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4  
5 IN THE CIRCUIT COURT OF THE STATE OF OREGON  
6 FOR THE COUNTY OF MULTNOMAH

7 CITY OF PORTLAND, by and  
8 through BUREAU OF FIRE AND  
9 POLICE DISABILITY AND  
10 RETIREMENT,

11 Plaintiff,

12 v.

13 JOSEPH GRAY, MARILORIS  
14 OLIVERIO, VERNON BUSS,  
15 ARNIE SCHUMANN, CLARK  
16 STEPHENS, DELMAR COFFEY,  
17 PHILLIP KELLER, GEORGE  
18 PICKETT, LAWRENCE  
19 REVERMAN, ROBERT  
20 WUERTH, LOIS SMITH and  
21 ROBERT SULLIVAN,

22 Defendants.

Case No.

1106-07794

PETITION FOR WRIT OF REVIEW

1.

19 Pursuant to ORS 34.010 to 34.100, plaintiff, City of Portland Bureau of Fire and Police  
20 Disability and Retirement, seeks review of the Consolidated Final Order of Administrative Law  
21 Judge Rick Barber, dated April 27, 2011, a copy of which is attached to this Petition as Exhibit A  
22 and incorporated in this Petition by reference.

2.

24 Defendants are beneficiaries of the City of Portland Fire and Police Disability and  
25 Retirement Fund (FPDR). At all times material to this dispute, defendants have been receiving  
26 retirement benefits from FPDR. These benefits are administered and paid by plaintiff.

1 3.

2 Specifically, the Fire and Police Disability and Retirement Fund was created on  
3 March 11, 1942, and revised by subsequent amendments. The most recent amendments to the  
4 Fire and Police Disability and Retirement Fund Charter was enacted on November 6, 2007.

5 4.

6 Chapter 5 of the Portland City Charter was adopted by voters in 1948, creating a  
7 funding source for the pension and disability system for fire fighters, police officers and their  
8 survivors. All funding for pension benefits under the FPDR plan is derived from a dedicated  
9 property tax millage rate levy.

10 5.

11 In 1989, the City of Portland voters passed a charter amendment which created a two-  
12 tiered pension system, then commonly referred to as the new plan and old plan. Members of  
13 the old plan, or FPDR I, consist of those sworn employees of the Fire Bureau or Police  
14 Bureau, and their surviving spouses and/or dependent minor children who are receiving  
15 retirement benefits as of January 1, 1990. Active members have the option to elect coverage  
16 under the new plan; most of them did so. All such elections were complete by 1991.

17 6.

18 All Portland fire fighters hired after 1990, but before January 2007, became members  
19 of the new plan now known as FPDR II.

20 7.

21 Defendants are all members of the old plan, now known as FPDR I. No additional  
22 members have been added to that plan since 1990.

23 8.

24 Plaintiff denied the requests of defendants to increase their FPDR I pension benefits  
25 by including Apparatus Operator Premium pay into the current salary of a First Class Fire

26 /////

1 Fighter, the salary upon which pensions are based pursuant to language in the Charter of the  
2 City of Portland. After plaintiff denied defendants' request, defendants requested a hearing.

3 9.

4 A hearing was held, and the Administrative Law Judge overturned plaintiff's denial  
5 and issued a Consolidated Final Order dated April 27, 2011.

6 10.

7 The Consolidated Final Order concluded that:

8 "Apparatus Operator premium" pay and Article 8 of the  
9 Collective Bargaining Agreement between the City and  
10 Portland Firefighters' Association Local 43 should be included  
11 as part of "current salary of a First Class Fire Fighter" under  
12 Charter Section 5-126(11), as that salary is used to determine  
13 the retirement benefit of "FPDR One" retirees.

12 11.

13 The independently sufficient grounds for issuing the Writ of Review and for reversing  
14 the determination of the Office of Administrative Hearings are that the determination is not  
15 supported by substantial evidence, is not supported by substantial reason, is the result of the  
16 failure to follow procedure applicable to the matter, and is based upon the applicable law  
17 being improperly construed. A substantial interest of the plaintiff has been injured by the  
18 determination described in paragraph 10 of this petition. The Administrative Law Judge's  
19 Consolidated Final Order indicates that it may be appealed to this Court by Writ of Review.

20 12.

21 In addition to the matter outlined in paragraphs 1-11, above, there is currently  
22 pending an appeal addressing related issues in the Oregon Court of Appeals (Gray, et al. v.  
23 City of Portland, et al., Case No. A146304) which is on appeal from Multnomah County  
24 Circuit Court (Gray, et al. v. City of Portland, et al., Case No. 0906-08908).

25 /////

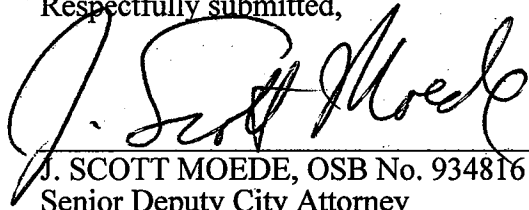
26 /////

13.

For the foregoing reasons, plaintiff respectfully petitions the Court for the issuance of a Writ of Review requiring the Office of Administrative Hearings to produce the entire evidentiary record, including the transcript of proceedings and deliberations. The Court should reverse the Consolidated Final Order dated April 27, 2011.

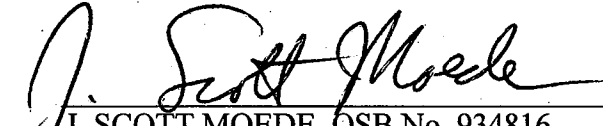
DATED this 17<sup>th</sup> day of June, 2011.

Respectfully submitted,



J. SCOTT MOEDE, OSB No. 934816  
Senior Deputy City Attorney  
Email: [Scott.Moede@portlandoregon.gov](mailto:Scott.Moede@portlandoregon.gov)  
Of Attorneys for Plaintiff

I hereby certify that I was present at the proceeding, have examined the evidentiary record and the determination thereon, and thereupon have reasonable grounds to seek a Writ of Review and to seek reversal of the determination in the decision described in this Petition.



