

IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Frank Piccioli et. al.,	)	Case No.: CV2012-010330
	)	
Plaintiffs,	)	<b>FINDINGS OF FACT AND</b>
v.	)	<b>CONCLUSIONS OF LAW</b>
	)	
City of Phoenix et. al.,	)	<b>(Assigned to the Hon. Mark H. Brain)</b>
	)	
Defendants,	)	
	)	
v.	)	
	)	
Stuart Casey, et al.,	)	
	)	
Intervenors.	)	
_____	)	

This matter came before the court for a bench trial in April and May, 2015. Having considered the evidence presented and the parties’ post-trial briefs and proposed findings, the court finds and concludes as follows.

**PARTIES**

1. Individual Plaintiffs and Intervenors (hereafter collectively referred to as “Plaintiffs”) are current employees and retirees of the City of Phoenix (“City”) who, on or before July 8, 2012, participated in the City of Phoenix Employees’ Retirement Plan (“COPERS” or “Retirement Plan”), a defined-benefit plan established pursuant to Chapter XXIV of the Charter of the City of Phoenix (“Charter”).

2. Plaintiff Frank Piccioli is an employee of the City of Phoenix and a member of Unit 3. Mr. Piccioli worked for the City from in or around 1999 through 2000 and began working for the City again in or around 2002 and has continuously worked for the City since that date. Mr. Piccioli is an “Employee” of the City and a “Member” of the Retirement Plan as those terms are defined in the Retirement Plan and is entitled to pension benefits under the Retirement Plan upon his retirement or eligibility for a deferred pension.

3. Plaintiff Debra Novak-Scott is an employee of the City of Phoenix and a member of Unit 3. Ms. Novak-Scott began working for the City in or around April 1984 and has continuously worked for the City since that date. Ms. Novak-Scott is a Member of the Retirement Plan and is entitled to pension benefits under the Retirement Plan upon her retirement or eligibility for a deferred pension.

4. Plaintiff Luis Schmidt is an employee of the City of Phoenix and a member of Unit 2. Mr. Schmidt began working for the City in or around August 1998 and has continuously worked for the City since that date. Mr. Schmidt is a Member of the Retirement Plan and is entitled to pension benefits under the Retirement Plan upon his retirement or eligibility for a deferred pension.

5. Ronald Ramirez is an employee of the City of Phoenix and a member of Unit 7. Mr. Ramirez began working for the City in or around 1986 and has continuously worked for the City since that date. Mr. Ramirez is a Member of the Retirement Plan and is entitled to pension benefits under the Retirement Plan upon his retirement or eligibility for a deferred pension.

6. Plaintiff AFSCME Local 2960 is a voluntary nonprofit labor organization affiliated with the American Federation of State, County and Municipal Employees, AFL-CIO International Union, which is the largest labor organization representing public employees in the United States. AFSCME Local 2960 is the certified Meet and Confer bargaining representative

for Unit 3 employees within the City of Phoenix Meet and Confer Ordinance. Unit 3 employees include clerical and pre-professional City of Phoenix employees. Local 2960 has entered into a series of binding and enforceable Memoranda of Understanding with the City of Phoenix pursuant to the City's Meet and Confer Ordinance that covers wages, hours and working conditions. Local 2960 also handles grievances and issues involving wages, hours and working conditions for City of Phoenix Unit 2 employees. Plaintiff Frank Piccioli is the current President of AFSCME Local 2960. Plaintiff Debra Novak-Scott is the current Vice-President of AFSCME Local 2960.

7. Plaintiff AFSCME Local 2384 is a voluntary nonprofit labor organization affiliated with the American Federation of State, County and Municipal Employees, AFL-CIO International Union, which is the largest labor organization representing public employees in the United States. AFSCME Local 2384 is the certified Meet and Confer bargaining representative for Unit 2 employees within the City of Phoenix Meet and Confer Ordinance. Field Unit 2 employees are skilled trades workers employed by the City of Phoenix. Local 2384 has entered into a series of binding and enforceable memoranda of understanding with the City of Phoenix pursuant to the City's Meet and Confer Ordinance that covers wages, hours and working conditions. Local 2384 also handles grievances and issues involving wages, hours and working conditions for Unit 2 employees. Plaintiff Luis Schmidt is the current President of AFSCME Local 2384.

8. Plaintiff ASPTEA is a voluntary nonprofit labor organization. ASPTEA is the representative for Unit 7 employees within the City of Phoenix Meet and Discuss Ordinance. ASPTEA has entered into a series of binding and enforceable memoranda of agreement with the City of Phoenix pursuant to the City's Meet and Discuss Ordinance that covers wages, hours and working conditions. Plaintiff Ronald Ramirez was the President of ASPTEA during the 2012 negotiations. Charlene Limbeck was on the ASPTEA Board of Directors from either 1994 or

1995, became the Board Secretary in 1999 and served as ASPTEA Board Secretary until her retirement in 2013. Jason Stokes is the current President of ASPTEA. Prior to his current position as ASPTEA, Mr. Stokes was Chief Representative and on the Board of Directors of ASPTEA beginning in 2007.

9. Intervenor Stuart Casey was an employee of the City of Phoenix from on or about February 11, 1985 through on or about November 26, 2012 and was employed in Unit 7 at the time of his retirement. Mr. Casey was and is a “Member” of the Retirement Plan. Mr. Casey retired from the City on or about November 26, 2012 and is currently receiving pension benefits under the Retirement Plan.

10. Intervenor Virginia Cota was an employee of the City of Phoenix from on or about January 19, 1981 through on or about November 26, 2012 and was employed in Unit 7 at the time of her retirement. Ms. Cota was and is a “Member” of the Retirement Plan. Ms. Cota retired from the City on or about November 30, 2012 and is currently receiving pension benefits under the Retirement Plan.

11. Intervenor Paul F. Enniss was an employee of the City of Phoenix from in or around March 1987 through on or about September 30, 2013 and was employed in Unit 2 at the time of his retirement. Mr. Enniss was and is a “Member” of the Retirement Plan. Mr. Enniss retired from the City on or about October 1, 2013 and is currently receiving pension benefits under the Retirement Plan.

12. Intervenor Vivian Escobar was an employee of the City of Phoenix from on or about June 9, 1980 through on or about November 27, 2013 and was employed in Unit 7 at the time of her retirement. Ms. Escobar was and is a “Member” of the Retirement Plan. Ms. Escobar retired from the City on or about November 27, 2013 and is currently receiving pension benefits under the Retirement Plan.

13. Intervenor John F. Estes was an employee of the City of Phoenix from on or about December 15, 1987 through in or around November 2012 and was employed in Unit 3 at the time of his retirement. Mr. Estes was and is a “Member” of the Retirement Plan. Mr. Estes retired from the City in or around November 2012 and is currently receiving pension benefits under the Retirement Plan.

14. Intervenor Philip Koda was an employee of the City of Phoenix from in or around April 1995 through on or about November 25, 2013 and was employed in Unit 3 at the time of his retirement. Mr. Koda was and is a “Member” of the Retirement Plan. Mr. Koda retired from the City on or about November 25, 2013 and is currently receiving pension benefits under the Retirement Plan.

15. Intervenor John Lay was an employee of the City of Phoenix from on or about May 18, 1998 through on or about March 25, 2013 and was employed in Unit 2 at the time he terminated employment. Mr. Lay was and is a “Member” of the Retirement Plan. Mr. Lay retired from the City in or around June 2013 and is currently receiving pension benefits under the Retirement Plan.

16. Intervenor Louis Matamoros was an employee of the City of Phoenix from in or around 1985 through on or about October 19, 2012 and was employed in Unit 7 at the time of his retirement. Mr. Matamoros was an “Employee” of the City and was and is a “Member” of the Retirement Plan. Mr. Matamoros retired from the City on or about October 19, 2012 and is currently receiving pension benefits under the Retirement Plan.

17. Intervenor David Meiner was an employee of the City of Phoenix from on or about January 11, 1988 through on or about November 26, 2012 and was employed in Unit 2 at the time of his retirement. Mr. Meiner was and is a “Member” of the Phoenix Retirement Plan. Mr.

Meiner retired from the City on or about November 26, 2012 and is currently receiving pension benefits under the Retirement Plan.

18. Intervenor Joan Olson was an employee of the City of Phoenix from on or about September 25, 1988 through on or about December 11, 2013 and was employed in Unit 7 at the time of her retirement. Ms. Olson was and is a “Member” of the Retirement Plan. Ms. Olson retired from the City on or about December 11, 2013 and is currently receiving pension benefits under the Retirement Plan.

19. Intervenor Willie R. Price, Jr. was an employee of the City of Phoenix from on or about September 19, 1988 through on or about November 13, 2013 and was employed in Unit 7 at the time of his retirement. Mr. Price was and is a “Member” of the Retirement Plan. Mr. Price retired from the City on or about November 13, 2013 and is currently receiving pension benefits under the Retirement Plan.

