

IN THE MATTER OF THE)
)
ARBITRATION)
)
BETWEEN)
)
CITY OF PORTLAND)
(The Employer))
)
AND)
)
PORTLAND POLICE)
ASSOCIATION)
(The Union))

ARBITRATOR'S
OPINION
AND
AWARD

FPDR Pension Benefits Grievance

HEARING: October 29, 2015

HEARING CLOSED: February 16, 2016

ARBITRATOR:

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REPRESENTING THE EMPLOYER:

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BACKGROUND

The City of Portland (hereafter “the Employer” or “the City”) and the Portland Police Association (PPA) (hereafter “the Union” or “the Association”) agreed to submit a dispute to arbitration. A hearing was held before Arbitrator Sylvia Skratek in Portland, Oregon on October 29, 2015. The parties submitted a list of prehearing stipulations prior to the beginning of the hearing:

1. The grievance is procedurally and substantively arbitrable;
2. The parties request that the Arbitrator retain jurisdiction after issuing her opinion and award for a period of 90 days to resolve any remedial issues;
3. The issue in this matter is whether the City of Portland’s 2012 changes to rules regarding Fire and Police Disability and Retirement Fund (“FPDR”) pension benefit final pay calculations violated Article 3 of the collective bargaining agreement? If so, what is the appropriate remedy?

At the hearing the parties presented their opening statements. The Arbitrator made a digital recording of the hearing and advised the parties that the recording was being made to supplement her notes and should not be considered an official record of the hearing.

The parties agreed to a schedule for the submission of their briefs which was later revised at the request of both parties. The Union’s closing brief was received on December 22, 2015; the Employer’s closing brief was received on February 8, 2016 and; the Union’s reply brief was received on February 16, 2016. The record was closed as of February 16, 2016. The award in this case is based upon the evidence, and arguments put forward during the hearing and the arguments presented by the parties in their post hearing briefs.

STIPULATED FACTS

1. The City of Portland (“City”) is located in Multnomah County, Oregon with a population of approximately 610,000. The City has a commission-based form of government headed by a mayor and four commissioners.
2. The Portland Police Association (“PPA”) is a labor organization representing nearly 900 sworn officers, sergeants, detectives and criminalists in the Portland Police Bureau.
3. The City and PPA are currently parties to a collective bargaining agreement effective July 1, 2013 through June 30, 2017. (Jt. Ex. 1)
4. At all material and relevant times, the City and PPA were parties to a collective bargaining agreement effective July 1, 2010 through June 30, 2013 (“Agreement”). (Jt. Ex. 2) The grievance at issue arose under the Agreement.

The Pension Plan

5. In 1902, the first City of Portland Pension fund for its police officers was created.
6. In 1942, the Fire and Police Disability and Retirement Fund (“FPDR” or “Fund”) was established, covering both police and fire City employees.
7. In 1948, Chapter 5 of the City Charter was amended and codified the structure of the pension plan.
8. FPDR funds pension benefits through a property tax levy on a pay-as-you-go basis. Administration of the Fund is delegated by the City Charter to the Fire and Police Disability and Retirement Board of Trustees (“Board”), which is composed of the Mayor or the Mayor’s designee, one active Fire Bureau member, one active Police Bureau member, and two citizen members. The Board is responsible for administering Chapter 5 of the City Charter and for supervising and controlling the FPDR Fund and Reserve Fund. Daily management of the Fund is performed by the City Bureau of Fire and Police Disability and Retirement.
9. PPA members hired by the City between 1990 and 2006 are members of the Fund and are referred to as “FPDR Two” members. FPDR Two members are not members of Oregon’s Public Employees Retirement System (“PERS”) nor do

FPDR Two members have a right to benefits under the federal social security system or the state workers' compensation system.

10. PPA members hired on or after January 1, 2007, are members of the Oregon Public Service Retirement Plan ("OPSRP"), which is a pre-paid pension plan that is part of PERS, and they do not participate in the FPDR Fund.
11. The grievance at issue only concerns pension benefits for PPA members who are FPDR Two members.

Pension Benefit Calculations

12. To determine pension benefits for FPDR Two members, the Fund first determines a PPA member's "base pay," which is the employee's base wages "including premium pay but excluding overtime and payments for unused vacation or sick leave." *See* City Charter Section 5-303(a). (Jt. Ex. 3 at 23)
13. The Fund then calculates the PPA member's "final pay" by selecting the highest total base pay received by an FPDR Two member for any of the three annual periods preceding the member's last day of employment as provided in City Charter Section 5-303(b). (Jt. Ex. 3 at 23)
14. The Fund then determines the amount of pension benefits by multiplying the employee's "final pay" by an accrual rate (ranging from 2.2% to 2.8%)¹ and by the employee's years of service, subject to a cap set by the Federal Internal Revenue Code. (Jt. Ex. 5 at 1)

The 27th Pay Period Issue

15. The issue at hand concerns changes to the "final pay" calculation under City Charter Section 5-303(b) for FPDR Two members.

