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2019 APR 25 PM 5:41

CITY OF OAKLAND



ONE FRANK H. OGAWA PLAZA • 6TH FLOOR • OAKLAND, CALIFORNIA 94612

Office of the City Attorney
Barbara Parker
City Attorney

(510) 238-3601
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May 7, 2019

HONORABLE CITY COUNCIL
Oakland, California

Subject: Retired Oakland Police Officers Association et. al. v. Oakland Police and Fire Retirement System, et. al.
Case No. RG16838274
City Attorney File No. X04324

President Kaplan and Members of the City Council:

Pursuant to Section 401 of the Charter, the City Attorney has prepared and requests your approval of a resolution authorizing compromise and settlement of the above-entitled action pursuant to the terms set forth in the Settlement Agreement attached hereto as Exhibit A.

This action arises out of a claim that Police and Fire Retirement System has been miscalculating holiday pay retirement benefits for its members who held the rank of police officer, sergeant, inspector or lieutenant for some or all of the 36-month period immediately preceding their retirement.

The Council authorized settlement of this case pursuant to the terms set forth in the Settlement Agreement attached hereto as Exhibit A in Closed Session on Tuesday, January 22, 2019 (moved by Vice Mayor Larry Reid and seconded by Councilmember Noel Gallo - 8 Ayes, 0 Noes).

Respectfully submitted,


BARBARA J. PARKER
City Attorney

Assigned Attorney:
Maria Bee, Assistant City Attorney
Jennifer Logue, Supervising City Attorney
Adam Hoffman, Outside Counsel
2741075

Settlement Agreement

In consideration of the mutual agreements and promises set forth below, the Parties to this Settlement Agreement (“Agreement”) hereby agree as follows:

I. Purpose and Scope of Agreement

~~This Agreement is entered into as of March __, 2019, by and among the following Parties:~~

Plaintiffs and Petitioners: Retired Oakland Police Officers Association; Robert Aven; Nita Balousek; Ronald Gunar; Raymond Miller; Ned Ubben (“Plaintiffs”);

Defendants and Respondents: City of Oakland; Oakland Police and Fire Retirement System (“PFRS”); Oakland Police and Fire Retirement System Board (“Defendants”).

The Parties are entering into this Agreement to compromise, resolve and settle Plaintiffs’ claims in the action entitled *Retired Oakland Police Officers Association et al. v. Oakland Police and Fire Retirement System et al.*, Alameda Superior Court Case No. RG16838274 (“Lawsuit”).

For purposes of calculating compensation attached to the average rank held under Article XXVI of the Oakland City Charter, PFRS currently credits members who are retirees and beneficiaries of retirees who held the rank of police officer, sergeant, inspector or lieutenant for some or all of the 36-month period immediately preceding their retirement (“Covered Retirees and Beneficiaries”) with 144 hours per annum for holiday pay in calculating their retirement allowance or benefit. Plaintiffs claim that Covered Retirees and Beneficiaries are entitled to be credited with a higher number of hours for holiday pay, including “floating holiday” pay. Defendants dispute Plaintiffs’ claims. The purpose of this Agreement is to settle this dispute for the period covered by the Lawsuit through June 30, 2024, when the 2019-2024 Memorandum of Understanding between the City of Oakland and the Oakland Police Officers Association (“the new MOU”) is scheduled to expire. This is a resolution of disputed claims and is not an admission of liability by any Party or the absence of liability on the part of any other Party, nor does it constitute an admission that averages may be used to determine compensation attached to the rank.

This Agreement does not settle or resolve any claims of members who are retirees or beneficiaries of retirees who held the ranks of captain and deputy chief of police at retirement, *provided however*, this Agreement does apply to the portion, if any, of the 36-month period immediately preceding retirement that such retirees held the rank of police officer, sergeant, inspector or lieutenant. The Parties specifically reserve for separate resolution the calculation of holiday pay benefits for retirees and beneficiaries of retirees who held the rank of captain or deputy chief.

This Agreement does not bar claims by any individual retiree or beneficiary not named herein. Pursuant to the terms of this Agreement, for purposes of calculating retirement allowances and benefits PFRS will credit Covered Retirees and Beneficiaries with 144 hours per annum for holiday pay, *provided however*, Defendants expressly reserve all rights, claims and

defenses with respect to any non-party retiree or beneficiary who hereafter asserts a claim demanding to be credited with a different number of holiday pay hours for any of the period covered by this Agreement.

