

RESOLUTION NO. 485

WHEREAS, in 2007 Apparatus Operator Premium was added to the Portland Fire Fighters Association (PFFA) contract; and

WHEREAS, to be eligible for the premium, a fire fighter would be required to have a DPSST Apparatus Operator certificate and a valid driver's license; and

WHEREAS, an FPDR One member's retirement benefit is based on the current salary of a First Class Fire Fighter; and

WHEREAS, at the time the premium was added to the PFFA contract, some FPDR One retirees requested that the premium be added to the pension amounts because they claimed it was part of the current salary of a First Class Fire Fighter; and

WHEREAS, the staff of the Bureau of Fire and Police Disability and Retirement (FPDR) determined that the premium was a premium pay for extra duty or services and not part of the pension amount and denied the FPDR One retirees request; and

WHEREAS, FPDR One retirees requested a hearing before the Office of Administrative Hearing (OAH); and

WHEREAS, a hearing was held and the OAH Administrative Law Judge overturned the FPDR's denial and issued a Consolidated Final Order dated April 27, 2011; and

WHEREAS, the following cases involving Apparatus Operator Premium pay potentially impact 501 retired or disabled City of Portland Fire and Police Disability, Retirement and Death Benefit Plan ("FPDR") Participants¹: *Joseph Gray, et al. v. City of Portland, et al.*, Multnomah County Circuit Court, Case No. 0906-08908, Oregon Court of Appeals, Case No. A146304 ("Gray I"); *City of Portland, et al. v. Joseph Gray, et al.*, Multnomah County Circuit Court, Case No. 1106-07794, Oregon Court of Appeals, Case No. A152175 ("Gray II"); *Coffey, et al. v. City of Portland, et al.*, Multnomah County Circuit Court, Case No. 1106-08147, Oregon Court of Appeals, Case No. A149858 ("Coffey"); *Gray, et al. v. City of Portland, et al.*, Multnomah County Circuit Court, Case No. 1303-03647 ("Gray Mandamus"); *Clark Stephens and Robert Wuerth v. City of Portland, et al.*, Multnomah County Circuit Court, Case No. 1312-16520 ("Stephens").

WHEREAS, there are appeals pending in this matter in three of the above cases; and

WHEREAS, the City of Portland and the FPDR One Retirees 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 has previously briefed the Board on the terms of the settlement and agrees that this settlement is reasonable; and

¹ "Participant" shall mean all FPDR One Fire Members, or the beneficiaries and alternate payees of Fire Members of the Fire and Police Disability Retirement and Death Benefit Plan ("Plan"), who received pension or disability payments from the Fire and Police Disability Retirement and Death Benefit Plan on or after August 1, 2007.

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. The 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 ____ day of March, 2014.



Samuel Hutchison
FPDR Director

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SETTLEMENT AND MUTUAL RELEASE AGREEMENT

WHEREAS, the following cases potentially impact 501 retired or disabled City of Portland Fire and Police Disability, Retirement and Death Benefit Plan ("FPDR") Participants¹: *Joseph Gray, et al. v. City of Portland, et al.*, Multnomah County Circuit Court, Case No. 0906-08908, Oregon Court of Appeals, Case No. A146304 ("Gray I"); *City of Portland, et al. v. Joseph Gray, et al.*, Multnomah County Circuit Court, Case No. 1106-07794, Oregon Court of Appeals, Case No. A152175 ("Gray II"); *Coffey, et al. v. City of Portland, et al.*, Multnomah County Circuit Court, Case No. 1106-08147, Oregon Court of Appeals, Case No. A149858 ("Coffey"); *Gray, et al. v. City of Portland, et al.*, Multnomah County Circuit Court, Case No. 1303-03647 ("Gray Mandamus"); *Clark Stephens and Robert Wuerth v. City of Portland, et al.*, Multnomah County Circuit Court, Case No. 1312-16520 ("Stephens").

WHEREAS, the Court has approved a motion for class certification in the case *Clark Stephens and Robert Wuerth v. City of Portland, et. al.*, Multnomah County Circuit Court, Case No. 1312-16520 on February 10, 2014 as a method of reaching a global settlement of all of the above-referenced cases.

WHEREAS, the cases cited above are all currently pending and involve the similar parties, facts and questions of law and the class representatives certified in the case *Clark Stephens and Robert Wuerth v. City of Portland* fairly and adequately protect the interests of the class members and there is no conflict between the Stephens plaintiffs and the plaintiffs in Gray I, Coffey, and Gray Mandamus and defendants in Gray II above.

WHEREAS, any settlement is subject to the approval of the Board of Trustees of the Fire and Police Disability, Retirement and Death Benefit Plan ("Board").

WHEREAS, on July 21, 2010, Judge Henry C. Breithaupt entered an Order dismissing Gray I plaintiffs' case on procedural grounds.

