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November 2, 2016

Ken McGair  
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Re: Alternate Payee and 27-Pay-Period Rules applied to FPDR members promoted  
out of the bargaining units before retirement  
Our File No. 4670-151, 5458-87

Dear Ken and Mark:

I am writing on behalf of the PPCOA and PFFA Local 43 regarding the proposed changes to the administrative rules as they affect members promoted out of the bargaining units. Administrative Rule 5.4.09(D)(2) (page 12) limits the reversionary benefit to members who belonged to the Union at the time of their retirement or termination – effectively, this means that anyone promoted out of the bargaining unit completely loses any benefit associated with Resolution 271. Obviously, such a limitation does not appear in Resolution 271, and two separate arbitrators held that this is a mandatory subject of bargaining.

As you know, **Arbitrator Gaba** held at the end of his 6-18-2013 decision:

**“AWARD**

“The grievance is sustained. The City is required to rescind any changes made by the repeal of Resolution No. 271 that affect mandatory subjects of bargaining. If any union members have been impacted (*or will be impacted*) by the change, they shall be made whole for and all lost benefits. . . .”

**Arbitrator Williams** said at the conclusion of his 7-21-2015 opinion:

**“CONCLUSION**

“The Arbitrator was tasked with the responsibility to determine whether the reversionary benefit provided by Resolution No. 271

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was a prohibited or mandatory subject of bargaining. The Arbitrator found that it was a mandatory subject of bargaining and that the elimination of the reversionary benefit violated Article 13 of the Parties CBA. As part of his discussion on remedy, the Arbitrator emphasized that PFFA – City of Portland: Alternate Payees Arbitration Award on Merits, his directions were given specifically to the City and that the City was directed *to make whole any firefighter*, including specifically the three Grievants, *financially harmed by the revocation of Resolution No. 271. . . .”*

Just as a PFFA, PPA, or PPCOA members cannot lose retirement benefits as a consequence of leaving the union, they cannot lose vested and bargained-for benefits after being promoted out of the bargaining unit. The language of these arbitration awards encompasses all union members who may later wish to use these benefits post-retirement. There is nothing in the language to suggest that it was intended to exclude folks who are promoted out of the bargaining unit, into a sworn or non-sworn position.

I understand that this rule change will be considered by Fund Trustees at the November 15 meeting. I would appreciate it if the trustees were provided with a copy of this letter as part of the comments on the proposed rule.

The ordinance passed by City Council states (in paragraph 4) that the additional benefits are “intended to bring the Plan into compliance with the applicable, legally binding requirements of arbitrators’ opinions and awards regarding the reversionary interests to Members upon death of Alternate Payees.” This language is echoed in the impact statement. As I stated, if we need clarification of the scope of these awards, we will get it. I still await your input regarding the decision method (i.e. go back to one of the arbitrators vs. get a new list from ERB).

I note that page 5 of the “Appendix A” describes the affected class as: “For Members who *were* members of the [3 unions] *or* had retired as members of those Associations, at the time of the Alternate Payee’s death . . .” It seems to me that you read the Appendix as if the “or” was an “and.” More specifically, you read this sentence as equivalent to “For Members of [3 unions] who had retired as members of those Associations at the time of the Alternate Payee’s death.” That is, your reading makes the first dependent clause of the sentence entirely superfluous.

In any case, as I said today in our telephone conversation, the Associations intend to enforce the arbitration awards regardless of whether the ordinance effectively authorizes payment from the FPDR Fund or the General Fund. I am simply trying to help you read the ordinance as consistent with what Arbitrators Gaba and Williams ordered.

#### Bifurcating the FPDR Two Plan

The arbitrators required the City to pay the Resolution 271 benefit, regardless of whether it comes from the FPDR Fund. If the City elects, however, to pay those benefits from the Fund, where is the Charter authority that permits the City to in effect, create a second plan within

FPDR Two? The Charter provides for three plans, not four. All members of each plan have the same FPDR benefits under the Charter. I do not see how the City can read Charter section 5-403 to authorize the creation of a separate set of benefits under the *same plan*, based only on contractual promises to one or more unions. I am not advocating for this, but if the City does not change the plan uniformly for all members of the plan, it simply does not have the Charter authority to change the plan benefits in such a piecemeal fashion, favoring some members but not others; the source of such additional payments would have to remain within the General Fund.