II. Settlement

A. Credit for Holiday Pay for Covered Retirees and Beneficiaries.

For the purpose of calculating retirement allowances and benefits for PFRS members who are retirees and beneficiaries of retirees who held the ranks of police officer, sergeant, inspector, and lieutenant, and subject to the terms and conditions stated in Section I above, PFRS shall credit Covered Retirees and Beneficiaries with 144 hours for holiday pay per annum during the term of this Agreement.

This holiday pay benefits methodology shall continue from the date hereof until the earlier of: (a) July 1, 2024; or (b) the effective date of any MOU amendment adopted hereafter that results in a material change in the average number of hours of holiday pay received by active sworn police below the rank of captain. (The use of the phrase “average number of hours of holiday pay received by active sworn police below the rank of captain” in this Agreement is used solely for purposes of determining whether an MOU amendment terminates this Agreement. The Parties agree that by using this terminology, Petitioners in no way concede that use of averages is proper in the calculation of holiday pay; Respondents agree that Petitioners have made no such concession.) The Party seeking to terminate the Agreement is responsible for providing evidence of a material change.

B. Term of Agreement. The term of this Agreement (“Term”) is from the date hereof until the earlier of: (a) July 1, 2024; or (b) the effective date of any MOU amendment adopted hereafter that results in a material change in the average number of hours of holiday pay received by active sworn police below the rank of captain.

C. Terms and Conditions for Active Sworn Officers. This settlement does not prevent the City of Oakland and the Oakland Police Officers Association from re-negotiating the way holiday pay is calculated for active sworn police, or from negotiating any other term or condition of employment for said active sworn officers.

D. Waiver and Release. Plaintiffs hereby waive and release any and all claims against Defendants that, at any time during the period commencing three years before the filing of the Lawsuit through the Term of this Agreement (the “Settlement Period”), Plaintiffs are entitled to be credited with more than 144 hours per annum for holiday pay (including, without limitation, “floating holiday” pay). Defendants hereby waive and release any and all claims that during the Settlement Period Plaintiffs should be credited with fewer than 144 hours per annum for holiday pay. Defendants further agree that in the event an MOU amendment is adopted hereafter that results in a material change in the average number of hours of holiday pay received by active sworn police below the rank of captain, PFRS will only adjust retirement allowances and benefits from the effective date of such changes and will not assert any claim for overpayments on account of payments made pursuant to this Agreement before such date.

E. Dismissal and Covenant Not to Sue. Promptly after execution of this Agreement by all Parties, Plaintiffs will dismiss the Lawsuit without prejudice. Plaintiffs hereby agree that during the Term of this Agreement they will not re-file the same or similar claims on behalf of themselves or Covered Retirees and Beneficiaries, or provide financial or other support for litigating such a claim. Plaintiffs further agree that they will not, after the Term of this Agreement, file the same or similar claims on behalf of themselves or Covered Retirees and Beneficiaries seeking relief for any portion of the Settlement Period except to enforce the terms of this Agreement. Notwithstanding the foregoing, nothing in this Agreement shall prevent Plaintiffs from filing claims pertaining to the same or similar claims on behalf of, and based upon a member's status as, a retiree or beneficiary of a retiree who held the rank of captain or deputy chief.

F. Costs and Fees. Each side will bear their own costs and fees, including expert fees and attorneys' fees.

G. Admissibility of Settlement Agreement. This Settlement Agreement shall not be admissible in a court of law or other proceeding except to secure its enforcement.

H. Warranty of Authority; Successors and Assigns. Each Party who executes this Agreement warrants that he or she has the authority to bind the person or entity on whose behalf he or she signs and that he or she is authorized to sign on behalf of the principal. This Agreement shall inure to the benefit of, and is binding upon, each Party's heirs, successors and assigns.

I. Right to Consult Attorney. Each Party acknowledges that each of them has read this Agreement and has had the opportunity to consult with attorneys as to the meaning and legal effect of the Agreement.

J. Voluntary Execution of Agreement. The Parties acknowledge, agree and understand that each of them executes this Agreement voluntarily and without any duress or undue influence on the part of, or on behalf of, any person or entity; and that no promise, inducement or agreement not expressed herein has been made by any Party to any other Party.

K. Acts in Furtherance of this Agreement. The Parties agree to execute, deliver and, where appropriate, file any and all documents required to carry out this Agreement.