J. SCOTT MOEDE, OSB No. 934816  
Senior Deputy City Attorney  
Email: [Scott.Moede@portlandoregon.gov](mailto:Scott.Moede@portlandoregon.gov)  
Of Attorneys for Plaintiff

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF OREGON  
for the  
CITY OF PORTLAND, FIRE AND POLICE DISABILITY FUND**

|                           |   |                                 |
|---------------------------|---|---------------------------------|
| IN THE MATTER OF:         | ) | <b>CONSOLIDATED FINAL ORDER</b> |
|                           | ) |                                 |
| <b>JOSEPH GRAY</b>        | ) | OAH Case No. 1001795            |
|                           | ) |                                 |
| <b>MARILORIS OLIVERIO</b> | ) | OAH Case No. 1001935            |
|                           | ) |                                 |
| <b>VERNON BUSS</b>        | ) | OAH Case No. 1001936            |
|                           | ) |                                 |
| <b>ARNIE SCHUMANN</b>     | ) | OAH Case No. 1001937            |
|                           | ) |                                 |
| <b>CLARK STEPHENS</b>     | ) | OAH Case No. 1001938            |
|                           | ) |                                 |
| <b>DELMAR COFFEY</b>      | ) | OAH Case No. 1001939            |
|                           | ) |                                 |
| <b>PHILLIP KELLER</b>     | ) | OAH Case No. 1001940            |
|                           | ) |                                 |
| <b>GEORGE PICKETT</b>     | ) | OAH Case No. 1001941            |
|                           | ) |                                 |
| <b>LAWRENCE REVERMAN</b>  | ) | OAH Case No. 1001942            |
|                           | ) |                                 |
| <b>ROBERT WUERTH</b>      | ) | OAH Case No. 1001943            |
|                           | ) |                                 |
| <b>LOIS SMITH</b>         | ) | OAH Case No. 1001944            |
|                           | ) |                                 |
| <b>ROBERT SULLIVAN</b>    | ) | OAH Case No. 1001945            |

**HISTORY OF THE CASE**

The City of Portland, Oregon, Bureau of Fire and Police Disability and Retirement (FPDR) denied the request of FPDR Member Joseph Gray to increase his "FPDR One" pension benefits by including "Apparatus Operator" (AO) pay into the regular compensation of a "First Class Fire Fighter," the salary upon which pensions are based pursuant to language in the Charter. Gray requested a hearing.<sup>1</sup>

<sup>1</sup> The letter to Gray was sent on August 11, 2008 and the hearing request was dated June 30, 2010. The delay was caused by the initial filing of the issue in the Circuit Court. In all cases, the parties agree that FPDR has denied the inclusion of apparatus pay in the salary upon which the retirement benefit is determined, and that all of the members have contested that decision.

On July 7, 2010, FPDR referred the Gray hearing request to the Office of Administrative Hearings (OAH). Administrative Law Judge (ALJ) Rick Barber was assigned to preside at hearing. A prehearing conference was convened on September 13, 2010, at which time eleven other cases were consolidated with Gray's case.<sup>2</sup> Hearing was initially set for November 1, 2010, but was postponed and reset for January 31, 2011.

Hearing was held as scheduled on January 31, 2011, in Tualatin, Oregon. The claimants<sup>3</sup> appeared through Gray and were represented by their attorney, Henry Kaplan. FPDR was represented by Senior Deputy City Attorney Scott Moede. City Human Resource Director/FPDR Board Chair Yvonne Deckard testified for FPDR. Battalion Chief Ken Burns testified for the Members. The record was held open for an additional exhibit and for written closing argument, and was closed on March 28, 2011.

### ISSUE

Whether the pay designated as "Apparatus Operator premium" pay in Article 8 of the Collective Bargaining Agreement between the City and Portland Firefighters' Association (PFFA) Local 43 should be included as part of "Current Salary of a First Class Fire Fighter" under Charter Section 5-126(11), as that salary is used to determine the retirement benefit of "FPDR One" retirees.

### EVIDENTIARY RULINGS

Exhibits A1 through A15, offered by FPDR, and Exhibits M1 through M11, offered by claimants, were admitted into the record without objection. On February 2, 2011, Exhibit A16 (the deposition testimony of Chief John Klum), was received and admitted into evidence. In addition, the parties' Stipulated Statement of Facts has been admitted into evidence as Joint Exhibit 1.

### STIPULATED FINDINGS OF FACT

The parties agreed upon specific facts that both sides considered important to my decision, and also agreed on the language of some that are disputed, without waiving possible objections to the relevance of the facts that are part of the stipulation. Their stipulation is included here in its entirety:

**"The parties agree that the following facts are true. The parties are not in agreement on the direct or conditional relevance of the statements set forth herein; disputes over relevance are specifically reserved for later argument.**

### Parties

<sup>2</sup> All 12 cases involve an appeal by an "FPDR One" retiree or surviving spouse, and involve a denial of apparatus pay as part of the pay from which the retirement benefit is calculated. Both sides agree that there is to be one record and one written decision for all of the cases.

<sup>3</sup> Generally, FPDR members are referred to as either "member" or by name, but both sides in this proceeding have referred to them by the equally appropriate title of "claimants." I will follow suit.

1. Each petitioner is a former employee of respondent City of Portland. Petitioners Gray, Buss, Schumann, Stephens, Coffey, Keller, Pickett, Reverman, Wuerth, and Sullivan each served as a sworn fire fighter of the Portland Fire Bureau, and retired in good standing from the Bureau on or before 1990. Petitioners Oliverio and Smith are the widowed beneficiaries of sworn firefighters who retired from the Portland Fire Bureau on or before 1990.

2. The City of Portland is a public employer and a political subdivision of the State of Oregon. The Fire, Police, Disability and Retirement Fund provides disability, retirement and death benefits to sworn employees of the Portland Police Bureau and the Bureau of Fire, Rescue and Emergency Services pursuant to Chapter 5 of the Charter of the City of Portland.