20. Intervenor David Robinson was an employee of the City of Phoenix from on or about February 5, 2001 through on or about November 27, 2013 and was employed in Unit 2 at the time of his retirement. Mr. Robinson was and is a “Member” of the Retirement Plan. Mr. Robinson retired from the City on or about November 27, 2013 and is currently receiving pension benefits under the Retirement Plan.

21. All Intervenors were active City employees and Members of the Retirement Plan prior to and after July 8, 2012.

22. Plaintiffs and Intervenors are “Members” of the Retirement Plan who have both vested and contractual rights to retirement benefits under the terms of the Retirement Plan.

23. Defendant, City of Phoenix, at all times relevant was and is a political subdivision of the State of Arizona and the public employer of Individual Plaintiffs and the former employer of Intervenors.

24. Defendant, City of Phoenix Retirement System is a named defendant in this action and a real party in interest.

25. Defendant, City of Phoenix Retirement Systems Board (“Retirement Board,” or “Board”) is the nine-member board established under the Retirement Plan and is a real party in interest.

### **COPERS**

26. The City of Phoenix Employees’ Retirement Plan<sup>1</sup> is a statutory defined benefit plan established in the Charter of the City of Phoenix (“City Charter”). Article II of Chapter 24 of the City of Phoenix Charter, the City of Phoenix Retirement Law of 1953, as amended from time to time, sets forth the provisions of the Retirement Plan including provisions regarding the retirement benefits to which individual Plaintiffs are entitled. The Plan was created to provide retirement, survivor and disability benefits to general City employees. Any active, permanent, full-time City employee, other than public safety personnel, is a “member” or “participant” in COPERS.

27. COPERS is administered by the Board. Section 4.1 of the Plan grants the Board full discretionary power and authority to administer COPERS, stating: “The authority and responsibility for the administration, management and operation of the Retirement Plan and for construing and carrying into effect the provisions of this Article, except as otherwise provided in this Article, are vested in a Retirement Board.” Section 36 of COPERS allows the Board Discretion to develop a practical solution for errors in the administration and operation of the Plan.

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<sup>1</sup> The court will refer to this as the Retirement Plan or the Plan.

28. Upon meeting the eligibility criteria for a particular type of retirement under COPERS, actually retiring, and proper application for a COPERS' pension, a participant in the Plan will receive a pension benefit calculated pursuant to a formula set forth in the Plan. The amount of a participant's pension benefit is calculated by multiplying the participant's "final average compensation" by the relevant "benefit rate" or "multiplier factor" set forth in the Plan, and then multiplying this product by the relevant portion of a participant's "credited service."

29. Members who meet the Retirement Plan's eligibility criteria, retire and properly apply for a pension can elect various pension options, including a straight life annuity pension or a reduced pension which provides that his/her beneficiary will receive benefits in the event of the Member's death. Retirement Plan §§ 19, 24.1.

30. The Charter provides for deferred vested pension benefits for Members who, *inter alia*, leave employment with more than 5 years of service, and disability pension benefits for Members with more than 10 years of credited service who become disabled. Retirement Plan §§ 20, 21.

31. Any member who has at least 5 years of service with the City and meets the eligibility criteria for retirement including the attainment of a specified age or combination of age and years of service, who files a proper application for a pension and who actually retires can elect to retire with a defined benefit pension calculated pursuant to the formula set forth in the Retirement Plan. § 17.

32. Since 1953, all Members who meet the eligibility criteria, who retire, and who properly apply for a pension have been entitled to defined benefits at retirement or their eligibility date or a deferred pension based on pension benefit formulas that take into account each Member's final average compensation and credited service. ST ¶ 30.

33. Under § 2.7 of the Retirement Plan, "Service" means personal service rendered to the City by an employee of the City and shall include service rendered in any function or enterprise the City may engage in as a municipal corporation or may have heretofore acquired through purchase or eminent domain. Under § 2.8 of the Retirement Plan, "Credited Service" means "the number of years and months of service credited a member by the Retirement Board[.]"

34. Section 2.14 of COPERS defines "final average compensation," in relevant part, as follows:

"Final average compensation" means the average of the highest annual compensations paid a member for a period of 3 consecutive, but not necessarily continuous, years of his credited service contained within his 10 years of credited service immediately preceding the date his City employment last terminates. If he has less than 3 years of credited service, his final average compensation shall be the average of his compensations for his total period of service.

35. Section 2.13 of COPERS defines "compensation" as follows:

"Compensation" means a member's salary or wages paid him by the City for personal services rendered by him to the City. In case a member's compensation is not all paid in money the City Council shall, upon recommendation by the City Manager, fix the value of the portion of his compensation which is not paid in money.

36. Sections 14.4 and 19.1(a) of COPERS provide that a Member will be granted service credit for all unused sick leave standing to his or her credit at retirement, death or termination of City employment. None of the COPERS terms expressly require amounts an employee is paid by the City for unused sick time to be included in final average compensation (as opposed to receiving service credit for the unused sick leave pursuant to these provisions). Specifically, "sick leave" is not "a member's salary or wages paid to him by the City for personal services rendered by him to the City" pursuant to Section 2.13.

37. Sick leave does fall within the second sentence of Section 2.13. Sick leave is not paid for by the City in money. Indeed, it is the right to take a paid day off if one is sick without penalty (i.e., non-monetary compensation).<sup>2</sup> Unused sick leave, therefore, is the type of compensation which the City Council shall, upon recommendation by the City Manager, “fix the value of.”

38. The Retirement Board is an entity established pursuant to the Retirement Plan and is assigned the responsibility for the administration, management and operation of the Retirement Plan and for construing and carrying into effect its provisions. It consists of nine (9) members enumerated in the Retirement Plan. Three Board members who are active City employees who are also Members of the Retirement Plan, are elected by Members of the Retirement Plan. Two Board members consist of a retired City employee who is a Member of COPERS, who is elected by the employee Board members, and a private citizen, who is elected by the other Board members. Four ex-officio, voting Board Members consist of the City Manager or his designee, the City Treasurer, the City Finance Director and an appointed department head, (historically, the Personnel Director – later renamed the Human Resources Director). Historically, the City Manager has appointed a Deputy City Manager to stand in the shoes of the City Manager on the Board. During the relevant time period, Retirement Plan had and continues to have a Retirement Plan Administrator who serves as the chief operating officer of the Retirement Plan, fulfills the function of Executive Secretary set forth under § 5.2 of the Retirement Plan and reports directly to the Board. In 1996 and 1997, the Retirement Plan Administrator was Duamel Vellon. From in or around May 2001 to in or around February 2013, the Retirement Plan Administrator was Donna

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<sup>2</sup> At times, various witnesses suggested that non-monetary compensation was limited to things like the provision of living quarters for a park ranger. The court sees no principled distinction between such forms of compensation and sick leave.

Buelow. All Retirement Board members and the Retirement Plan Administrator have fiduciary duties. The Retirement Plan is not a department of the City of Phoenix. Under the Charter, neither the Mayor, City Council nor City Manager have independent authority or responsibility for the operation or administration of the Retirement Plan.

### **MEET AND CONFER/DISCUSS ORDINANCES AND PRACTICES**

39. During the relevant time period, the City of Phoenix has had a Meet and Confer Ordinance in force which requires the City to bargain with certain groups of its employees and their representatives concerning compensation, wages, work hours and other terms and conditions of employment. The Meet and Confer Ordinance sets forth a process by which the City and representatives of various employee groups (including Units 1, 2 & 3) negotiate, bargain and reach agreements on compensation, wages, work hours and other terms and conditions of employment.

40. During the relevant time period, the City of Phoenix has had a Meet and Discuss Ordinance in force which requires the City to meet and discuss with certain of its employees and their representatives (namely, Units 7 & 8) concerning compensation, wages, work hours and other terms and conditions of employment. The Meet and Discuss Ordinance sets forth a process by which the City and representatives of Units 7 & 8 negotiate, bargain and reach agreements on compensation, wages, work hours and other terms and conditions of employment.

41. Unit 1 is not a party to this lawsuit. Unit 1 is a bargaining unit recognized by the City of Phoenix under the Meet and Confer Ordinance and consists principally of unskilled laborers and related entry level positions. During the relevant time, Unit 1 employees have been represented by the Labors International Union of North America (“LIUNA”), Local 777. Ex. 1, D001049. Neither LIUNA Local 777 nor any Unit 1 City employee is a plaintiff in this lawsuit.

42. Unit 2 is a bargaining unit recognized by the City of Phoenix under the Meet and Confer Ordinance and consists principally of skilled laborers and building trades employees. AFSCME Local 2384 is the certified Meet and Confer bargaining representative for Unit 2 employees. All City of Phoenix employees who fall within the definition of Unit 2 employees are covered by the Memorandum of Understanding (“MOU”) between Local 2384 and the City of Phoenix in force and applicable to Unit 2 employees.