L. Mutual Drafting. This Agreement is the product of negotiations and preparation by and among the Parties and their respective counsel. The Parties agree that this Agreement shall not be deemed prepared or drafted by one Party or another, or by one Party's or another's attorneys. The language of this Agreement shall be construed according to its fair meaning, and not strictly for or against any of the Parties. The Parties expressly waive the provisions of Cal. Civ. Code § 1654. The Parties agree that prior drafts of this Agreement were made pursuant to settlement privilege and shall not be admissible to show the meaning of the Agreement.

EXHIBIT A

M. Applicable Law. This Agreement shall be construed and enforced in accordance with the laws of the State of California.

N. Execution in Counterparts; Facsimile Signatures. This Agreement may be executed in one or more duplicate counterparts, all of which taken together shall constitute the complete Agreement. A faxed signature shall have the same force and effect as an original signature.

FOR PLAINTIFFS:

Dated: March _____, 2019

Retired Oakland Police Officers Association

By: _____
Peter Peterson, President

Dated: March _____, 2019

Robert Aven

By: _____
Robert Aven

Dated: March _____, 2019

Nita Balousek

By: _____
Nita Balousek

Dated: March _____, 2019

Ronald Gunar

By: _____
Ronald Gunar

EXHIBIT A

Dated: March _____, 2019

Raymond Miller

By: _____

Raymond Miller

Dated: March _____, 2019

Ned Ubben

By: _____

Ned Ubben

FOR DEFENDANTS AND RESPONDENTS:

Dated: March _____, 2019

City of Oakland

By: _____

Dated: March _____, 2019

Oakland Police and Fire Retirement System

By: _____

EXHIBIT A

Dated: March _____, 2019

Oakland Police and Fire Retirement System
Board

By: _____

APPROVED AS TO FORM:

Dated: March _____, 2019

McCracken, Stemerma & Holsberry, LLP

By: _____
Sarah Grossman-Swenson
Counsel for Plaintiffs and Petitioners

Dated: March _____, 2019

Hanson Bridget, LLP

By: _____
Adam Hofmann
Counsel for Defendant and
Respondent City of Oakland

Dated: March _____, 2019

Gordon & Polland, LLP

By: _____
Paul Gordon
Counsel for Defendants and
Respondents Oakland Police and
Fire Retirement System and PFRS
Board

FILED
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Approved as to Form and Legality


City Attorney's Office

OAKLAND CITY COUNCIL

RESOLUTION NO. _____ C.M.S.

RESOLUTION AUTHORIZING AND DIRECTING THE CITY ATTORNEY TO COMPROMISE AND SETTLE THE CASE OF *RETIRED OAKLAND POLICE OFFICERS ASSOCIATION ET. AL. v. OAKLAND POLICE AND FIRE RETIREMENT SYSTEM ET. AL.*, ALAMEDA COUNTY SUPERIOR COURT CASE NO. RG16838274, REGARDING HOLIDAY PAY CALCUATIONS FOR POLICE RETIREES CLASSIFIED BELOW THE RANK OF CAPTAIN

WHEREAS, pursuant to Article XXVI of City of Oakland Charter, retirees of the Oakland Police Department who are members of the Oakland Police and Fire Retirement System ("Covered Retirees") are entitled to receive a retirement allowance that is based on "compensation attached to the average rank held" during the three years immediately preceding retirement; and

WHEREAS, "compensation attached to rank" for Covered Retirees currently includes, but is not limited to, holiday pay; and

WHEREAS, the Oakland Police and Fire Retirement System currently credits Covered Retirees who held the rank of police officer, sergeant, inspector or lieutenant during the three years immediately preceding retirement with 144 hours of holiday pay per year; and

WHEREAS, on November 8, 2016, the Retired Oakland Police Officers Association, Ronald Gunar, Ned Ubben, Raymond Miller, Robert Aven, and Nita Balousek (collectively "Plaintiffs") filed a lawsuit, Alameda County Superior Court Case No. RG16838274, against the Oakland Police and Fire Retirement System ("PFRS"), the Oakland Police and Fire Retirement System Board ("PFRS Board"), and the City of Oakland alleging that PFRS has been miscalculating the holiday pay retirement benefit received by Covered Retirees and that Covered Retirees who held the rank of police officer, sergeant, inspector or lieutenant are entitled to more than 144 hours of holiday pay per year ("Lawsuit"); and

WHEREAS, all parties to the Lawsuit wish to compromise, resolve and settle Plaintiffs' claims in the Lawsuit pursuant to the terms set forth in the Settlement Agreement attached hereto as **Exhibit A**; now, therefore, be it

RESOLVED: That the City Attorney is authorized and directed to compromise and settle the case of *Retired Oakland Police Officers Association et al. v. Oakland Police and Fire Retirement System et al.*, Alameda Superior Court Case No. RG16838274, pursuant to the terms set forth in the Settlement Agreement attached hereto as **Exhibit A**; and be it

FURTHER RESOLVED: That the City is authorized and directed to take whatever steps as may be necessary to effect said settlement.

