

## RESOLUTION NO. 478

WHEREAS, on or about July 2008, the staff of the Bureau of Fire and Police Disability and Retirement (FPDR) determined that the FPDR had been incorrectly calculating a tax offset benefit to retirees causing an overpayment of benefits; and

WHEREAS, the FPDR Board of Trustees at their September 2008 meeting discussed the potential impact of the overpayment on the Plan's tax qualified status and passed a motion to seek a determination from the Internal Revenue Service on correcting the calculation; and

WHEREAS the FPDR Board of Trustees sought to correct the prior overpayments and subsequently took a number of steps to preserve the tax qualified status of the plan, minimize the impact on the affected Members, and recover the overpaid benefits by holding back cost-of-living adjustment ("COLA") increases. Because the overpayments violated the terms of the tax qualified plan, the overpayments jeopardized the tax qualified status of the Plan.

WHEREAS, the FPDR then began recovery of previously overpaid benefits in August of 2011 after extensive discussions with the Internal Revenue Service by holding back COLA increases or making actuarially-based adjustments. The Board of Trustees retained outside tax counsel to help in its dealings with the IRS. The outside tax counsel submitted a Voluntary Compliance Application with the IRS. The IRS approved the holdback actions to maintain the tax qualified status of the Plan.

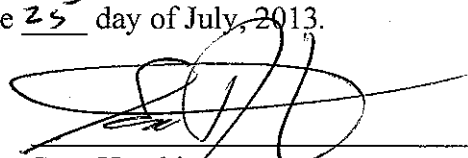
WHEREAS a group of Members representing a class of FPDR Two and FPDR One retirees objected to the holdbacks which resulted in the filing of a Complaint in Multnomah County Circuit Court (Case No. 1108-11052) against the City of Portland by and through the FPDR. Plaintiffs filed their Complaint alleging that the method of recovering the overpaid benefits through the holdbacks violated ORS 652.610. The City asserted counterclaims asking that the overpaid benefits be reduced to judgment. The parties filed cross motions for summary judgment; and

WHEREAS, on July 26, 2012, Judge Henry C. Breithaupt heard argument on the cross motions for summary judgment and issued an Order in favor of the Members but not resolving the City's counterclaims; and

WHEREAS, a new VCP Application was submitted to the IRS, the IRS approved the terms of the settlement, and the City and the Members would like to resolve this dispute and have reached a proposed settlement which is set forth in the Settlement and Mutual Release Agreement, attached to this resolution as Exhibit "A". The City Attorney's Office and the Internal Revenue Service agree that this settlement is reasonable and will preserve the FPDR Plan's tax qualified status; and

NOW, THEREFORE, BE IT RESOLVED that the Settlement and Mutual Release Agreement (the "Agreement") attached hereto as Exhibit "A" is hereby accepted and the FPDR Director is authorized to execute said agreement on behalf of the FPDR Board of Trustees and FPDR staff and the City Attorney's Office are authorized to implement the agreement by taking all necessary actions contemplated in the Agreement.

ADOPTED by the Board of Trustees on the 25 day of July, 2013.

  
Sam Hutchison  
FPDR Director

## SETTLEMENT AND MUTUAL RELEASE AGREEMENT

WHEREAS, Multnomah County Circuit Court, Case No. 1108-11052 potentially impacts 919 City of Portland Fire and Police Disability, Retirement and Death Benefit Plan ("FPDR") retirees.

WHEREAS, the Court has approved a motion for class certification and a motion to add an additional party, Patrick D. McMahon, an FPDR One retiree.

WHEREAS, any settlement may be subject to the approval of the Fire and Police Disability, Retirement and Death Fund Board ("Board") and acceptance by the Internal Revenue Service ("IRS") through a Voluntary Compliance Application ("VCP") or other mechanism.

WHEREAS the current plaintiffs are retired police officers and firefighters who were overpaid pension benefits because of a miscalculation by the prior staff of the City of Portland Fire and Police Disability, Retirement and Death Benefit Plan.

WHEREAS the FPDR Board of Trustees sought to correct the prior overpayments and subsequently took a number of steps to preserve the tax qualified status of the plan, minimize the impact on the affected Members, and recover the overpaid benefits by holding back cost-of-living adjustment ("COLA") increases. Because the overpayments violated the terms of the tax qualified plan, the overpayments jeopardized the tax qualified status of the plan.