43. Unit 3 is a bargaining unit recognized by the City of Phoenix under the Meet and Confer Ordinance and consists principally of office, clerical and pre-professional employees. AFSCME Local 2960 is the certified Meet and Confer bargaining representative for Unit 3 employees. All City of Phoenix employees who fall within the definition of Unit 3 employees are covered by the Memorandum of Understanding (“MOU”) between Local 2960 and the City of Phoenix in force and applicable to Unit 3 employees.

44. Unit 7 is a bargaining unit recognized by the City of Phoenix under the Meet and Discuss Ordinance and consists principally of supervisory and professional employees. ASPTEA is the certified Meet and Discuss bargaining representative for Unit 7 employees. *Id.* at FP003332.

45. Until 2006, the City’s Meet and Discuss Ordinance, City of Phoenix Ord. G-1536, Phoenix City Code §2-223 *et. seq.*, Ex. 312, there were no written MOAs. Rather, the City Manager had authority to meet and discuss with ASPTEA representatives on matters relating to wages and fringe benefits and to make recommendations to the City Council for approval of agreements reached during that process. City of Phoenix Ord. G-1536, Ex. 312, at §§ 2-223, 2-229 & 2-231.

46. For a period of time, certain confidential employees within Unit 8 have also been covered by the same MOA as Unit 7 employees.

47. Prior to 2006 and before the first MOA, many of the terms and conditions of employment for Unit 7 & 8 employees reached through the meet and discuss process were memorialized in various documents including, but not limited to, administrative regulations, memoranda from the City Manager and letter agreements.

48. In 2006, the City's Meet and Discuss Ordinance was amended and ASPTEA first began entering into written MOAs with the City which are approved by the City Manager pursuant to authority from City Council under the Meet and Discuss Ordinance for two year terms.

49. Negotiations between the City and ASPTEA typically take place between a negotiating team of ASPTEA and representatives from the City's labor relations, personnel and other departments.

50. In advance of the first negotiation session, ASPTEA presents the City with written proposals of terms and conditions ASPTEA would like to see added to or changed in the existing MOA, which are typically the results of surveys of ASPTEA members.

51. After receiving ASPTEA's proposals, the City puts forth its proposals which it provides to the ASPTEA's negotiating team.

52. The City identifies each proposal as "Clarification," "Work Rule," "Economic" or some combination thereof. Any item identified as "Economic" is recognized as having a financial impact on the City budget for the related fiscal year(s) of the MOA should the proposal be agreed upon and adopted.

53. The City's Budget and Research Department attempts to "cost" each economic proposal – a process referred to by both labor and management during the negotiating process as "costing." Costing is an attempt to determine (or estimate as best one can, recognizing the vagaries involved) the dollar amounts necessary to finance a particular proposal if incorporated

into the MOA. Costing information is prepared in written form and is presented to both the City and labor organization or association negotiating teams to be used during the meet and confer process.

54. Costing is important because it allows both the City and the labor associations to determine overall costs associated with the various proposals put forth during negotiations and how those costs may be allocated among the total financial resources the City is willing to commit for a the MOA term. This overall cost is commonly referred to by the parties during the meet and discuss negotiations as the financial “package” the City is willing to commit to for a particular MOA term being negotiated.

55. The meet and discuss process is not unlike collective bargaining in the private labor sector where the parties negotiate how the “package” will be allocated among wages, benefits, terms and conditions of employment for the contract (MOA) term and is a “give-and-take” process covering multiple bargaining sessions.

56. When agreements are reached as a result of this process, they are memorialized by a Tentative Agreement (“TA”) which is signed by a member of the ASPTEA and the City’s negotiating teams.

57. After an agreement is reached during the meet and discuss process, ASPTEA must immediately submit the written agreement to the Unit 7 employees for approval. The City Manager must also approve the MOA before the MOA can be effective. Phoenix City Code §2-232.

58. Similar to the meet and discuss process for ASPTEA, the meet and confer sessions are conducted in the first part of the calendar year so that agreements reached can be implemented at the beginning of the fiscal year on July 1<sup>st</sup>. Unit 2 and Unit 3 negotiations, however, usually commence weeks before Unit 7 & 8 negotiations and Local 2384 and Local 2960 are thus well

into their respective negotiations with the City before ASPTEA commences its first session with the City negotiating team. *Id.*

59. Separate negotiations take place between a negotiating team of each union (Local 2384 on behalf of Field Unit 2 employees; Local 2960 on behalf of Unit 3 employees) and representatives from the City's labor relations, personnel and other departments. In advance of the first negotiating session, the unions each present the City with their respective written proposals of terms and conditions each would like to see added to or changed in the existing MOU for their unit. After the receiving a union's proposals, the City puts forth its counter-proposals which it provides to the union negotiating teams.

60. The City follows the same procedures as it does in the meet and discuss process with ASPTEA by identifying each proposal as "Clarification," "Work Rule," "Economic" or some combination thereof and "costing" economic items through the Budget and Research Department.

61. Costing information for Units 2 & 3 negotiations is equally important and also prepared in written form for presentation and use to both the City and union negotiating teams for use during the meet and confer process.

62. The meet and confer process is also a "give-and-take" process covering multiple bargaining sessions during which the parties negotiate how the "package" will be allocated among wages, benefits, terms and conditions of employment for the contract (MOU) term.

63. When Tentative Agreements ("TA") are reached, they are signed by the representatives of the union and the management negotiating team. They are then incorporated into a written MOU which must be made available for public comment and must be approved by members of the respective units and the City Council before becoming a part of the terms and conditions of employment for the respective Unit 2 and Unit 3 employees.

64. An MOU covers a period of two years and coincides with the City's fiscal year beginning on July 1<sup>st</sup> and ends two years later on June 30<sup>th</sup>. Like an MOU, since 2006, the MOAs have covered a period of two years and coincide with the City's fiscal year beginning on July 1<sup>st</sup> and end two years later on June 30<sup>th</sup>.

## **ADMINISTRATIVE REGULATION 2.441 AND CASHING**

### **OUT UNUSED SICK LEAVE**

65. Beginning in 1996, the City allowed certain employees to cash out a portion of their unused sick leave at retirement, subject to various limitations and conditions. This practice was captured in Administrative Regulation 2.441 (as amended from time to time). The principal purpose for instituting Administrative Regulation 2.441 was to encourage City employees not to abuse their sick leave during their employment by taking sick leave when they were not actually sick (which was an obvious benefit to the City). Additionally, saving sick leave provided a potential benefit to the employees, because the City does not have a short term disability plan.

66. Since its inception, Administrative Regulation 2.441 included specific requirements an employee must meet in order to qualify for a sick leave cash-out. An employee must complete one full year of service in an eligible category of employment prior to retirement in order to be eligible for the payout of any unused sick leave. Further, an employee must accrue a minimum number of unused sick leave hours prior to retirement in order to be eligible for a sick leave cash-out. Additionally, there are a number of "base hours" of unused sick leave that are not eligible for payout.

67. If an employee meets the eligibility criteria for a sick leave cash-out, the choice to receive one is voluntary. Any accrued sick leave that an employee does not cash out is credited to the employee as service credit for pension calculation purposes under COPERS.

68. *The various historical versions of Regulation 2.441 are silent regarding the use of cashed-out sick leave as a part of a member's final average compensation for purposes of a pension calculation.<sup>3</sup> Nonetheless, and as set forth more fully below, from the time that Regulation 2.441 was instituted until 2012, it was commonly, widely and uniformly understood that the sick-leave payouts would be included in final compensation for purposes of pension calculations. Indeed, there was no evidence that anyone ever believed otherwise. And, its contents were part of the negotiations which led to the various memoranda of understandings, which were approved by the Council upon recommendation of the City Manager.*

### THE NEGOTIATIONS

69. Prior to the 1996 negotiations between the City and ASPTEA, ASPTEA learned that the bargaining units covering police and fire personnel had a program which allowed for the payout of accumulated, unused sick leave. At the time, Unit 7 & 8 employees could not receive any payment for accumulated, unused sick leave. It could only be used at the time of retirement for service credits under the Retirement Plan Retirement Plan.

70. ASPTEA sought to bargain with the City during the 1996 meet and discuss negotiating process to allow retiring employees in Unit 7 & 8 who met certain criteria to convert a portion of their accumulated, unused sick leave to cash payments as additional compensation.

71. Phil Kundin and Don Walsh were members of the bargaining team which negotiated agreements with ASPTEA on behalf of the City, including the 1996 agreement.

72. Effective July 1, 1996, following meet and discuss negotiations with ASPTEA, the City agreed to allow eligible Unit 7 & 8 employees to convert a portion of their accumulated,

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<sup>3</sup> The Regulation (in its various revisions), does provide that any hours which are “cashed out” will not be used in the “length of service” portion of the pension calculation.

unused sick leave at retirement into pay at retirement and began paying a portion of the accrued and unused sick leave at retirement.