3. The petitioners filed a complaint in Multnomah County Circuit Court on June 29, 2009, alleging that FPDR and the City of Portland committed a breach of contract in not including Apparatus Operator premium pay in the calculation of FPDR One Member's "earned pension." The City answered petitioners Complaint on August 27, 2009.

4. On June 3, 2010, cross motions for Summary Judgment were heard by Judge Henry C. Breithaupt in Multnomah County Circuit Court. On June 14, 2010, Judge Breithaupt granted the City's Motion for Summary Judgment on the jurisdictional issue that the plaintiffs had failed to exhaust their administrative remedies with the Office of Administrative Hearings. Judge Breithaupt opined, in dicta, that the Apparatus Operator premium pay was wages for extra duty or services because "a premium is logically for something extra."

5. Judgment in favor of the City was signed on July 12, 2010 and entered on July 21, 2010. Petitioners filed a Notice of Appeal to the Oregon Court of Appeals on August 9, 2010; that appeal is pending.

#### **Fire and Police Disability and Retirement Fund**

6. The Fire, Police, Disability & Retirement Fund was created on March 11, 1942, and revised by subsequent amendments. The most recent amendment to the Fire, Police, Disability & Retirement Fund charter was enacted on November 6, 2007.

7. Chapter 5 of the Portland City Charter was adopted by voters in 1948, creating a funding source for the pension and disability system for fire fighters, police officers, and their survivors. All funding for pension benefits under the FPDR plan is derived from a dedicated property tax millage rate levy.

8. In 1989, the City of Portland voters passed a Charter amendment which created a two-tiered pension system, then commonly referred to as the "New Plan" and "Old Plan." Members of the "Old Plan," or FPDR One, consist of those sworn employees of the Fire Bureau or Police Bureau, and their Surviving Spouses and/or Dependent Minor Children who were receiving retirement benefits as of January 1, 1990. Active Members had the option to elect coverage under the New Plan; most of them did so. All such elections were complete by 1991.

9. All Portland fire fighters hired after 1990 but before January 2007 became members of the "New Plan" now known as FPDR Two.

10. Plaintiffs are all members of the "Old Plan," now known as FPDR One. No additional members have been added to that plan since 1990.

**Joint Statement of the Issue**

11. The parties agree that the dispositive issue in this case is whether the pay designated as "Apparatus Operator premium" pay in Article 8 of the Collective Bargaining Agreement between the City of Portland and the Portland Firefighters' Association Local 43 should be included as part of "Current Salary of a First Class Fire Fighter" under Charter Section 5-126(11), where "First Class Fire Fighter" is defined under Charter Section 5-126(1) as a "member of the Bureau of Fire who receives the maximum payment in the fire fighter classification," and the "current salary of a First Class Fire Fighter" excludes "wages or salaries for extra duties or extra service."

12. Petitioners have all filed timely appeals from denial of their claims; all claims are properly before the Office of Administrative Hearings.

**Provisions of the City Charter**

13. The pension and disability benefits for FPDR One members are described by Chapter 5, Article 5 of the Portland City Charter. Only the pension benefit is at issue in this case.

14. Chapter 5, Article 5 of the Charter states in part:

**Section 5-120. Variation in Amount of Benefit or Pension Payments.** All benefits and pensions granted and paid under this Act shall vary annually and shall be based on the current salary of a first class fire fighter . . . computed annually at the beginning of the fiscal year.

15. Section 5-126 of the Charter contains the following definitions:

[1]. The term "First Class Fire Fighter" shall mean a member of the Bureau of Fire who receives the maximum payment in the fire fighter classification, as set forth in the classification of positions in the Bureau of Fire by the Civil Service Board, and in the event of the change of the name of such classification where the term "First Class Fire Fighter" is used it shall be that position by whatever name i[t] may hereafter be called;

\* \* \*

5. The term "maximum pension" shall mean a pension equal to sixty percent of the then current salary of a First Class Fire Fighter for fire fighters . . . and said pension shall vary annually as said salaries may vary from time to time;

6. The term "earned portion of maximum pension" or "maximum earned pension" shall mean that portion of a maximum pension that the member's years of service bear to the years of service required for a maximum pension, but in no event shall it exceed the maximum pension;

\* \* \*

11. The terms "current salary of a First Class Fire Fighter" . . . shall mean all wages or salary paid on a monthly basis to a member for service in that Civil Service classification. The terms shall not include wages or salaries for extra duties or extra services. For the purposes of payments under this Article "current salary of a First Class Fire Fighter" . . . shall be computed annually at the beginning of the fiscal year; (emphasis added)

#### **FPDR One Pension Calculations**

16. Petitioners retired at various ranks ranging from Fire Fighter to Deputy Chief. An FPDR One Member's pension depends only on years of service and the current salary of a "First Class Fire Fighter," and is not dependent on the actual rank, assignment, or salary of the fire fighter at any point during his or her career.

17. "First Class Fire Fighter" pay is not defined in the IAFF Local 43 Collective Bargaining Agreement. "First Class Fire Fighter" pay has always included the highest step rate in the fire fighter classification, and any longevity pay increase in that classification for which fire fighters may be eligible under the Collective Bargaining Agreement.

18. FPDR One benefits do not depend on actual level of pay achieved by the retiree.

19. "First Class Fire Fighter" pay has always excluded pay for classification[s] higher than fire fighter, and "wages or salaries for extra duties or extra services" in accordance with Charter Section 5-126(11). This exclusion applies to all assignment-based specialty pay, which is wages for extra duties or extra service.

20. The pension received by FPDR One Members is dependent upon the "current salary of a First Class Fire Fighter." The "current salary of a First Class Fire Fighter" is dependent on the amount of salary set for a fire fighter by the contract with Local 43, which represents all First Class Fire Fighters." None of the plaintiffs are current members of the IAFF Local 43.

21. First Class Fire Fighter pay under the Charter includes Longevity Pay. Longevity pay represents increases beyond Top Step, associated with years of service in the Fire Bureau.