WHEREAS, with respect to the FPDR Two retirees, in August of 2008, the FPDR Board stopped the overpayment of plaintiffs' benefits by correctly calculating the tax benefit offset provided in ORS Chapter 238 rather than the incorrect formula they had been using. The FPDR then began recovery of previously overpaid benefits in August of 2011 after extensive discussions with the Internal Revenue Service by holding back COLA increases or making actuarially-based adjustments. The Board of Trustees retained outside tax counsel to help in its dealings with the IRS. The outside tax counsel submitted a Voluntary Compliance Application with the IRS. The IRS approved the holdback actions to maintain the tax qualified status of the Plan. Because the COLA holdback has presently been rejected by the Courts, a new VCP Application will need to be submitted to the IRS approving any terms of a settlement.

WHEREAS, from 1995 until 2008, the five plaintiffs were overpaid benefits in excess of \$19,500. However, that amount is only a fraction of the total overpayments made to all Members and beneficiaries of the FPDR, which is approximately \$2.9 million.

WHEREAS plaintiffs' objection to the holdbacks resulted in the filing of a Complaint in Multnomah County Circuit Court. Plaintiffs filed their Complaint alleging that the method of recovering the overpaid benefits through the holdbacks violated ORS 652.610. Defendant asserted counterclaims asking that the overpaid benefits be reduced to judgment. The parties filed cross motions for summary judgment.

WHEREAS, on July 26, 2012, Judge Henry C. Breithaupt heard argument on the cross motions for summary judgment and an Order was entered as follows:

1. Plaintiffs' motion for partial summary judgment regarding ORS 652.610 is GRANTED. The City's recoupment of FPDR retiree overpayments through the withholding of retiree pension benefits equal to the cost-of-living adjustments violates ORS 652.610.
2. Plaintiffs' motion for summary judgment regarding defendant's counterclaims is DEFERRED.
3. Defendant's motion for summary judgment regarding ORS 652.610 is DENIED.
4. Defendant's motion for summary judgment regarding defendant's counterclaims is DEFERRED.
5. Defendant is granted leave to re-plead its counterclaims, which will then be subject to further proceedings. Defendant shall file an amended answer on or before August 22, 2012.

WHEREAS, with respect to FPDR One retirees, recovery of overpayments is being achieved through a method of actuarial recoupment. Under this approach, the overpayment is recovered actuarially by amortizing the recoupment over an overpaid retiree's remaining life expectancy; plaintiffs assert that the actuarial recoupment also violates the requirements of ORS 652.610.

WHEREAS at the time of this Agreement, there are 55 living FPDR One retirees.

WHEREAS as the case presently stands, plaintiffs' counsel is entitled to an award of attorney fees. The applicable section of the wage claim statute that provides for such an award is ORS 652.615.

WHEREAS, if this matter is resolved, there is significant legal work that would need to be completed in the future to complete the settlement. That work would include class notifications and preparation of related settlement documents.

WHEREAS, if the matter is not resolved, the expense of pursuing counterclaims against class members will be costly and time consuming.

IT IS, THEREFORE, AGREED:

I

FOR THE SOLE CONSIDERATION enumerated below, the parties, which include all plaintiffs, defendants and class members, hereby mutually release and forever discharge one another, as well as their agents, officers, employees, officials, heirs, assigns, and all other persons, firms, corporations or other entities liable or who might be claimed to be liable from any and all claims for damages and/or injuries from or relating to the overpayment and subsequent recoupment of overpaid retirement benefits from the Fire and Police Disability, Retirement and Death Benefit Plan that is the subject of a lawsuit filed in Multnomah County Circuit Court, Case No. 1108-11052. This mutual release shall also apply to all class members approved by the court in this matter.

## II

IT IS UNDERSTOOD AND AGREED that the parties have read this Settlement and Mutual Release Agreement and that it is fully understood and voluntarily accepted for the purpose of making a full and complete settlement and compromise of any and all claims arising out of the above-described matter in paragraph I, in whatever legal form or theory plaintiffs might assert, whether disputed or otherwise, and in particular including, but not limited to, those matters set forth in the complaint of Case No. 1108-11052 in the Circuit Court of the State of Oregon for the County of Multnomah.