73. The City notified Supervisory & Professional Employees of the Sick Leave Payout Program through a letter dated May 15, 1996 from Carlos Arauz, the City Personnel Director and also a Member of the Retirement Board. The letter stated, in relevant part:

The City Manager has recommended, and the City Council has endorsed, the following changes in wages and benefits for supervisory and professional employees:

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A program to pay a portion of an employee's accumulated sick leave at the time of retirement will begin for those employees who retire on or after July 1, 1996. To qualify, the employee must have a minimum of 1,000 hours of accumulated sick leave. The first 500 hours of leave do not qualify for payment. Of the remaining hours, 20% will be paid at the employee's base hourly rate of pay. An individual must be classified as "supervisory/professional" at the time of retirement and must have completed one full year in this category immediately prior to retirement. Sick leave is currently used in the Retirement System to calculate total service. With the institution of this sick leave payout program, the service credit will be reduced by the total number of hours compensated. Also, with the introduction of this new payout program, the plan that provided \$20 per month toward health insurance premiums based upon total sick leave accrued will be discontinued for those employees retiring on or after July 1, 1996.

Ex. 7.

74. The City also advised Unit 7 & 8 employees in 1996 that “[w]ith the institution of this sick leave payout program, the [COPERS] service credit will be reduced by the total number of hours compensated.” *Id.*

75. The fiscal year 1996-1997 Pay Ordinance, S23753, passed by City Council June 26, 1996 effective July 1, 1996 provided, in relevant part:

(x) The City Manager is hereby authorized to issue an administrative regulation providing for payment of retiree's health insurance premiums for certain groups of employees. Such payment may be to the retiree, to the insurer, or to a trust fund established for that purpose. For persons retiring on or after July 1, 1996, such payments shall not include the \$20 per month supplement for unused sick leave.

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(uu) The City Manager is hereby authorized to issue an administrative regulation establishing guidelines for the cash payment of a portion of accumulated sick leave hours at retirement for Executives, Middle Managers, and Professional and Supervisory employees.

Ex. 47, at Section 12(x), (uu).

76. The City's Pay Plan in the fiscal year 1996-1997 Pay Ordinance provided, in relevant part, under "Sick Leave Payout at Retirement" in the "1996-97 Compensation and Benefits Reference Guide" for Meet and Discuss/City Manager Represented Units:

Effective July 1, 1996, upon retirement employees with a minimum of 1,000 hours of accrued and unused Sick leave, excluding the first 500 hours, will be paid for 20% of the remaining hours at base hourly wage.

ST ¶ 45; Ex. 47, p. 186.

77. Consistent with the agreement reached during the meet and discuss process, the Pay Ordinance and applicable provisions of the Meet and Discuss Ordinance in effect at the time, the City Manager, with the approval of the City Council, issued Administrative Regulation ("AR") 2.441 with an effective date of July 1, 1996.

78. Administrative Regulation 2.441 ("AR 2.441") effective July 1, 1996 was the first City Administrative Regulation ("AR") governing the payment of accrued and unused sick leave at the time of retirement for professional and supervisory employees. ST ¶ 46.

79. AR 2.441, dated July 1, 1996, provided that if a supervisory and professional employee had a minimum of 1,000 hours of accrued but unused sick leave at retirement, the first 500 hours were "base hours" (that could not be paid out) but that an employee could elect to be paid 20% of his or her accrued and unused sick leave hours in excess of 500 at the employee's base rate of pay at the time of retirement. Ex. 8. The AR further provided that if the employee elected to receive a cash payment of his unused, accrued sick leave, those hours would be deducted from the total number of retirement service credit hours. Ex. 8, at p. 2 ¶4(B). In other words, any accumulated unused sick leave that was converted to compensation at retirement and

included in final average compensation was deducted from the unused sick leave bank for that Member. *Id.* Only the sick leave remaining after the conversion of a portion of unused sick leave for cash was available for and used to calculate additional service credit for the pension benefit calculation under the Retirement Plan. *Id.*

80. During the July 1996 Retirement Board meeting, Deputy City Manager Manion represented to the Retirement Board that “the new sick leave plan was part of labor negotiations and that the actuarial impact was covered in the City’s budget through employer contributions.” Ex. 70 at p. 70-6. During the same meeting, Mr. Arauz, City Personnel Director and Retirement Board Member, indicated that the Retirement Plan’s actuary had been consulted and provided an estimate of the impact to the System and that the “City has budgeted this amount to be available to Finance to be put in the Pension Plan.” *Id.* Mr. Manion further advised the Retirement Board that “the cost of the sick leave program was calculated into the benefit package” and that “100% of the cost would be reimbursed to the retirement fund” and that “this included both employer and employee contributions.” *Id.* Assistant Personnel Director Don Walsh and Phil Kundin, who together negotiated contracts with ASPTEA on behalf of the City, including the 1996 agreement, also attended the July 1996 Retirement Board meeting in which the sick leave payout at retirement was discussed. Ex. 71.

81. Effective July 1, 1996, the City began paying unused sick leave at retirement to employees in the Executive, Middle Management, and Supervisory and Professional categories and the Retirement Plan included all payments of unused sick leave at retirement in the calculation of compensation and final average compensation used for calculating retirement benefits under the Retirement Plan. ST ¶¶ 37, 43, 46-47; Ex. 8.

82. From 1996 to 2012, the only changes made to the sick leave payment at retirement provisions in the agreements were to increase the amount of sick leave that could be paid at retirement and to expand the employees who were eligible for a payout of unused sick leave.

83. AR 2.441 was revised for fiscal years beginning 1999, 2000 and 2002, in part and as relevant to this litigation, as a result of agreements reached during collective bargaining negotiations between the City, AFSCME Local 2384, AFSCME Local 2960 and ASPTEA. Ex. 9-11.

84. In each such instance, the revisions to AR 2.441 increased the amount of accumulated, unused sick leave that employees were eligible to receive as pay at time of their retirement, lowered the number of accumulated hours needed to be eligible for payment of accumulated sick leave at retirement and/or to expanded the categories of employees eligible for payment of unused sick leave to include all City employees who were Members of COPERS. Ex. 9-11

85. In or around 1998, then aware of the agreement obtained by ASPTEA for payment of a portion of unused sick leave at retirement and inclusion of the payment in final average compensation by COPERS, AFSCME 2960 and AFSCME 2384 likewise negotiated and reached agreement with the City for payment of accumulated and unused sick leave at retirement for Unit 3 and Unit 2 employees in their respective 1998-2000 Memoranda of Understanding with the City covering the period of July 1, 1998 to June 30, 2000 to be effective at the commencement of the second year of their respective MOUs.

86. Article 31 of the 1998-2000 MOU between AFSCME 2960 and the City provided, in relevant part:

#### SICK LEAVE CONVERSION AT RETIREMENT

Effective July 12, 1999, a unit member who has accumulated a minimum of one thousand (1,000) qualifying hours or more of accrued and unused sick leave at the

time of a duty related retirement shall be eligible for payment of an amount of compensation equal to twenty (20%) of his base hourly rate for all hours in excess of five hundred (500) hours.

Ex. 33.

87. Article 39 of the 1998-2000 MOU between AFSCME 2384 and the City provided, in relevant part:

#### SICK LEAVE CONVERSION AT RETIREMENT

Effective at the beginning of the first pay period in July, 1999, (July 12, 1999) the following benefits shall apply:

Upon retirement, bargaining unit employees with a minimum of 1,000 hours of accrued and unused sick leave, excluding the first 500 hours, will be paid for 20% of the remaining hours as base hourly wage.

Ex. 25.

88. The 1998-2000 MOUs were approved by City Council on May 20, 1998. Ex. 63-64.

89. In 1999, the Unit 7 employees represented by ASPTEA also received an increased amount of sick leave payout at retirement. Instead of being entitled to a payout if they had 1,000 hours and being paid for 20% for all hours above 500 hours, effective July 1, 1999 ASPTEA employees could now receive a payout of sick leave at retirement if they had a minimum of 750 hours and could receive 20% of all hours above 250 hours as opposed to the previous 500 hour requirement. Ex. 48, at p. 173.

90. City's Pay Plan and Pay Ordinance effective July 1, 1999 (the second year of each of these MOUs) provided, in relevant part:

(zz) The City Manager is hereby authorized to issue an administrative regulation establishing guidelines for the cash payment of a portion of accumulated sick leave hours at retirement for employees excluding sworn Public Safety personnel.

ST ¶ 56; Ordinance No. S-26270 Section 12(zz)

91. The City’s Pay Plan and Pay Ordinance effective July 1, 1999 also provided, in relevant part, under “Sick Leave Payout at Retirement” in the “1999-2000 Benefits Reference Guide” for Meet and Discuss/City Manager Represented Units under “Retirement” that “[c]redited service for unused sick leave will exclude any sick leave hours compensated through the Sick Leave Payout Program (see below).” ST ¶ 57.

92. The City’s Pay Plan and Pay Ordinance for fiscal year 1999 provided, in relevant part, in the fiscal year 1999-2000 Benefits Reference Guide for Meet and Confer Units under “Sick Leave Payout at Retirement” that, for Unit 2 and Office & Clerical employees:

20% of base wage for all accrued and unused sick leave over 500 hours if 1,000 hour trigger is met. Eff. 7/12/99.