Longevity Pay is included in Schedule A of the Local 43 collective bargaining agreement showing Salary Rates of pay for the Fire Fighter and other classifications.

22. Except for Longevity Pay and Apparatus Operator pay, all other premium pays or specialty pays provided by the Local 43 contract are contingent upon actual assignment to specific duties.

23. The practice of the Fire Bureau has been to rotate driving duties among fire fighters as determined by the officer in charge of an individual fire station. The practice of rotating driving duties among fire fighters predates the 1990 FPDR Charter reform. All FPDR One members were expected to be qualified to drive emergency apparatus as part of their regular duties.

24. Since before 2007, the job descriptions of fire fighter, fire lieutenant, fire captain, and fire battalion chief have included a requirement that the employee maintain a valid Oregon driver's license and State certification to drive emergency response vehicles.

25. The purpose of the requirement to maintain valid Oregon driver's license is to provide the Fire Bureau with greater operational flexibility.

26. The City temporarily accommodates fire fighters who lose their driver's license, but requires them to take all necessary steps to restore their driver's license in order to preserve operational flexibility in the Fire Bureau.

27. A fire fighter who does not attain and maintain a valid driver's license and the DPSST certification does not receive the Apparatus Operator premium payment, but is paid the Salary Rate of his or her classification in Schedule A of the collective bargaining agreement, plus all applicable longevity and assignment-based pays.

28. Both before and since 2007, all fire fighters had a duty to maintain a certification to drive emergency response vehicles. Prior to 2007, there was no premium or other pay specifically associated with qualifications to operate a Fire Bureau emergency response vehicle, or for attaining and maintaining a valid driver's license and State certification to drive emergency vehicles. As of December 20, 2010 there were 5 fire fighters, out of approximately 697 members of Local 43, who were not receiving Apparatus Operator premium pay because of driving restrictions such as license suspensions. In addition, there were 27 fire fighters who did not receive the pay because they were still in probationary status and had not yet completed the requirements necessary to obtain certification to drive emergency equipment. As of April 23, 2010 there were 4 fire fighters who were not receiving apparatus operator premium pay because of driving restrictions, and 19 others who did not receive the pay because they were recent hires on probationary status who had not yet completed their certification to drive emergency equipment.

## Negotiations over 2007-2010 Collective Bargaining Agreement

29. During initial negotiations for the 2007-2010 collective bargaining agreement IAFF Local 43 sought an increase of 5% above the cost of living for the entire bargaining unit, and an 8% Apparatus Operator premium to be paid only to those fire fighters actually assigned to drive emergency response vehicles. The City rejected these proposals.

30. Local 43's priority in labor negotiations was to achieve a wage increase for the entire bargaining unit in excess of the cost-of-living. It initially proposed a 5% increase in base pay, over the cost of living. Later in negotiations Local 43 expressed a willingness to characterize an increase as payment for certifications or requirements that applied to all Local 43 members; these included Apparatus Operator certification, wild land certification, and/or hazmat awareness certification. Both before and after these negotiations, every firefighter in the Portland Fire Bureau is required to be certified as a wild land fire fighter, certified in hazardous materials awareness, and certified to drive emergency response vehicles. The driver's license and DPSST certifications were not mentioned in any contract prior to the 2007-2010 contract.

31. Local 43 also proposed increases to longevity pay premiums.

32. During the entire course of negotiations, the possible impact of increases to longevity pay premiums and Apparatus Operator premiums on FPDR One benefits was never brought up, discussed, or considered at the bargaining table, away from the bargaining table, or in any discussions between the parties.

33. During these negotiations, representatives of the City expressed the City's position that any fire fighter who lost their license was subject to progressive discipline and potential termination of employment. The Union negotiators asserted that a driver's license was not a requirement of the job of fire fighter. The City proposed contract language to reflect the requirement that all fire fighters maintain a driver's license. That language was incorporated into Article 29 of the current agreement.

34. During these negotiations, City negotiators asserted that fire fighters could be terminated or laid off if they lost their license for an extended period.

35. The current text of Article 29 in the Local 43 2007-2010 agreement reads as follows:

### ARTICLE 29 - DRIVING PRIVILEGES

All unit member employees are required to maintain a current valid state Drivers License; an employee must report the suspension or revocation of his/her driving privileges no later than the employee's next shift. A suspended or revoked employee will be accommodated by non-assignment of Apparatus Operator duty and/or placement in an assignment for thirty (30) calendar days in which driving duties, in the judgment of bureau management, can be temporarily avoided. Such placement may be in the same or lower job classification; if placement is made

into a lower job classification, the employee shall be temporarily demoted until reassigned to his/her previous classification.

If the employee has not had his/her driving privileges reinstated at the end of the thirty (30) day accommodation period, and if the bureau can continue to provide placement in an assignment in which driving duties can be temporarily avoided or to not assign Apparatus Operator duty without, in the sole judgment of bureau management, any adverse impact to the bureau carrying out its mission, the employee shall be assigned accordingly. If, however, such accommodation cannot be made in the judgment of bureau management without adverse impact, the bureau may transfer the employee to another assignment in the same or lower job classification. If transfer is made to an assignment in a lower job classification, the employee shall be temporarily demoted until reassigned to his/her previous classification.

36. The City's original proposed language for Article 29 included the following additional paragraph:

An employee who, as a result of suspension or revocation of his/her driving privileges, is placed in an assignment where driving duties can be temporarily avoided or is not assigned Apparatus Operator duty shall not be eligible for trade time or call shift time until such time as his/her driving privileges are reinstated. However, if the member has been demoted in order for the bureau to make an assignment in which driving duties can be temporarily avoided, said employee shall not be eligible for trade time but may be granted call shifts into positions within his or her demoted job classification.

37. Following a period of negotiations in 2007, Local 43 and the City reached impasse, in accordance with the procedures set forth in ORS 243.712.

38. Fire fighters are not permitted to strike; when fire fighter contract negotiations result in impasse, the impasse is ultimately resolved through binding arbitration governed by ORS 243.746.