## III

IT IS UNDERSTOOD AND AGREED that plaintiffs are retired police officers and firefighters who were overpaid pension benefits because of a miscalculation by the prior staff of FPDR. In 2008, when the error was discovered, the FPDR Board stopped the overpayment of plaintiffs' benefits and recalculated the tax benefit offset. In August 2011, FPDR began recovery of previously overpaid benefits after extensive discussions with the IRS.

## IV

IT IS UNDERSTOOD AND AGREED that FPDR Members and/or beneficiaries who received an overpayment of benefits and voluntarily repaid FPDR the overpaid amount either in a lump sum or by signing an authorization form agreeing to a repayment plan prior to August 29, 2012 (the date the Motion for Class Certification was filed by plaintiffs' counsel), are not included in the class and will not be given that option nor will they be sent a class notice.

## V

IT IS UNDERSTOOD AND AGREED that all plaintiffs and approved class members waive all claims for penalties and pre-judgment interest.

## VI

IT IS UNDERSTOOD AND AGREED that plaintiffs were overpaid benefits in the following amounts:

Tim Anderson	\$4,004.96
Michael Cullivan	\$5,493.83
James Leinweber	\$2,531.64
Clara Renfro	\$3,025.16
Terry Wagner	\$4,452.74

## VII

IT IS UNDERSTOOD AND AGREED that FPDR will recover sixty percent (60%) of the overpaid pension benefits from plaintiffs and all approved class members.

## VIII

IT IS UNDERSTOOD AND AGREED that the recovery of the overpaid monies will continue with FPDR's methodology for recouping overpayments by holding back the Members' cost of living adjustments and/or actuarial reduction until the sixty percent (60%) recovery is achieved.

## IX

IT IS UNDERSTOOD AND AGREED that if FPDR has already recovered more than sixty percent (60%) of the overpaid benefits from any plaintiff or class member, the excess over sixty percent (60%) will be refunded to the plaintiff or class member within 60 days after the Court gives final approval of this class settlement.

## X

IT IS UNDERSTOOD AND AGREED that notices have been sent to all class members regarding this proposed settlement. The notice includes an option for any class member that signed an authorization agreeing to a repayment plan after August 29, 2012, to sign a reaffirmation authorization regarding the lump sum or completed payments.

## XI

IT IS UNDERSTOOD AND AGREED that the notice sent to class members includes the amount they were overpaid, and the amount the defendant will retain.

## XII

IT IS UNDERSTOOD AND AGREED that the Court has ultimate authority to determine the language of the notice and any other communications with members of the certified class.

## XIII

IT IS UNDERSTOOD AND AGREED that FPDR will pay plaintiffs' attorneys' fees in the sum of One Hundred Ninety-Nine Thousand Six Hundred Forty-Two and 50/100 Dollars (\$199,642.50), plus costs in the amount of Five Thousand One Hundred Seventy-Seven and 43/100 Dollars (\$5,177.43), through February 28, 2013. The City of Portland further agrees that all challenges to the attorneys' fees will be waived. Plaintiffs and their counsel agree to give up the right to add a multiplier to the attorneys' fees.

## XIV

IT IS UNDERSTOOD AND AGREED that beginning March 1, 2013, plaintiffs' attorneys' fees will be billed at fifty percent (50%) of the rates used to determine the pre-March 1, 2013 fees, with a cap of Fifty Thousand and no/100 Dollars (\$50,000.00). It is further agreed that the amount of attorney fees from March 1, 2013, forward can be challenged at the conclusion of the case. If the IRS does not approve the new VCP Application, then no fees shall be paid as part of this Agreement and all plaintiffs' fees are subject to objection and review by the Court.

XV

IT IS UNDERSTOOD AND AGREED that the City's pension counsel has filed, and the IRS has approved, a new VCP Application to the IRS setting forth the terms of the settlement contained in this Agreement.

XVI

IT IS UNDERSTOOD AND AGREED that all terms of this Agreement are contingent upon approval of the IRS. If the IRS approves the terms of this Agreement, then the Agreement is binding in all respects. If the IRS does not approve the terms of this Agreement, then the Agreement is void and no aspect of the Agreement is binding in any way on any person and/or party to the case and Multnomah County Circuit Court Case No. 1108-11052 shall go forward and all parties shall be permitted to assert any and all claims and defenses of any kind whatsoever allowed by law without limitations.