Ex. 48; ST ¶ 60.

93. Below the language in the “Sick Leave Payout at Retirement” section in the fiscal year 1999-2000 “Benefits Reference Guide” for Meet and Discuss/City Manager Represented Units for Confidential Office & Clerical employees, the City’s Pay Plan and Pay Ordinance for fiscal year 1999 provided:

Effective 7/1/99, upon retirement: employees with a minimum of 1,000 hours of accrued and unused sick leave, excluding the first 500 hours, will be paid for 20% of the remaining hours at base hourly wage (A.R. 2.441)

Ex. 48, ST ¶ 58.

94. Effective July 1, 1999, following the collective bargaining changes to sick leave, AR 2.441 was revised to provide for payments of unused, accumulated sick leave hours at time of retirement to employees in Units 1, 2 and 3 as well as employees in the Executive, Middle Management, Supervisory and Professional, Confidential Office and Clerical categories. ST ¶ 61. The revised AR 2.441 effective July 1, 1999 set forth the increased amount of sick leave payout for ASPTEA employees and the amounts that were agreed to in the MOUs for “*All other*

*COPERS-eligible employees*” including Field Unit 2 and Unit 3. Ex. 9, at p. 2 ¶3(B) (emphasis supplied).

95. AR 2.441 Revised, effective as of July 1, 1999, provided that employees in Units 2 and 3 could elect to receive a payout at retirement of 20% of their base wage for all accumulated and unused sick leave in excess 500 hours if the employee had at least 1,000 hours of accrued and unused sick leave at retirement. ST ¶ 62.

96. AR 2.441 Revised, effective as of July 1, 1999, provided that Executive, Middle Management, and Supervisory and Professional employees with a minimum of 750 hours of accumulated and unused sick leave at the time of retirement could receive payment 20% of such hours at their base hourly wage, excluding the first 250 hours at the time of retirement. ST ¶ 63.

97. The amount of sick leave that could be paid out at retirement increased as a result of negotiated changes for employees represented by ASPTEA and Unit 2 effective July 1, 2000 and increased for employees represented by Unit 3 effective July 1, 2001. Ex. 24 Art. 39; Ex. 32 Art. 31; ST ¶ 64.

98. Article 31 of the 2000-2002 MOU between AFSCME 2960 and the City provided, in relevant part:

#### SICK LEAVE CONVERSION AT RETIREMENT

Effective July 12, 1999, a unit member who has accumulated a minimum of one thousand (1,000) qualifying hours or more of accrued and unused sick leave at the time of a duty related retirement shall be eligible for payment of an amount of compensation equal to twenty (20%) of his base hourly rate for all hours in excess of five hundred (500) hours.

Effective July 9, 2001, a unit member who has accumulated a minimum of seven hundred and fifty (750) qualifying hours or more of accrued and unused sick leave at the time of a duty related retirement shall be eligible for payment of an amount of compensation equal to twenty (20%) of his base hourly rate for all hours in excess of two hundred and fifty (250) hours.

Ex. 32.

99. Article 39 of the 2000-2002 MOU between AFSCME 2384 and the City provided, in relevant part:

SICK LEAVE CONVERSION AT RETIREMENT

Effective July 10, 2000, the following benefits shall apply:

Upon retirement, bargaining unit employees with a minimum of 750 hours of accrued and unused sick leave, excluding the first 250 hours, will be paid for 20 % of the remaining hours as base hourly wage.

Ex. 24.

100. The respective 2000-2002 Memoranda of Understanding between the City and AFSCME 2384 and AFSCME 2960 were each approved by the City Council on May 10, 2000.

ST ¶ 67.

101. The City's Pay Plan and Pay Ordinance, effective July 1, 2000 provided, in relevant part:

(zz) The City Manager is hereby authorized to issue an administrative regulation establishing guidelines for the cash payment of a portion of accumulated sick leave hours at retirement for employees excluding sworn Public Safety personnel.

ST ¶ 68; Ordinance No. S- 27252, Section 12(III).

102. The City's Pay Plan and Pay Ordinance effective July 1, 2000 provided, in relevant part, under "Sick Leave Payout at Retirement" in the 2000-2001 Benefits Reference Guide for Meet and Discuss/City Manager Represented Units under "Retirement" that "[c]redited service for unused sick leave will exclude any sick leave hours compensated through the Sick Leave Payout Program (see below)." ST ¶ 69.

103. Below the language in the Sick Leave Payout at Retirement section in the 2000-2001 Benefits Reference Guide for Meet and Discuss/City Manager Represented Units for Confidential Office & Clerical employees, the City's Pay Plan and Pay Ordinance provided:

Upon retirement: employees with at least 1,000 hours of accrued and unused sick leave, excluding the first 500 hrs, will be paid for 20% of the remaining hours at base hrly wage. (A.R. 2.441)

ST ¶ 70.

104. The Sick Leave Payout at Retirement section in the 2000-2001 Benefits Reference Guide for Meet and Discuss/City Manager Represented Units provided that for Supervisory & Professional, Middle Management and Executive employees:

Upon retirement: employees with at least 750 hours of accrued and unused sick leave, excluding the first 250 hrs, will be paid for 20% of the remaining hrs at base hrly wage. (A.R. 2.441).

ST ¶ 71..

105. The City's Pay Plan and Pay Ordinance for 2000-2001 provided, in relevant part, in the 2000-2001 Benefits Reference Guide for Meet and Confer Units under "Sick Leave Payout at Retirement" for Unit 2 employees:

Eff. 7/1/00, upon retirement, employees with a minimum of 750 hours of accrued and unused sick leave, excluding the first 250 hrs, will be paid for 20% of the remaining hrs at base hourly wage. (Art. 33 ) (AR 2 441)

ST ¶ 72.

106. The City's Pay Plan and Pay Ordinance for 2000-2001 provided, in relevant part, in the 2000-2001 Benefits Reference Guide for Meet and Confer Units under "Sick Leave Payout at Retirement" for Office & Clerical employees:

Eff. 7/12/99, upon retirement, employees with a minimum of 1000 hours of accrued and unused sick leave, excluding the first 500 hrs, will be paid for 20% of the remaining hrs at base hourly wage. (Art. 31 ) (AR 2 .441)

ST ¶ 73.

107. Effective July 1, 2000, AR 2.441 was again revised "to incorporate changes resulting from agreements with employee representatives" to provide that a Unit II employee who had at least 750 hours could be paid all hours in excess of 250 hours: "base hours for employees designated as ... Unit II changes from 500 to 250 hours." ST ¶ 74

108. AR 2.441 Revised, effective as of July 1, 2000, also reflected changes to the 2000-2002 MOU between AFSCME 2960 and the City by providing that effective July 1, 2001, Unit 3 employees who had accrued at least 750 hours of unused sick leave at retirement could be paid 20% of all hours in excess of 250 hours at their base rate of pay. ST ¶ 75.

109. The amount of sick leave that could be paid out at retirement increased again as a result of negotiated changes for employees represented by ASPTEA, Unit 2 and Unit 3 effective July 1, 2002. Ex. 23 Art. 39; Ex. 31, at FP006869.

110. Just as in 1996 and 1998 and 1999, 2000 and 2001 following the negotiated changes that were effective in 2002, the City's Pay Ordinances and Pay Plans were revised and AR 2.441 was revised to reflect the negotiated changes. Ex. 10, 11, 50, 51.

111. The City's Pay Plan and Pay Ordinance effective July 1, 2002 provided, in relevant part:

(sss) The City Manager is hereby authorized to issue an administrative regulation establishing guidelines for the cash payment of a portion of accumulated sick leave hours at retirement for employees excluding sworn Public Safety personnel.

ST ¶ 80; Ordinance No. S- 29256, Section 12(sss).

112. . The City's Pay Plan and Pay Ordinance effective July 1, 2002 provided, in relevant part, under "Sick Leave Payout at Retirement" in the 2002-2003 Benefits Reference Guide for Meet and Discuss/City Manager Represented Units under "Retirement" that "[c]redited service for unused sick leave will exclude any sick leave hours compensated through the Sick Leave Payout Program (see below)." ST ¶ 81.

113. Below the language in the "Sick Leave Payout at Retirement" provision in the 2002-2003 Benefits Reference Guide for Meet and Discuss/City Manager Represented Units for Confidential Office & Clerical and Supervisory & Professional employees, the City's Pay Plan and Pay Ordinance for fiscal year beginning July 1, 2002 provided:

Upon retirement: employees with at least 750 hrs of accrued and unused sick leave, excluding the first 250 hrs, will be paid for 25% of the remaining hours at base hrly wage. (A.R. 2.441)

ST ¶ 82.

114. The “Sick Leave Payout at Retirement” provision in the 2002-2003 Benefits Reference Guide for Meet and Discuss/City Manager Represented Units provided that for Middle Management and Executive employees:

Upon retirement: employees with a minimum 750 hrs of accrued and unused sick leave will be paid for 20% of the remaining hrs at base hrly wage. (A.R. 2.441)

ST ¶ 83.