39. Following impasse, but before interest arbitration, the City and IAFF Local 43 reached agreement on all disputed issues.

40. The Apparatus Operator premium was not included in Schedule A – Salary Rates of the collective bargaining agreement, or in Article 8 C – Specialty pay; instead, it was placed in Article 8B of the CBA<sup>4</sup> which reads, in relevant part, as follows:

A. Wage Adjustments. In applying wage adjustments in Schedule A the employee will receive the rate of the new schedule in accordance with his/her time in grade as required by the new schedule, however, if his/her present rate is

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<sup>4</sup> The terms Collective Bargaining Agreement (CBA) and Labor Agreement, when used in this decision, both refer to the same document covering the years 2007 to 2010.

higher than or equal to the entry level for the new classification, the employee's salary upon promotion shall be at the lowest step which results in a pay increase. However, if an employee is appointed to a classification within the same pay grade (Fire Inspector/Fire Lieutenant), they shall retain their anniversary date for future pay increases.

B. Apparatus Operator Certification. All unit member employees may be called on to operate Portland Fire & Rescue apparatus and vehicles, and are required to attain and maintain DPSST Apparatus Operator certification and a valid state Drivers License. Effective July 1, 2007, all unit members who earn and maintain DPSST Apparatus Operator certification and hold a valid state Drivers License shall receive an Apparatus Operator's Premium for two percent (2%) of the top step Fire Fighter base hourly rate. Effective July 1, 2008, all unit members who earn and maintain DPSST Apparatus Operator certification and hold a valid state Drivers License shall receive an Apparatus Operator's Premium for three percent (3%) of the top step Fire Fighter base hourly rate.

41. Every Fire Fighter who attains and maintains a valid driver's license and their DPSST certification receives the Apparatus Operator premium, regardless of assignment. Only fire fighters who attain and maintain a valid driver's license and DPSST certification receive the premium. Newly hired fire fighters who have not yet attained the DPSST certification, and fire fighters who lose their driver's license or DPSST certification are not eligible for the premium payment.

42. Apparatus Operator pay was designated as "premium pay" when first proposed by Local 43. That designation as "premium pay" was not modified when the final agreement was reached between the City and Local 43. Apparatus Operator premium pay was inserted in Article 8 and not in Schedule A of the CBA – Salary Rates, nor in Article 8C – Specialty pay.

43. The appendix to the Collective Bargaining Agreement between the City of Portland and Local 43 includes a schedule of wage rates. It was prepared by the City after the City and Local 43 reached agreement on salary rates. It includes Longevity Pay in each classification. It does not list Apparatus Operator pay.

44. After the City made an offer that included Apparatus Operator premium pay for the entire bargaining unit, Petitioner Joe Gray attended an open meeting at the Local 43 Hall in 2008. After the meeting, Petitioner Gray had a discussion with a negotiator from Local 43 about the proposal, but made no language suggestions concerning Apparatus Operator pay or any other contract provision. These discussions had no influence or impact on the bargaining process.

45. Yvonne Deckard has been the Director of the City's Bureau of Human Resources since 1999. Ms. Deckard was involved in the final negotiations of the 2007-2010 contract between the City and Local 43. Since January 1, 2007, Ms. Deckard has also served as the chair of the FPDR Board.

46. The 2007-10 agreement was ratified by the membership of Local 43 and then adopted by the City Council on June 4, 2008. Retroactive to July 1, 2007, all first class fire fighters who attain and maintain a valid driver's license and the DPSST Apparatus Operator certification receive Apparatus Operator premiums as part of their salaries. The immediate result of losing either of those certifications is that the Bureau reassigns the fire fighter to a non-driving duty to achieve operational flexibility, and the fire fighter is not given the Apparatus Operator premium payment. No fire fighter has ever actually been terminated, demoted, or laid off for failing to have a valid driver's license or DPSST certification for more than 30 days.

47. The new language of the 2007-2010 Local 43 collective bargaining agreement did not change the required duties or services of its members. Nothing changed operationally for the Fire Bureau under the new contract; only the pay rates changed, and several types of payments were added or enhanced; these include the addition of the Apparatus Operator premium and increases in Longevity Pay.

48. Under both the 2005-2007 and the 2007-10 Collective Bargaining Agreement between the City of Portland and the PFFA Local 43, all fire fighters are required to maintain their driver's license; all may be assigned to drive, and under the 2007-10 Agreement, all are subject to the provisions of Article 29.

#### **DISPUTED POINTS:**

**The following assertions are disputed by the City. No representations, however, are made herein as to whether any of the disputed points are regarded as dispositive of the issues in the case.**

49. At all times relevant, every sworn member of the Portland Fire Bureau has been required as a condition of employment, to maintain a valid driver's license and certification to drive emergency response vehicles.

50. At all times relevant, the City has maintained the right to progressively discipline, by reassignment, demotion, or termination, fire fighters who lost their driver's license for more than 30 days as a result of traffic crimes or other causes.

**The following assertions are disputed by the Claimants. No representations, however, are made herein as to whether any of the disputed points are regarded as dispositive of the issues in the case.**

51. The language in the Collective Bargaining Agreement, and not the bargaining history, is the manifest intent of the union and the City with regard to driving duties.

52. There is no provision in the Collective Bargaining Agreement that references driving duties as a condition of employment, or that failure to attain or maintain a driver's license or DPPST certification is grounds for termination or lay off.

(Signatures)"

(Joint Ex. 1).

### ADDITIONAL FINDINGS OF FACT

53. To be hired as a fire fighter by the City, a candidate must have a valid driver license and must obtain DPSST apparatus certification within the first year of employment. (Test. of Burns; Ex. M1 and Ex. A2).

54. The position formerly referred to as "First Class Fire Fighter" is now referred to as a "top step fire fighter." (Test. of Deckard). On April 9, 2008, Director Deckard sent a letter to all fire fighters addressing the AO pay provision in the Labor Agreement. She wrote:

a 3% Top Step FF wage increase (2% retroactive to 7/1/07, plus 1% effective 7/1/08), to all members for Apparatus Operator premium[.]