XVII

IT IS UNDERSTOOD AND AGREED that the terms of this Agreement are subject to Court approval. If the Court does not approve the terms of this Agreement, then the Agreement is void and no aspect of the Agreement is binding in any way on any person and/or party to the case.

XVIII

IT IS UNDERSTOOD AND AGREED that this Settlement Agreement pertains only to the issue of overpayment of pension benefits and no other issues related to FPDR pension benefits.

XIX

IT IS EXPRESSLY UNDERSTOOD AND AGREED that this Settlement and Mutual Release Agreement is intended to, and does, cover not only all known losses and damages, but any further losses and damages arising out of the facts alleged in the complaint not now known or anticipated which may later develop or be discovered including all effects and consequences thereof.

XX

IT IS UNDERSTOOD AND AGREED that the payments made to the plaintiffs and class members under this Agreement are not to be construed as an admission of liability. The City of Portland expressly denies liability to the undersigneds, or any other person for injuries or damages arising out of the aforementioned recoupment of overpaid retirement benefits. Plaintiffs expressly deny liability on the counterclaims asserted by the City.

XXI

IT IS UNDERSTOOD AND AGREED that except as specified herein, all expenses incurred to date or which will be incurred in the future, which are related in any way to claims being released herein, have either been paid or will be paid from the proceeds of this settlement

Page 5 – SETTLEMENT AND MUTUAL RELEASE AGREEMENT

and that the plaintiffs will agree that the City of Portland, its agents, employees and assigns have satisfied any claim for any such expense whenever incurred.

XXII

IT IS UNDERSTOOD AND AGREED that plaintiffs agree to dismiss their lawsuit entitled Tim Anderson, et al. v. City of Portland, Multnomah County Circuit Court Case No. 1108-11052, with prejudice and release their claims as provided in paragraph I.

XXIII

IT IS UNDERSTOOD AND AGREED that the City of Portland agrees to release its counterclaims filed in the case entitled Tim Anderson, et al. v. City of Portland, Multnomah County Circuit Court Case No. Case No. 1108-11052, with respect to all named plaintiffs and class members.

XXIV

THE TERMS SET FORTH HEREIN are contractual and not a mere recital.

XXV

IT IS UNDERSTOOD AND AGREED THAT the parties reserve the right to add mutually agreeable provisions to this written Settlement Agreement.

CITY OF PORTLAND

By: \_\_\_\_\_  
Dated: \_\_\_\_\_, 2013

Tim Anderson  
Dated: \_\_\_\_\_, 2013

State of OREGON       )  
                                  ) ss.  
County of Multnomah   )

This instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_,  
2013, by Tim Anderson.

\_\_\_\_\_  
Notary Public – State of Oregon  
Commission No.:  
Commission Expiration:

\_\_\_\_\_  
Michael Cullivan  
Dated: \_\_\_\_\_, 2013

State of OREGON        )  
                              ) ss.  
County of Multnomah    )

This instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_,  
2013, by Michael Cullivan.

\_\_\_\_\_  
Notary Public – State of Oregon  
Commission No.:  
Commission Expiration:

\_\_\_\_\_  
James Leinweber  
Dated: \_\_\_\_\_, 2013

State of OREGON        )  
                              ) ss.  
County of Multnomah    )

This instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_,  
2013, by James Leinweber.

\_\_\_\_\_  
Notary Public – State of Oregon  
Commission No.:  
Commission Expiration:



\_\_\_\_\_  
Clara Renfro

Dated: \_\_\_\_\_, 2013

State of OREGON       )  
                              ) ss.  
County of Multnomah   )

This instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_,  
2013, by Clara Renfro.

\_\_\_\_\_  
Notary Public – State of Oregon  
Commission No.:  
Commission Expiration:

\_\_\_\_\_  
Terry Wagner

Dated: \_\_\_\_\_, 2013

State of OREGON       )  
                              ) ss.  
County of Multnomah   )

This instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_,  
2013, by Terry Wagner.

\_\_\_\_\_  
Notary Public – State of Oregon  
Commission No.:  
Commission Expiration:

APPROVED:

\_\_\_\_\_  
Henry J. Kaplan, OSB #83055  
Of Attorneys for Plaintiffs