115. The City’s Pay Plan and Pay Ordinance for fiscal year 2002-2003 provided, in relevant part, in the 2002-2003 Benefits Reference Guide for Meet and Confer Units under “Sick Leave Payout at Retirement” for Field Unit 2 and Office & Clerical employees:

Eff. 7/8/02, upon retirement, employees with a minimum of 750 hrs of accrued and unused sick leave, excluding the first 250 hrs, will be paid for 25% of the remaining hrs at base hourly wage.... (AR 2 441)

ST ¶ 84.

116. From July 2002 until the Pay Ordinance for fiscal year 2012-2013, effective July 1, 2012, there were no changes to the sick leave payout provisions at retirement other than to change the Pay Ordinance to reflect the fact that the City began requiring all sick leave payouts at retirement to be made to the City’s 401(a) Deferred Compensation Plan (“DCP”) as follows:

The City Manager is authorized to establish guidelines to have a portion of accumulated sick leave hours at retirement converted to service credit under the City of Phoenix Employees' Retirement Plan or converted to an employer contribution to the 401 (a) Defined Contribution Plan.

ST ¶ 88.

117. In 2002, AFSCME 2960 and AFSCME 2384 and the City again negotiated and agreed upon an increase in the value of the accrued, unused sick leave that could be paid out at

retirement for Unit 3 and Unit 2 employees in the 2002-2004 MOUs between the City and AFSCME 2960 and AFSCME 2384. ST ¶ 76.

118. Whereas, prior to 2002 employees meeting the hours threshold were only eligible to receive payment at 20% of their base rates of pay for all hours eligible for payment, beginning in 2002 the City agreed with AFSCME 2960 and AFSCME 2384 to fix the value of the portion of an employee's unused sick leave eligible to be paid at retirement at 25% of an employee's base rate of pay. Accordingly, Article 31 of the 2002-2004 MOU between AFSCME 2960 and the City provided, in relevant part:

#### SICK LEAVE CONVERSION AT RETIREMENT

Effective July 8, 2002, a unit member who has accumulated a minimum of seven hundred and fifty (750) qualifying hours or more of accrued and unused sick leave at the time of a duty related retirement shall be eligible for payment of an amount of compensation equal to twenty five (25%) of his base hourly rate for all hours in excess of two hundred and fifty (250) hours.

Ex. 31, at FP006869.

119. Article 39 of the 2002-2004 MOU between AFSCME 2384 and the City provided, in relevant part:

#### SICK LEAVE CONVERSION AT RETIREMENT

Effective July 8, 2002, the following benefits shall apply:  
Upon retirement, bargaining unit employees with a minimum of 750 hours of accrued and unused sick leave, excluding the first 250 hours, will be paid twenty five percent 25 % of the remaining hours as base hourly wage.

Ex. 23.

120. The 2002-2004 MOU between the City and AFSCME 2384 and the 2002-2004 MOU between the City and AFSCME 2960 were each approved by City Council on June 26, 2002. ST ¶ 79.

121. Effective July 8, 2002, AR 2.441 was again revised to “incorporate changes resulting from agreements with employee representatives.” ST ¶ 85.

122. AR 2.441 Revised, effective as of July 8, 2002, reflected “the current practice of Unit II” to change the “base hours” from 500 to 250 hours and provided, in relevant part, that employees in Units 2 and 3, Confidential Office and Clerical and Supervisory/Professional employees “may have 25% of the hours above the base paid (previously 20%).” ST ¶ 86.

123. No further changes to sick leave payouts at retirement or retirement benefits were negotiated or agreed to between the City and Locals 2384, 2960 and ASPTEA after July 2002. Ex. 18-27, 26-29, 34-36, 77.

124. From July 2002 until the City’s 2012 unilateral revision to AR 2.441 Revised effective July 8, 2012, there were no changes to AR 2.441 Revised. ST ¶ 87.

125. The employee’s “compensation” and “base rate” of pay and “wages” were and are words negotiated and used in the MOUs and MOAs and have a “clear and well understood” meaning and have “been consistently interpreted and understood by all concerned for decades” to mean the rates “set forth in the pay ordinance Schedule II.” Ex. 62, at ¶ 1, 2, 85-87; Ex. 18, Art. 3; 19, Art. 3; 20, Art. 3; 21, Art. 3; 22, Art. 3; 23, Art. 11; 25, Art. 11; 26, Art. 3; 27, Art. 3; 28, Art. 3; 29, Art. 3; 30, Art. 3; 31, Art. 10; 33, Art. 10; 34, Art. 3; 35, Art. 3; 36, Art. 3; 37, Art. 3.

126. The agreements also used the language “base hourly rate” and “base hourly wage” which was the same language used in the Pay Ordinances, Pay Plans, Administrative Regulations governing sick leave payouts and also in the Administrative Regulations governing other forms of compensation paid to City employees which, at the time of this litigation, have consistently been included in the calculation of compensation and final average compensation under the Retirement Plan benefit formulas, including vacation payouts, holiday payouts, out-of-class pay, longevity pay, shift differential, tool allowance, overtime pay and show-up-time pay. See Ex. 62, ¶87.

127. The language “base rate” of pay is used in Administrative Regulations governing sick leave payouts and also in Administrative Regulations governing other forms of compensation paid to City employees which, at the time of this litigation, have consistently been included in the calculation of compensation and final average compensation under the Retirement Plan benefit formulas, including vacation pay, holiday pay, out-of-class pay, longevity pay, shift differentials, tool allowance, overtime pay and show-up-time pay. Ex. 62, ¶ 87.

128. Similarly, all categories of pay under the relevant MOUs and MOAs that use the terms compensation, wages, base hourly wage, regular rate of pay, base hourly rate of pay, applicable rate of pay, etc., have at all relevant times been included in the calculation of final average compensation under the Retirement Plan benefit formula.

129. Likewise, all of the following categories of pay listed under the MOU between the City and Local 2960 have been included in the computation of final average compensation under the Retirement Plan benefit formula: compensation, wages, base hourly wage, regular rate of pay, base hourly rate of pay and applicable rate of pay. The same holds true for ASPTEA’s Memoranda of Agreement. Ex. 37-39.

**THROUGH JULY 2012, CASHED OUT SICK LEAVE WAS  
COMMONLY UNDERSTOOD TO BE A COMPONENT OF FINAL  
AVERAGE COMPENSATION IN A VARIETY OF CONTEXTS**

130. Following the July 24, 1996 Retirement Board Meeting, effective July 1, 1996, when the City began paying the unused sick leave at retirement to employees in the Executive, Middle Management, and Supervisory and Professional categories, and through July 8, 2012, the Retirement Board consistently included all payments of unused accrued sick leave at retirement in the determination of compensation and final average compensation for purposes of calculating retirement benefits under the Retirement Plan system.

131. From July 1, 1996 when payment of accrued sick leave at retirement for certain Retirement Plan members commenced, until July 8, 2012, if a Member was eligible and elected to be paid his or her unused sick leave at retirement, all paid sick leave was included in the calculation of compensation under the Retirement Plan benefit formula.

132. From the outset, the Retirement Board determined that the impact of inclusion of payments of unused sick leave at retirement in final average pay should be included in the determination of the benefit liabilities and corresponding contribution obligations under the Retirement Plan and, in fact, the Board made certain that the impact was calculated by Retirement Plan actuaries and included in the annual certifications of the City's required contributions to COPERS. Ex. 7, 70-71.

133. The first record of the Retirement Board's official notice that the City had negotiated for and agreed to the sick leave payments to commence on July 1, 1996 is reflected in the minutes of the June 26, 1996 Retirement Board meeting. Ex. 70. There, in response to a question from Board Member Warren, Board Member and Deputy City Manager Pat Manion, (the City Manager's Retirement Board designee), admitted that the sick leave payments, as agreed to in the ASPTEA negotiations were intended to be included in the retirement benefit formula. *Id.* at 70-6. The minutes (p.6) state that Mr. Manion "noted the new sick leave plan was part of labor negotiations and the actuarial impact was covered in the City's budget, through employer contributions." *Id.*

134. At the very next meeting of the Retirement Board held on July 24, 1996, the City's agreement to sick leave payout at retirement was on the agenda and the program was reviewed by Personnel Director and Board Member Carlos Aruaz. Ex. 71. This meeting was attended by 8 of the 9 Retirement Board members and others including, *inter alia*: Carlos Aruaz, the City's Personnel Director and Retirement Board Member; Deputy City Manager and Retirement Board

Member Pat Manion; Kevin Keogh, the City's Finance Director and Retirement Board Member; Barbara Alvarez, the City Treasurer and Retirement Board Member; Duamel Vellon, the Retirement Plan Retirement Program Administrator and several additional representatives from the Personnel Department, City Auditor Department, Finance Department and Law Department along with a representative from ASPTEA. Ex. 71, 70-1.