(Ex. M4 at 1).

55. Former union president Ken Burns agreed with Director Deckard that AO pay was to be a form of increased wages. He wrote to the fire fighters:

Some of the highlights of the contract include Apparatus Operator pay for all sworn members and longevity pay.

(Ex. M6).

56. The Lake Oswego Fire Department assigns specific individuals to train as apparatus operators, and pays them an additional percentage of regular pay to perform those duties. Those operators generally get a five-to-ten percent specialty pay for the assignment. This approach is the most common way for fire departments to address the apparatus operation need. (Test. of Burns).

### CONCLUSION OF LAW

"Apparatus Operator premium" pay in Article 8 of the Collective Bargaining Agreement between the City and Portland Firefighters' Association Local 43 should be included as part of "current salary of a First Class Firefighter" under Charter Section 5-126(11), as that salary is used to determine the retirement benefit of "FPDR One" retirees.

### OPINION

Claimants in this action are retirees, or surviving spouses of retirees, who receive FPDR benefits under a pre-1990 retirement plan known as "FPDR One."<sup>5</sup> They seek a ruling that the Apparatus Operator (AO) pay created in the 2007-2010 Labor Agreement should be included in

<sup>5</sup> As a rough guideline, FPDR One members worked and retired before 1990, FPDR Two members were hired between 1990 and 2007, and FPDR Three members were hired in 2007 or thereafter.

the wages of a "First Class Fire Fighter" for purposes of determining the amount of their pensions. Claimants have the burden of proof to establish entitlement to these additional pension amounts. FPDR Admin. Rule 5.6.04(A).

**Calculating FPDR One Pensions.** To understand the importance of this issue to claimants, it is necessary to briefly explain how the pensions for FPDR One members are set. The pensions are not based upon the job the retiree was performing, but rather are based on a percentage of the "current salary of a First Class Fire Fighter" as that phrase is used in the Charter.

**The Charter Language.** FPDR Charter Section 5-120 states in part:

**Section 5-120. Variation in Amount of Benefits or Pension Payments.** All benefits and pensions granted and paid under this Act shall vary annually and shall be based upon *the current salary of a First Class Fire Fighter \* \* \**, computed annually at the beginning of the fiscal year.

(Emphasis added). If the amount of that "current salary" goes up, then the amount of the pension also goes up according to the appropriate percentage.

The term "First Class Fire Fighter" is not currently used by the City, except in the pension language. That fire fighter is now referred to as a "top step fire fighter." (Test. of Deckard). Charter Section 5-126 states in part:

1. The term "First Class Fire Fighter" shall mean a member of the Bureau of Fire *who receives the maximum payment in the fire fighter classification*, as set forth in the classification of positions in the Bureau of Fire by the Civil Service Board, and in the event of the change of the name of said classification where the term "First Class Fire Fighter" is used it shall be that position by whatever name it may hereafter be called;

\* \* \* \* \*

11. The terms "current salary of a First Class Fire Fighter" or [similar police designation] *shall mean all wages or salary paid on a monthly basis to a member for service in that Civil Service classification. The terms shall not include wages or salaries for extra duties or extra services.*

(Ex. A1 at 46, 47; emphasis added).

Thus, pursuant to subsection (1), the salary upon which the pension is determined is the "maximum payment in the firefighter classification." Under subsection (11), I must determine whether AO pay is part of the wages or salary paid on a monthly basis, or whether it is paid for "extra duties or extra services." The emphasized portions of subsection (11) are the key language I must interpret in this case.

**The Labor Agreement Language.** The Labor Agreement reached between the City and PFFA, covering the 2007-2010 time period, created several assignment-based specialty pays for groups such as the Dive Team, HazMat Team, and others. To receive those pay increases, a fire fighter had to meet the requirements of team membership (e.g., SCUBA certification for Dive Team members), and had to be assigned to the team. The Labor Agreement referred to these assignments as “Specialty Pays.” (Ex. A2 at 7).

The City and the union also negotiated for an “Apparatus Operator Certification,” not included among the specialty pays, in the same contract. The agreement stated:

B. Apparatus Operator Certification. *All unit member employees* may be called on to operate Portland Fire & Rescue apparatus and vehicles, and *are required to attain and maintain DPSST Apparatus Operator certification and a valid state Drivers License.* Effective July 1, 2007, all unit members who earn and maintain DPSST Apparatus Operator certification and hold a valid state Drivers License shall receive an Apparatus Operator’s Premium for two percent (2%) of the top step Fire Fighter base hourly rate. Effective July 1, 2008, all unit members who earn and maintain DPSST Apparatus Operator certification and hold a valid state Drivers License shall receive an Apparatus Operator’s Premium for three percent (3%) of the top step Fire Fighter base hourly rate.

(*Id.* at 6; emphasis added). This section of the Labor Agreement is remarkable in its straightforward statement that all “unit member employees” are required to have a DPSST certification and a valid driver license. The importance of that point will be addressed below.

Before addressing that issue, however, I will address the evidence to show that AO pay is not one of the specialty pays in the Labor Agreement. First, the AO pay description is listed separately from specialty pays in the Labor Agreement.

Second, evidence from the City and the claimants shows that Portland’s approach to apparatus operation differs from the common method used in other fire departments. Even before 1990, the last time the retirees worked for the Department, the City and union both agreed that *all* of the fire fighters should be trained to operate apparatus as part of their job. That plan has historically added “operational flexibility” to the Department’s ability to fight fires.

Apparatus operation is a specialty pay in other fire departments. Other departments treat apparatus operators in exactly the same way as Portland treats the Dive Team or HazMat Team—requiring certification and a specific assignment to apparatus operation. For instance, the Lake Oswego Fire Department assigns specific individuals to train as apparatus operators, and pays them an additional percentage of regular pay to perform those duties. Those operators generally get a five-to-ten percent specialty pay for the assignment. This approach is the most common way for fire departments to address the apparatus operation need. (Test. of Burns).