IN COUNCIL, OAKLAND, CALIFORNIA,

PASSED BY THE FOLLOWING VOTE:

AYES - FORTUNATO BAS, GALLO, GIBSON MCELHANEY, KALB, REID, TAYLOR, THAO AND
PRESIDENT KAPLAN

NOES -

ABSENT -

ABSTENTION -

ATTEST: _____

LATONDA SIMMONS
City Clerk and Clerk of the Council of the
City of Oakland, California

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Defendants and Respondents: City of Oakland; Oakland Police and Fire Retirement System (“PFRS”); Oakland Police and Fire Retirement System Board (“Defendants”).

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This Agreement does not settle or resolve any claims of members who are retirees or beneficiaries of retirees who held the ranks of captain and deputy chief of police at retirement, *provided however*, this Agreement does apply to the portion, if any, of the 36-month period immediately preceding retirement that such retirees held the rank of police officer, sergeant, inspector or lieutenant. The Parties specifically reserve for separate resolution the calculation of holiday pay benefits for retirees and beneficiaries of retirees who held the rank of captain or deputy chief.

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II. Settlement

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D. Waiver and Release. Plaintiffs hereby waive and release any and all claims against Defendants that, at any time during the period commencing three years before the filing of the Lawsuit through the Term of this Agreement (the “Settlement Period”), Plaintiffs are entitled to be credited with more than 144 hours per annum for holiday pay (including, without limitation, “floating holiday” pay). Defendants hereby waive and release any and all claims that during the Settlement Period Plaintiffs should be credited with fewer than 144 hours per annum for holiday pay. Defendants further agree that in the event an MOU amendment is adopted hereafter that results in a material change in the average number of hours of holiday pay received by active sworn police below the rank of captain, PFRS will only adjust retirement allowances and benefits from the effective date of such changes and will not assert any claim for overpayments on account of payments made pursuant to this Agreement before such date.

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F. Costs and Fees. Each side will bear their own costs and fees, including expert fees and attorneys' fees.

G. Admissibility of Settlement Agreement. This Settlement Agreement shall not be admissible in a court of law or other proceeding except to secure its enforcement.

H. Warranty of Authority; Successors and Assigns. Each Party who executes this Agreement warrants that he or she has the authority to bind the person or entity on whose behalf he or she signs and that he or she is authorized to sign on behalf of the principal. This Agreement shall inure to the benefit of, and is binding upon, each Party's heirs, successors and assigns.

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FOR PLAINTIFFS:

Dated: March _____, 2019

Retired Oakland Police Officers Association

By: _____
Peter Peterson, President

Dated: March _____, 2019

Robert Aven

By: _____
Robert Aven

Dated: March _____, 2019

Nita Balousek

By: _____
Nita Balousek

Dated: March _____, 2019

Ronald Gunar

By: _____
Ronald Gunar

EXHIBIT A

Dated: March _____, 2019

Raymond Miller

By: _____

Raymond Miller

Dated: March _____, 2019

Ned Ubben

By: _____

Ned Ubben

FOR DEFENDANTS AND RESPONDENTS:

Dated: March _____, 2019

City of Oakland

By: _____

Dated: March _____, 2019

Oakland Police and Fire Retirement System

By: _____

EXHIBIT A

Dated: March _____, 2019

Oakland Police and Fire Retirement System
Board

By: _____

APPROVED AS TO FORM:

Dated: March _____, 2019

McCracken, Stemerma & Holsberry, LLP

By: _____
Sarah Grossman-Swenson
Counsel for Plaintiffs and Petitioners

Dated: March _____, 2019

Hanson Bridget, LLP

By: _____
Adam Hofmann
Counsel for Defendant and
Respondent City of Oakland

Dated: March _____, 2019

Gordon & Polland, LLP

By: _____
Paul Gordon
Counsel for Defendants and
Respondents Oakland Police and
Fire Retirement System and PFRS
Board