135. At the July 24, 1996 Retirement Board meeting, referencing the discussion at the June 1996 meeting, the Retirement Plan Administrator Duamel Vellon stated: "[T]he sick leave program payments *are intended* to be included only in the final average salary calculation" and went on to explain that in such instance the hours paid would not count for service credit. Ex. 71, 71-2. (Emphasis supplied). When asked if the benefit package for the sick leave payout program was reviewed by the Retirement Plan actuary, the City responded that the "Retirement Plan actuary was consulted on this, and provided an estimate."

136. Consistent with the testimony of Plaintiffs' witnesses that during negotiations for the sick leave payout at retirement, the wage and benefits packages presented to the Unions and ASPTEA had included the City's anticipated costs of including the sick leave payments at retirement in final average pay under the Retirement Plan, Deputy City Manager and Retirement Board Member Pat Manion explained that "the cost of the sick leave cash out program was calculated into the benefit package" and that "100% of the cost would be reimbursed to the retirement fund," and that the costs "included both employer and employee contributions."

137. In *Baldwin v. City of Phoenix, et. al.* No. CV 96-22584, the plaintiff sued the City and the Retirement Plan claiming, *inter alia*, that the value of *all* amounts expended on the plaintiff's behalf including the value of sick leave not paid in cash at retirement (but rather used to increase the plaintiff's sick leave credited service) and the value of premiums for health, life, and

dental insurance, and Medicare and old age taxes, etc., should have been included in the calculation of the plaintiff's Final Average Compensation under the Retirement Plan. Ex. 62.

138. Both Retirement Program Administrator Vellon and City Assistant Personnel Director Walsh, who attended both the June 1996 and July 1996 Retirement Board meetings submitted sworn declarations in Baldwin.

139. The sworn statements, *inter alia*, recited the Retirement Plan provisions for compensation and final average compensation and stated that amounts "not paid in cash to, or for, the employee" have not been included in compensation, salary or wages, but that accrued unused sick leave that the employee elected to be paid at retirement was included in final average compensation under the Retirement Plan. Ex. 61, at ¶¶ 4, 5, 16, 18, 30, 32, 45, 47-51; Ex. 62, at ¶¶ 8, 9, 16, 34, 77.

140. The Retirement Plan declaration submitted by Mr. Vellon in or around March 1997 stated that:

In calculating final average compensation, the [COPERS] Board includes in the last year any lump-sum payments received for unused sick leave and unused vacation time. These can be very substantial amounts, and generally significantly increase the FAC, and hence the monthly pension benefits.

Ex. 61, ¶ 30.

141. Mr. Walsh, the Assistant Personnel Director also submitted a sworn declaration. The sworn statements, *inter alia*, recited the Retirement Plan provisions for compensation and final average compensation and stated that amounts "not paid in cash to, or for, the employee" have not been included in compensation, salary or wages, but that accrued unused sick leave that the employee elected to be paid at retirement was included in final average compensation under the Retirement Plan. Ex. 61, at ¶¶ 4, 5, 16, 18, 30, 32, 45, 47-51; Ex. 62, at ¶¶ 8, 9, 16, 34, 77.

142. Mr. Vellon's sworn declaration also stated that the plaintiff in that case, a Retirement Plan Member and City employee who retired in December 1996, "received lump-sum

payments for unused vacation and sick leave hours upon his retirement, which payments were included in his 1996 compensation for pension calculation purposes.” Ex.61, ¶ 4.

143. The Board included in service credit calculations, for purposes of the Retirement Plan retirement benefits formula, only those amounts of accumulated unused sick leave that were not paid out to the employee as compensation at time of retirement. ST ¶ 41. In other words, any accumulated unused sick leave that was converted to compensation at retirement and included in final average compensation was deducted from the unused sick leave bank for that Member. *Id.* Only the sick leave remaining after the conversion of a portion of unused sick leave for cash was available for and used to calculate additional service credit for the pension benefit calculation under the Retirement Plan. *Id.*

144. In October 2002, the Retirement Board adopted Policy 173, which defines for purposes of sick leave service credit, what constitutes the “unused service credit” which distinguishes between the sick leave that is paid out at retirement and is compensation (or “eligible payment”) and the unused sick leave that must be included in Retirement Plan service credit. The policy provides that unused sick leave under the Retirement Plan is the amount of sick leave as to which the individual has not elected to receive any payment. Ex. 41, at D001000. TR 04/30/2015 (PM) (Donna Buelow), p. 106:118-p.107:25.

145. From July 1, 1996 when payment of accrued and unused sick leave at retirement commenced, sick leave paid at retirement was used in the calculation and determination of the City’s funding obligations under Retirement Plan for the payment of benefits for Members of the Retirement Plan.

146. Since the City first began paying employees unused sick pay at retirement in 1996, Retirement Plan actuaries have consistently included the value of the payments to Members of accrued, unused sick leave at retirement in determining COPERS’ benefit obligations and have

included this value in their actuarial valuations and reports of their actuarial valuations. Ex. 52, 53, 54; ST ¶ 25.

147. The Annual Actuarial Valuations included in the Retirement Plan's Comprehensive Annual Financial Reports which are used to certify to the City Council the amounts to be appropriated and paid to the Retirement Plan contain a "Summary of Plan Provisions" prepared by the Retirement Plan. On the first page of each Summary of Plan Provisions, the reports explain Final Average Compensation and state clearly, as a term of the Retirement Plan, that unused sick leave paid at retirement is included in Final Average Compensation: "Inclusion of the sick leave payout in the calculation of final average compensation began in 1996." Ex. 52, p. 68; 53, p. 68; 54, p. 66; 69, p. 68.

148. The City Council has consistently paid the City's share of all required contributions as determined by the Retirement Plan actuaries and as certified by the Retirement Board and City Finance Director. ST ¶ 26.

149. It is undisputed that from July 1, 1996 until July 8, 2012 the City and Retirement Plan repeatedly communicated to Members in multiple types of communications their agreement and practice of including the payment at retirement of unused sick leave in compensation and final average compensation to Members in multiple ways.

150. The Retirement Plan's Comprehensive Annual Financial Reports required under the Charter including the required actuarial report that consistently and repeatedly have stated that "[i]nclusion of the sick leave payout in the calculation of final average compensation began July 1, 1996" is a "Plan Provision." On the first page of each Summary of Plan Provisions, the reports explain Final Average Compensation and state clearly, as a term of the Retirement Plan, that unused sick leave paid at retirement is included in Final Average Compensation: "Inclusion of the sick leave payout in the calculation of final average compensation began in 1996." Ex. 52, p. 68;

53, p. 68; 54, p. 66; 69, p. 68. These reports are provided annually to City Council and were and are also published. ST ¶ 24.

151. At all relevant times, the Retirement Plan Comprehensive Annual Financial Reports have reflected the combined efforts of Retirement Plan staff and the City Finance Department and were intended to provide accurate information as a means for making management decisions, complying with statutory provisions and demonstrating responsible stewardship for the assets of the Retirement Plan Retirement Plan.

152. The Retirement Plan’s summary plan descriptions, titled “A Guide to Retirement,” which are established to advise employees about their retirement benefits, reported that the Retirement Plan includes sick leave in compensation and final average compensation and that:

Any applicable lump sum payments for vacation, compensatory time, etc., will be added to your last three years before comparison with other periods of payment....

They further state:

Also, Pat will have the option of receiving compensation for a portion of unused sick leave. The vacation and sick pay is added to Pat’s highest 36 months of wages when figuring her FAS. Her vacation and sick pay increased her three-year average.

Pat’s FAS is calculated as follows:

\$51,000	2004 Salary
\$52,000	2005 Salary
\$53,000	2006 Salary
\$5,700	VACATION PAY & SICK PAY
\$161,700	TOTAL

The total for the past three years will then be divided to calculate her monthly FINAL AVERAGE SALARY.

\$161,700.00 divided by 36 equals \$4,491.67 per month.

Thus, Pat’s FAS is \$4,491.67 per month.

Ex. 38, first page and pp. 7-8 (D000247); Ex. 39, first page and pp. 6-7.

153. All of the reports, counseling sessions, seminars as well as new orientation sessions referenced in the summary plan descriptions (until a few months prior to July 2012 when

the sick leave snapshot was effective) provided the same information with respect to unused sick leave payments made at the time of retirement - all of those payments would be included in final average compensation if the last year of retirement was one of their highest years.

154. The information presented by the City in training sessions advising that sick leave payouts at retirement were included in final average compensation and final average salary was, in fact, accurate and consistent with how these payments were actually handled and factored into retirement benefits calculations.

155. In or around 2002 and 2003, the City considered whether to move the City's 911 dispatchers out of the Retirement Plan and into the Arizona Correction Officers' Retirement Plan ("CORP"). In connection with the City's consideration of whether to move the City's 911 dispatchers out of the Retirement Plan and into CORP, the Retirement System embarked on a series of educational meetings and presentations for the City's 911 dispatchers. In comparing the Retirement Plan Retirement Plan and the CORP Plan, the City advised the City's 911 dispatchers of the differences between final average compensation under the two plans, in part, as follows:

Final Average Compensation

- Phoenix [COPERS]- Includes payment at retirement for unused vacation and sick time. Includes most payroll items.
- CORP – Does NOT include payments for unused vacation and sick time. Includes base pay, shift differential pay and holiday pay, excludes overtime.