Second, evidence from both the City and the union show that AO pay under the Labor Agreement was intended to increase the pay of every fire fighter—to, in essence, become a wage increase. During bargaining, the union was looking for a way to raise the wages of its fire

fighters at a time when the City could or would not consider an across-the-board wage increase for all city workers. The approach, therefore, was to create a wage increase that would apply only to the fire fighters.

The City's philosophy about apparatus operation (described above) had not changed, so AO pay was not included among the several assignment-based specialty pays being negotiated in the same Labor Agreement. Rather, because all fire fighters could be called on to operate apparatus, the AO pay would be granted to any fire fighter who had a valid driver license and a DPSST certification. Both sides expected this increase to go to all of the fire fighters because valid driver licenses and DPSST certifications were required of every fire fighter. This intent is important to my analysis.

Thus, AO pay was not just coincidentally based upon two criteria that most fire fighters already had; the decision was intentional. AO pay was intended to increase the wages or salary of all of the fire fighters, based upon two criteria that both the City and the union *expected* the fire fighters to have. The only fire fighters who would not qualify were probationary fire fighters (who would soon qualify) and disciplinary fire fighters (those who would be restored to full status and again qualify or, if that was not possible, would be demoted or laid off).

The evidence shows that this was the intent of both sides at the bargaining table. Chief Burns announced that AO pay was for "all sworn members." (Ex. M6). Director Deckard told the members that AO pay was a "wage increase" to "all members." (Ex. M4). Thus, both sides recognized that the AO pay was intended to go to every fire fighter who qualified.

**AO Pay Should be Included.** With these factors in mind, the analysis is quite straightforward. Under the Charter language, the AO pay is either part of the regular wages and salary of the First Class Fire Fighter, or it is pay for "extra duties or extra services." If AO pay is considered part of the "wages or salary paid on a monthly basis to a member for service in the Civil Service classification," the pay would be included in the maximum salary upon which the pension is based. If, as the City contends, AO pay is for "extra duties or extra services," it would not be included in the maximum salary.

Reviewing the language of the documents, there are two key points that convince me that AO pay should be included in the pension calculations.

First, under the Charter, the First Class Fire Fighter is a prototype rather than a person: He<sup>6</sup> is a fiction, a fire fighter who is working for the maximum salary in his class. It is the role, and not a specific person, that is the basis of the pension. His sole purpose is to determine a number, a wage or salary, upon which the pension is built.

This First Class Fire Fighter is at the maximum salary, so there are a few things that may be inferred about the prototype. He has been there long enough to earn the maximum salary (and also Longevity Pay under the Labor Agreement). And, because this is true, he is not a

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<sup>6</sup> The masculine is used for simplicity's sake, recognizing that the First Class Fire Fighter could be a man or a woman.

probationary fire fighter and he is not one currently being disciplined for loss of license or DPSST certification.

Many of the City's arguments focus on possible exceptions—circumstances that might be true about specific fire fighters (being probationary, losing a driver license but still being employed), but do not apply to the prototypical First Class Fire Fighter. Simply put, the First Class Fire Fighter is the fire fighter making the maximum salary in his position.

Second, despite the City's arguments, there are no "extra duties and extra services" necessary to obtain AO pay. The Labor Agreement, the job descriptions, and the testimony of witnesses all show that fire fighters are required to have a valid state driver license and DPSST certification to be fully employed as a fire fighter. Certainly, the First Class Fire Fighter at maximum salary is going to have both the valid license and the certification.

There may have been "extra duties" to obtain the DPSST certification when a fire fighter was a probationary employee, but those were duties completed years before the fire fighter became a First Class Fire Fighter and were actually conditions of employment. The City can point to no extra duties or services that the First Class Fire Fighter would have to perform to receive AO pay. In fact, the City's chief spokesman during the labor negotiations testified that (if the fire fighter had a license and the DPSST certification), receipt of AO pay was "automatic."<sup>7</sup>

Therefore, there is no merit to the argument that obtaining and maintaining a driver license and DPSST certification are "extra" because the fire fighter must obtain and maintain both, because both are expressly required as conditions of full employment as a fire fighter.<sup>8</sup> If the license and the certification are necessary to employment, then those criteria cannot in any reasonable way be described as "extra."<sup>9</sup>

In reaching this decision, I have carefully considered the arguments of both the City and the claimants. Although many of the City's arguments have been addressed above, I want to address the additional arguments more fully at this point.

*Deference to the Director.* The City contends that the Director's decision (that AO pay is not included in the pension calculation) is entitled to deference because the Director is a fiduciary of the pension and must apply the express terms of the pension plan. The City argues that the Director made this conclusion, now entitled to deference:

<sup>7</sup> The word "automatic" was not used by Herron, but he agreed the term was accurate. (Ex. M10 at 19).

<sup>8</sup> Exhibit M1 contains the job description for a fire fighter, and shows that any person on an engine company, a truck company, or a rescue company must be able to "drive and operate" the apparatus and vehicles.

<sup>9</sup> The City asserts there is a difference between a "minimum qualification for employment" and a "condition of employment." (Test. of Deckard). If there is, it is an unimportant distinction here. Regardless what it is called, there is clearly a requirement that fire fighters have a valid driver license and a DPSST certification. Certainly, the First Class Fire Fighter at maximum salary would meet those requirements.

The Director determined that a plain, natural and ordinary reading of the terms of the CBA and the charter demonstrate that the Apparatus Operator Premium are wages or salaries for extra duties or extra service and thus not part of an FPDR One Member's pension calculation.

(Arg. at 2). To support this argument, the City contends that pension decisions prior to 2007 did not follow the terms of the charter, and were done on an *ad hoc* basis with a "first-do-no-harm" protection of the Member. The City argues that since 2007 the pension decisions have followed the plan more closely.

However, as claimants point out, the City's argument lacks both evidence and a legal foundation. The City argues its case using ERISA<sup>10</sup> case law, but admits that ERISA law does not apply in this case. Furthermore, the City did not present any evidence about the implementation of Charter requirements, past or present. On this record, there is no basis to conclude that the City is interpreting the Charter any differently now than it did before 2007. Equally as important, it is not clear why such a change would be relevant.