WHEREAS, plaintiffs in Gray I, Coffey, Gray Mandamus, and Stephens and defendants in Gray II are retired firefighters or their surviving spouses who were denied increases to their FPDR One pension benefits because the FPDR Director did not include Apparatus Operator Premium pay ("AO Pay") in the definition of the "current salary of a First Class Fire Fighter."

WHEREAS, each of the plaintiffs in Coffey, Gray Mandamus and Stephens and defendants in Gray II filed administrative appeals of the FPDR Director's decision not to include AO Pay in the definition of "current salary of a First Class Fire Fighter" under Section 5.04 of the FPDR Administrative Rules.

WHEREAS, Gray II defendants' and Coffey plaintiffs' objection to the denial of inclusion of AO Pay in the current salary of a First Class Fire Fighter resulted in a consolidated appeal of the Director's decision and hearing before the Office of Administrative Hearings.

WHEREAS, a hearing was held before the Office of Administrative Hearings on January 31, 2011, and the hearing record was closed on March 28, 2011.

¹ "Participant" shall mean all FPDR One Fire Members, or the beneficiaries and alternate payees of Fire Members of the Fire and Police Disability Retirement and Death Benefit Plan ("Plan"), who received pension or disability payments from the Fire and Police Disability Retirement and Death Benefit Plan on or after August 1, 2007.

WHEREAS, on April 27, 2011, Administrative Law Judge Rick Barber issued a Consolidated Final Order reversing the decision of the Director of FPDR in not including AO Pay in the regular pay of a First Class Fire Fighter, and the pension benefit of an FPDR One Member.

WHEREAS, on June 17, 2011, a Petition for Writ of Review was filed by the City in Multnomah County Circuit Court (Gray II above). The City filed their Petition alleging that the determination of the Office of Administrative Hearings should be reversed because the determination was not supported by substantial evidence, was not supported by substantial reason, was the result of the failure to follow procedure applicable to the matter, and was based upon the applicable law being improperly construed.

WHEREAS, on June 23, 2011, Coffey plaintiffs filed a class action Complaint in Multnomah County Circuit Court (Coffey case cited above) asserting a breach of contract and a wage claim violation pursuant to ORS 652.610(3).

WHEREAS, on September 28, 2011, Gray II defendants filed an Answer, Affirmative Defenses, and Counterclaims asserting a breach of contract and a wage claim violation pursuant to ORS 652.610(3).

WHEREAS, on September 30, 2011, Judge Leslie Roberts entered an Order of Dismissal in Coffey as follows:

1. City Defendants' first motion, Motion to Dismiss is granted;
2. City Defendants' second motion, Motion for Abatement is moot; and
3. Coffey Plaintiffs' Complaint is dismissed.

WHEREAS, on December 15, 2011, Judge Youlee You heard argument on the cross motions for summary judgment in Gray II.

WHEREAS, on April 20, 2012, Judge Youlee You heard argument regarding Gray II plaintiffs' counterclaims.

WHEREAS, on June 18, 2012, an Order was entered by Judge You as follows:

4. The decision of the Administrative Law Judge is affirmed.
City Plaintiff's Writ of Review is dismissed.
5. Because counterclaims are not allowed in a writ of review, City plaintiff's motion to dismiss is granted and the Gray II defendants' counterclaims are dismissed with prejudice.

WHEREAS, appeals are pending in Gray I, Gray II, and Coffey.

WHEREAS, on June 19, 2012, the parties engaged in mediation of Gray I, Gray II, and Coffey in hopes reaching a settlement of all issues involved while all appeals are pending.

WHEREAS, on October 24, 2013 Judge Jerome LaBarre authorized the Clerk of the Multnomah County Circuit Court to issue a Writ of Mandamus in the Gray Mandamus action, directing the FPDR Fund to incorporate Apparatus Operator pay into the pension benefit calculations of three FPDR One members, and a petition for attorneys' fees is still pending in that matter, and whereas other FPDR One beneficiaries stand ready to file similar mandamus actions.

WHEREAS at the time of this Agreement, there are 303 living FPDR One Fire Participants and 166 FPDR One Fire Participants whose benefits ceased upon their death, or their reaching age 18 in the case of a dependent minor child, who received pension or disability benefits effective July 1, 2008 or after.

WHEREAS, if these matters are 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 matters are not resolved, the expense of further litigation 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 of the cases cited above, 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 FPDR Director's decision not to include AO Pay in the definition of "current salary of a First Class Fire Fighter" under the Fire and Police Disability, Retirement and Death Benefit Plan that is the subject of the lawsuits filed in the above-referenced Multnomah County Circuit Court Cases and appeals. This mutual release shall also apply to all class members approved by the Court in this matter who do not elect to opt out of the class, including the plaintiffs or defendants in the related cases cited above.

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 and appeals 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 complaints of Case Nos. 0906-08908; A146304 (Gray I), Case Nos. 1106-07794; A152175 (Gray II), Case Nos. 1106-08147; A149858 (Coffey), *Gray, et al. v. City of Portland, et al.*, Multnomah County Circuit Court, Case No. 1303-03647 (Gray Mandamus) and Case No. 1312-16520 (Stephens) in the Circuit Court of the State of Oregon for the County of Multnomah.