Applicability to 27-pay-period Issue

I know that Council has not yet issued an ordinance requiring the Fund to pay the 27-pay-period benefit. However, I note that the same rationale will apply to the decisions in the 27 pay-period cases. As I stated in my email of October 14, the decisions of those arbitrators (Skratek and Williams) expressly apply to all *former* members of the bargaining units, whether or not they promoted out of the units before they retired. The remedies issued in those two cases read as follows:

**Arbitrator Skratek** stated in the remedy section at the end of her March 16, 2016 decision:

“The City shall make whole **any affected current or former** PPA member who retired or will retire after the effective date of the City of Portland’s 2012 changes that removed the 27<sup>th</sup> pay period from the final pay pension calculation.”

**Arbitrator Williams** stated in the award addendum to his decision released October 19, 2016:

“2. The City is directed to stop reducing pension benefits in violation of Article 3 of the PPCOA Agreement. The City is further directed to make whole **any affected current or former** PPCOA member who retired or will retire after the effective date of the City of Portland’s 2012 changes that removed the 27<sup>th</sup> pay period from the final pay pension calculation. . . .

\* \* \* \*

“4. The City is directed to stop reducing pension benefits in violation of Article 13 of the PFFA Agreement. The City is further directed to make whole **any affected current or former** PFFA member who retired or will retire after the effective date of the City of Portland’s 2012 changes that removed the 27<sup>th</sup> pay period from the final pay pension calculation.”

Again, neither of these arbitrators created an exception for former members of the bargaining unit who happened to take on another assignment with the City of Portland outside the bargaining unit before they retired.

I understand that under the proposed administrative rule, former bargaining unit members who went to work as PERS-covered managers for the City would still get the benefit of the alternate payee rule and the 27-pay-period rule, but those who promoted out of the bargaining unit while still member of the FPDR Fund would not. I cannot surmise any policy rationale, let alone legal rationale, for that distinction. For that matter, I cannot surmise any reason to distinguish between someone who retired when they left the bargaining unit vs. someone who waits to start collecting retirement benefits, for whatever reason (e.g., age at departure or leaving for another position).

In short, the proposed administrative rule penalizes very few people – all and only those folks who take on managerial responsibilities while still accruing service credits under the Fund. I cannot fathom why the City or the Trustees would wish to penalize only those who take on the leadership duties that exclude them from the bargaining unit.

#### Substantive Arbitrability

Finally, let me summarize my points directed at Mark's concern that the Arbitrators may not have jurisdiction to extend these retiree benefits to people who left the bargaining unit before retiring.

In *Portland Fire Fighters Association Local 43 v. City of Portland*, 181 Or. App. 85 (2002), the Court of Appeals held that a grievance over the calculation of retiree medical insurance premiums was arbitrable. “Where the arbitrability of a particular issue under a collective bargaining agreement is in dispute, ERB must order arbitration unless it can say “ ‘with positive assurance that the arbitration clause is not susceptible [to] an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.’ ” 181 Or. App. at 96.

In *Portland Police Association v. City of Portland*, 248 Or App 109 (2012), the Court of Appeals affirmed the rationale of the *Local 43* case. In that case, the Fund had changed the rules applying the lookback period for retirees (citing the City Charter language), and refused to submit the matter to arbitration. The Court agreed that the matter was arbitrable under the rationale of the *PFFA Local 43* case, affirming that: “[W]hen a collective bargaining agreement is ambiguous with respect to whether a particular issue is arbitrable; we resolve that ambiguity in favor of arbitrability.” 248 Or App at 117.

Thus, it is fairly certain that ERB will agree that this matter subject to the jurisdiction of these arbitrators. The plain language of the arbitration awards would apply to all retirees, whether or not they promoted out of the bargaining unit before retiring. As indicated, the language of those decisions is plain and clear; the arbitrators did not carve out the exceptions that are reflected in the proposed administrative rule before the Fund on November 15.

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Please include this letter in the materials issued to the Board in advance of the November 15 meeting. Thank you for your attention to this matter.

Very truly yours,



Henry J. Kaplan

HJK:kaj

Cc: Alan Ferschweiler  
Craig Morgan

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