The question of deference to the Director—even if appropriate—does not end my responsibility to interpret the provisions of the Charter and the Labor Agreement, nor does it preclude the application of those provisions to the facts of this case. The Director's interpretation, to the extent it is supported by any evidence, has been considered as I have considered all of the other evidence in the case.

However, the Director's interpretation is not binding. The Director's fiduciary responsibility to uphold the express terms of the plan makes it all the more important to determine what those terms mean.

*The "Explicit and Clear" Language.* The City's second argument is that:

the applicable provisions of the CBA and the FPDR plan in Chapter 5 are explicit and clear—when calculating an FPDR One's retiree's benefits, the "current salary of a First Class Fire Fighter" does not include premium pay (whether assignment based or not) such as Apparatus Operator Premium if they are "wages or salaries for extra duties or extra services."

(Arg. at 3)

This second argument has several parts, most of which have been addressed in my opinion above. I will here address the specific contention that AO pay cannot be part of the wages of a First Class Fire Fighter because the parties who created it agreed it was a "premium." (Arg. at 4).

AO pay is called a "premium" in the Labor Agreement, but the word "premium" is not defined in that Agreement. After careful consideration, I have concluded that the word is of little

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<sup>10</sup> ERISA refers to the Employee Retirement Income Security Act of 1974.

meaning and little help in the Labor Agreement, and in this dispute. The word adds no real information to the issue.

As the City notes, the general definition of "premium" suggests something more. *Webster's Third New International Dictionary* defines "premium," pertinently, as:

**1 a:** a reward or recompense for a particular act; \* \* \* **b:** something paid over and above a fixed wage, price or other remuneration.

(*Websters (2002 ed.)*, at 1789). On its face, this word would suggest, as Judge Breithaupt indicated, that a premium was for "something extra."<sup>11</sup>

However, despite the common meaning of the word, the evidence shows that nothing extra is required to obtain AO pay beyond the conditions of employment. It is not, therefore, a premium. The word is ambiguous in this context; it does not answer the pivotal question whether AO pay is part of the regular pay of the First Class Fire Fighter, or whether it is pay for extra duties or extra services.

As noted, the AO "premium" does not fit into the Specialty Pay category in the Labor Agreement. However, the evidence adduced at hearing demonstrates that both sides intended the AO pay to be a wage increase for the fire fighters. I consider that evidence more persuasive than the ambiguous use of the word "premium" in the Labor Agreement. Neither the Charter nor the Labor Agreement requires the addition or deletion of AO pay because it is called a premium. The test remains whether the pay is for "extra duties or extra services," and the evidence shows it was not.

In summary, the AO pay was intended to be a wage increase for all fire fighters who have a driver license and a DPSST certification. The First-Class Fire Fighter, now known as the top step fire fighter, would have both because both are required for full employment as a fire fighter. There are no extra duties or services the fire fighter must perform beyond the conditions of employment to obtain the AO pay. AO pay is therefore part of the regular wages of the First Class Fire Fighter for FPDR One pension purposes.

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<sup>11</sup> In *dicta*, the circuit court judge who granted the City's Motion for Summary Determination on procedural grounds apparently stated "a premium is logically for something extra." It is just as true to note that, if there is nothing extra required, it may have been mislabeled as a "premium."

**ORDER**

The decisions refusing to include Apparatus Operator pay in the regular pay of the First Class Fire Fighter, and refusing to determine the FPDR One pension amounts based upon the added Apparatus Operator pay, are REVERSED.

**Rick Barber**

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Administrative Law Judge  
Office of Administrative Hearings

**NOTICE TO ALL PARTIES:** If you are dissatisfied with this Final Order, pursuant to Administrative Rule 5.4.08 and ORS 34.030, you have sixty (60) days from the mailing date of the Final Order to petition for a Writ of Review with the Multnomah County Circuit Court. If a Petition for Writ of Review is not filed within sixty (60) days from the mailing date of the Final Order, then pursuant to ORS 34.030 the writ shall not be allowed.

**CERTIFICATE OF MAILING**

On April 27, 2011 I mailed the foregoing Final Order issued on this date in OAH Case No. 1001795 and consolidated cases 1001935 through 1001945.

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Certified Mail Receipt #7010 0290 0001 7076 6994

Henry Kaplan  
Bennett Hartman Morris & Kaplan  
210 SW Morrison St Ste 500  
Portland OR 97204-3149

By: First Class Mail

Nancy Hartline  
City of Portland, Fire and Police Disability Fund  
1800 SW First Ave  
Suite 450  
Portland OR 97201

Kenneth McGair  
City Attorney's Office  
1221 SW 4th Ave Ste 430  
Portland OR 97204

Scott Moede  
City Attorney's Office  
1221 SW 4th Ave Ste 430  
Portland OR 97204

Carol Buntjer  
Administrative Specialist  
Hearing Coordinator

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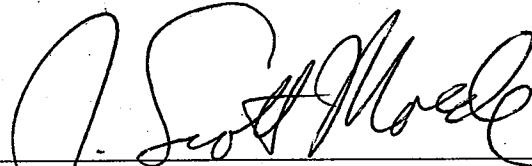
CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PETITION FOR WRIT OF REVIEW on:

Henry J. Kaplan  
Bennett, Hartman, Morris & Kaplan, LLP  
210 SW Morrison Street, Suite 500  
Portland, OR 97204-3149  
*Of Attorneys for Defendants*

Rick Barber  
Administrative Law Judge  
Office of Administrative Hearings  
P.O. Box 14020  
Salem, OR 97309-4020

on June 17<sup>th</sup>, 2011, by mailing to said attorney and Administrative Law Judge a correct copy thereof, contained in a sealed envelope, with postage paid, and deposited in the post office at Portland, Oregon, on said day.

  
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J. SCOTT MOEDE, OSB #934816  
Senior Deputy City Attorney  
Email: Scott.Moede@portlandoregon.gov  
Fax: (503) 823-3089  
Of Attorneys for Plaintiff