III

IT IS UNDERSTOOD AND AGREED that Gray I, Coffey, Gray Mandamus and Stephens plaintiffs and Gray II defendants are retired firefighters or their surviving beneficiaries who did not receive increased FPDR One pension or disability benefits as the result of the FPDR Director's decision not to include AO Pay in the definition of "current salary of a First Class Fire Fighter".

IV

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

V

IT IS UNDERSTOOD AND AGREED that FPDR agrees to pay to the class a maximum settlement sum of up to Two Million Two-Hundred Forty-Five Thousand Eight Hundred and Fifty-Nine Dollars and Thirty-Seven Cents (\$2,245,859.37) for retroactive pension and disability benefits based upon the 3% AO Pay for the period from July 1, 2008 until June 1, 2014.²

VI

IT IS UNDERSTOOD AND AGREED that FPDR will prospectively include AO Pay in the calculation of pension and disability benefits payable to FPDR One Fire Participants effective June 1, 2014, and thereafter if due.

VII

IT IS UNDERSTOOD AND AGREED that Gray I, Coffey, Gray Mandamus and Stephens plaintiffs' and Gray II defendants' attorneys shall receive a twenty-five percent (25%) common fund recovery fee, in the maximum amount of up to Five Hundred Sixty-One Thousand Four Hundred and Sixty-Four Dollars and Eighty-Four Cents (\$561,464.84),³ out of the class retroactive settlement amount in paragraph V above. The City of Portland further agrees that all challenges to the attorneys' fees will be waived. Gray I, Coffey, Gray Mandamus and Stephens plaintiffs and Gray II defendants and their counsel agree to give up the right to add a multiplier to the attorneys' fees.

VIII

IT IS UNDERSTOOD AND AGREED that the FPDR will not pay any interest on the retroactive settlement amount provided in paragraph V.

² These figures assume that all Participants alive as of February 2014 will remain alive through the date of distribution of payments, and that none will opt out of the class. The figures may be later adjusted for deaths and opt-outs.

³ Subject to the same qualifications set forth in Note 2 above.

IX

IT IS UNDERSTOOD AND AGREED that the FPDR will pay any retroactive pension or disability benefit less a pro-rata share of attorneys' fees to each class member in a one-time payment. There will be no payment of attorneys' fees for this matter out of future pension or disability benefits.

X

IT IS UNDERSTOOD AND AGREED that notices have been sent to all class members regarding this proposed settlement.

XI

IT IS UNDERSTOOD AND AGREED that the notice sent to class members includes the amount of their retroactive benefit payment, if any.

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 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.

XIV

IT IS UNDERSTOOD AND AGREED that this Settlement Agreement pertains only to the issue of inclusion of AO Pay in the pension and disability benefits of FPDR One Fire Participants and to no other issues related to FPDR benefits.

XV

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 above-referenced complaints and appeals not now known or anticipated which may later develop or be discovered including all effects and consequences thereof.

XVI

IT IS UNDERSTOOD AND AGREED that the payments made to the Gray I, Coffey, Gray Mandamus and Stephens plaintiffs and Gray II defendants 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 undersigned, or any other person for injuries or damages arising out of the aforementioned recoupment of overpaid retirement benefits. Gray I, Coffey, Gray Mandamus

and Stephens plaintiffs and Gray II defendants expressly deny liability on the counterclaims asserted by the City.

XVII

IT IS UNDERSTOOD AND AGREED that all parties agree to dismiss their lawsuits, counterclaims, and appeals in the following cases with prejudice and release their claims as provided in paragraph I: *Joseph Gray, et al. v. City of Portland, et al.*, Multnomah County Circuit Court, Case No. 0906-08908, Oregon Court of Appeals, Case No. A146304 ("Gray I"); *City of Portland, et al. v. Joseph Gray, et al.*, Multnomah County Circuit Court, Case No. 1106-07794, Oregon Court of Appeals, Case No. A152175 ("Gray II"); *Coffey, et al. v. City of Portland, et al.*, Multnomah County Circuit Court, Case No. 1106-08147, Oregon Court of Appeals, Case No. A149858 ("Coffey"); *Gray, et al. v. City of Portland, et al.*, Multnomah County Circuit Court, Case No. 1303-03647 ("Gray Mandamus"); *Clark Stephens and Robert Wuerth v. City of Portland, et al.*, Multnomah County Circuit Court, Case No. 1312-16520 ("Stephens").

XVII

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

XIX

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: Sam Hutchison, Director

Dated: _____, 2014

Clark Stephens

Robert Wuerth

Joseph Gray

Mariloris Oliverio

Donald Buss, Personal Rep. of Estate of Madge Buss, Surviving Spouse of Vernon Buss

Arnie Schumann

Diana Sullivan, surviving spouse of Robert Sullivan

Delmar Coffey

Carolyn Keller, surviving spouse of Phillip Keller

George Pickett

Lawrence Reverman

Lois Smith