156.

157. The presentations given by the City and Retirement Plan staff included, *inter alia*, the following information:

Final Average Compensation (FAC)

\*\*\*

If high 36 months is last 36 months we include all retirement applicable payouts at retirement including sick leave, vacation and comp-time.

Increasing Your Final Average Compensation

- Comp Time Payout

- Sick Leave Payout
- Vacation Payout

Ex. 79, D4905-06.

158. There were multiple other Retirement Plan presentations all uniform in their message to employees that they could increase their final average compensation by saving up their sick leave and receiving a payout at retirement. *And, there were no examples of information to the contrary. Everyone understood this is how it works.*

**The Pension Reform Task Force, Subsequent Negotiations,  
and the Imposition of Revised Regulation 2.441**

159. The City created a Pension Reform Task Force in December 2010 “to examine the pension system” and “review and recommend any changes necessary.” The Pension Reform Task Force came up with a series of recommendations, which included recommendations to change the pensionable nature of sick leave payments at retirement with respect to new City employees only. ST ¶ 144.

160. Beginning in or around January 2012, in connection with the collective bargaining negotiations for the 2012-2014 MOU for Units 1, 2 and 3, and Memorandum of Agreement for Unit 7, the City attempted to negotiate an economic change to the collective bargaining agreements by proposing to establish a new limit on the inclusion of sick leave payouts at retirement in final average compensation for Retirement Plan pension calculation purposes during several collective bargaining negotiation sessions with AFSCME 2384, AFSCME 2960, ASPTEA and with Laborers' International Union of North America, Local 777, AFL-CIO ("LIUNA Local 777"), a labor organization that is not a party to this litigation and that represents the City's Unit 1 employees.

161. The City's proposal to establish a new maximum on the “pensionability” of sick leave payouts (or “sick leave snapshot”) was a proposal put forth by the City to change the

collective bargaining agreements by limiting the amount of sick leave payout at retirement that could be used in the calculation of final average compensation under Retirement Plan retirement benefits.

162. Local 777 signed a Tentative Agreement Form agreeing to the change the MOU covering Unit 1 employees, agreeing to a maximum or ceiling on the amount of unused sick leave paid out at retirement that could be included in calculations of final average compensation by limiting or “capping” the total amount of unused sick leave hours that could accumulate to those sick leave hours that a Unit 1 employee had accrued as of July 1, 2012. This Agreement was ultimately encompassed in a binding Memorandum of Understanding regarding Local 777.

163. In the 2012 negotiations, the City also presented AFSCME 2960 with a sick leave snapshot TA similar to the sick leave snapshot TA the City presented to Local 777. AFSCME 2960 rejected the City’s sick leave snapshot proposal. The City withdrew the 2012 sick leave snapshot bargaining proposal it made to AFSCME 2960, although the City threatened to unilaterally impose it. Accordingly, the snapshot concept was not incorporated into the final agreement with AFSCME 2960.

164. Although in the 2012 negotiations, the City presented AFSCME 2384 with a sick leave snapshot TA similar to the sick leave snapshot TA that the City presented to Local 777, AFSCME 2384 rejected the proposal. The City withdrew the 2012 sick leave snapshot proposal it made to AFSCME 2384, although the City threatened to unilaterally impose it. Accordingly, the snapshot concept was not incorporated into the final agreement with AFSCME 2348.

165. Likewise, although in early 2012 the City discussed with ASPTEA the City’s sick leave snapshot proposal, ASPTEA told the City during a negotiating session that it would not agree to such a proposal and, in fact, never agreed to the proposal. The City never formally presented a sick leave snapshot TA to ASPTEA.

166. The City sick leave snapshot proposed to AFSCME 2384, AFSCME 2960 and ASPTEA was intended to limit the amount of unused and accrued sick leave paid at retirement that could be used in the calculation of final average compensation based on the amount of unused sick leave hours that an employee had accrued as of July 1, 2012.

167. To sum up, AFSCME 2384, AFSCME 2960 and ASPTEA rejected the City's sick leave snapshot proposal to limit the amount of unused and accrued sick leave paid at retirement that could be used in the calculation of final average compensation. Local 777 (which is no longer a plaintiff) was the only labor association that agreed to change the existing sick leave pay out program.

168. After collective bargaining negotiations were concluded, the City drafted AR 2.441 Revised, to be effective July 8, 2012, and for the first time purported to establish "the maximum amount of sick leave that can be included in an employee's Final Average Salary for the purposes of pension calculation."

169. The City first published AR 2.441 Revised effective July 8, 2012, to City employees in July 2012. It purports to limit the amount of accrued yet unused sick leave that can be included in the calculation of final average compensation under the Retirement Plan.

170. The implementation of the sick leave snapshot did in fact reduce and diminish the pension benefits of Plaintiffs. Each of the Intervenors retired after July 8, 2012 and received payment for accrued unused sick leave at retirement that was not included in their final average compensation for purposes of calculating their individual retirement benefits under the Retirement Plan.

171. Exhibit 314 accurately sets out the monthly difference in pension payments that the intervenors have lost. They range from the relatively trivial (80 cents per month for Mr. Matamoros) to several hundred dollars a year (\$22.55 per month for Ms. Escobar). The Court

notes in passing that the amounts are likely to grow for those who retire later—all else being equal, the amount of the payment lost is related to the length of time between the City’s unilateral imposition of revised AR 2.441 and a member’s retirement.

#### CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties under Rule 3 of the Rules of Procedure for Special Actions which provides that a special action is appropriate to determine if Defendants are proceeding or “threatening to proceed without or in excess of jurisdiction or legal authority.” *See, e.g., Book Cellar, Inc. v. City of Phoenix*, 139 Ariz. 332, 335 (App. 1983). This Court also has jurisdiction under the Arizona Constitution Article 6 § 14 and Ariz. Rev. Stat. §§12-123, 12-1801, 12-1831 and 12-2021.

2. As noted above, unpaid sick leave is the type of non-monetary compensation that can be fixed by the City Council upon recommendation by the City Manager pursuant to Section 2.13 of the City Charter. The City Council did so by repeatedly approving Memoranda of Agreement/Understanding (and issuing/amending AR 2.441 consistent with the negotiations leading to those contracts) over more than a decade. The Court rejects the City’s argument that the statute of frauds has anything to do with this case; those contracts are in writing, and the interpretation of those contracts is set by the parties’ understandings of them when they were entered. *See Taylor v. State Farm Mut. Auto Ins. Co.*, 175 Ariz. 148 (1993). And, as noted above, in the decade leading up to 2012, it was uniformly, widely and commonly understood that payouts for unpaid sick leave were to be included in final average compensation. The Memoranda of Understanding/Agreement were uniformly negotiated with that baseline understanding.

3. Pursuant to Arizona law, a public employee has a common law and an Arizona Constitutional “right in the existing formula by which his benefits are calculated as of the time he

began employment and any beneficial modifications made during the course of his employment.” *Fields v. Elected Officials' Ret. Plan*, 234 Ariz. 214, 220, (2014); *Thurston v. Judges' Ret. Plan*, 179 Ariz. 49, 51, (1994) (recognizing that “when the amendment [to retirement benefits] is beneficial to the employee or survivors, it automatically becomes part of the contract by reason of the presumption of acceptance”).

4. The Arizona Constitution provides further protections for public retiree benefits by providing, *inter alia*, that:

Membership in a public retirement system is a contractual relationship that is subject to article II, §25, and public retirement system benefits shall not be diminished or impaired

Article 29 of the Arizona Constitution, §1(C).

5. In light of these contractual provisions, the City could not unilaterally revise AR 2.441 in 2012, and those revisions were not applicable to the intervenors, who are entitled to have their pensions calculated under the prior version of that Regulation.

6. Plaintiffs and the Intervenors are entitled to a judgment in their favor that the 2012 revision to A.R. 2.441 was not applicable to them for their 2012-2014 contracts.

7. The Court notes that no one put on any evidence regarding what happened during the 2014 negotiations (and, by the time they occurred, revised A.R. 2.441 was “on the books,” so it is at least arguable that it became effective at that point if not formally carved out in the contracts which were ultimately reached). Accordingly, the Court expresses no opinion regarding whether revised A.R. 2.441 currently applies against plaintiffs and the intervenors.

Dated: July \_\_\_\_, 2015.

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Hon. Mark H. Brain

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Grant with New Order



/S/ Mark H. Brain Date: 7/19/2015  
Judicial Officer of Superior Court

**ENDORSEMENT PAGE**

CASE NUMBER: CV2012-010330

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FILED DATE: 7/21/2015 8:00:00 AM

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