federal Income Tax status of the payments and did not have the effect of classifying the payments as “wages”, “salary” or “payroll” under Arkansas law for inclusion in pay for the purpose of calculating retirement contributions or benefits. It is not uncommon for an individual taxpayer to have “other compensation” that is not “wages”, “salary” or “payroll” for Federal tax purposes. Items such as interest income, investment income, rental income, and capital gains are all taxable income, but just like the travel and uniform allowances, these items are not “wages”, “salary” or “payroll” under Arkansas law for determining or calculating any retirement contributions or benefits resulting from employment.

ACKNOWLEDGMENT

I, Bruce H. Waller, state on my oath that the above and foregoing facts are true and correct to the best of my knowledge, information and belief.

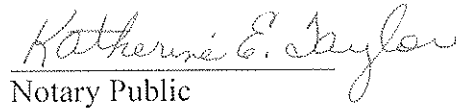


BRUCE H. WALLER

STATE OF ARKANSAS/
COUNTY OF PULASKI/

SUBSCRIBED AND SWORN to before me, a Notary Public on this 24 day of October
____, 2011.





Notary Public

My Commission Expires:

12-28-19