¹ A lower accrual rate carries with it a higher survivor's percentage of benefits upon the retiree's death:

<u>Accrual Rate</u>	<u>Survivor's Percentage</u>
2.2%	100%
2.4%	75%
2.6%	50%
2.8%	25%

(Jt. Ex. 6 at 9)

16. On August 8, 2012, the Portland City Council adopted Resolution 36948, which referred Measure 26-145 to City voters. (Jt. Ex. 3 at 1) The City did not request or obtain the PPA's consent to submit the pension changes contained in Measure 26-145 to City voters.
17. On November 6, 2012, City voters passed Measure 26-145. (Jt. Ex. 4) The City proceeded to implement Measure 26-145. The City did not seek or obtain the PPA's consent prior to implementing the Measure 26-145 Charter changes.
18. The adoption of Resolution 36948 and passage of Measure 26-145 changed the final pay calculation under City Charter Section 5-303(b).
19. The City did not reach agreement with the PPA over changes to the final pay calculation under City Charter Section 5-303(b) prior to adopting its Resolution and referring the Measure to the voters. The PPA did not waive any bargaining or grievance rights with respect to those changes.
20. Part of the final pay calculation requires the Fund to determine the "lookback" period. Historically, FPDR has had varying interpretations and applications of the "lookback" period.
21. Prior to the 2012 City Charter changes, the lookback period under City Charter Section 5-303(b) meant the "12-month periods preceding the month in which the FPDR Two Member retires, dies or otherwise terminates employment with the Bureau of Fire or Police." (Jt. Ex. 3 at 23) For the period May 2007 through December 2012, FPDR interpreted the lookback period under City Charter Section 5-303(b) as meaning the 12 calendar months preceding the member's last day of employment.
22. Based on the City's bi-weekly pay structure for PPA members, most 12-month lookback periods only contain 26 pay periods. However, there are a number of 12-month lookback periods that contain 27 pay periods. (Jt. Ex. 5 at 3; Jt. Ex. 6 at 22). For example, a PPA member looking to retire using the lookback period that was in place prior to the 2012 City Charter changes could, assuming other requirements for retirement were met, choose to retire during one of the following months which include 27 pay periods as the "lookback" to establish his or her final pay calculation: June 2012; December 2012; November 2013; May 2015;

- April 2016; October 2016; September 2017; February 2019; March 2019; August 2020; January 2021; and other dates after January 2021. (Jt. Ex. 5 at 3)
23. A lookback period that includes 27 pay periods will typically yield a higher final pay amount and, therefore, a higher pension benefit than a lookback period with only 26 pay periods. (*See* Jt. Ex. 5 at 3 [“Maximizing Final Pay”]; Jt. Ex. 8 at 6 [“Is there a best time of year to retire?”])
24. After the 2012 City Charter changes, the lookback period under City Charter Section 5-303(b) meant the “365-day, or 366-day in a leap year, period where the most recent day is the last day for which pay was received in the calendar month preceding the calendar month in which the FPDR Two Member retires, dies or otherwise terminates employment with the Bureau of Fire or Police.” (Jt. Ex. 3 at 23) As a result, part of the 27th pay period was excluded from the lookback period and the final pay calculation, thus reducing the total pension benefits available to a PPA member retiring in one of the months referenced in paragraph 22.²
25. By removing the 27th pay period from the final pay calculation, the FPDR actuarial estimated present value of the pension benefit reductions is approximately \$40 million over a 25-year period. (Jt. Ex. 3 at 90)
26. For example, Sergeant Tom Perkins, the PPA’s Secretary-Treasurer, received a pension benefit estimate from the City on July 14, 2010. (Jt. Ex. 7) FPDR updated Sergeant Perkins’ pension benefit estimate on October 27, 2015. (Jt. Ex. 19) Under that updated estimate, his monthly base pension benefit without including a 27th pay period would be \$5,859.33. (Jt. Ex. 19 at 1) In contrast, his monthly base pension benefit using the same assumptions and including a 27th pay period would be \$6059.80. (Jt. Ex. 19 at 2) The exclusion of the 27th pay period from Sergeant Perkins’ final pay calculation would amount to a loss of \$200.47 per month for the remainder of his post-retirement life. Assuming Sergeant Perkins draws 25 years of pension benefits based on the Fund’s average life expectancy for retirees (Jt. Ex. 6 at 10), Sergeant Perkins would lose

² An FPDR Two member retiring in months other than those referenced in paragraph 22 may have a higher total pension benefit as a result of other 2012 City Charter changes. Those other changes are not the subject of the PPA’s grievance before the Arbitrator.

\$60,141.00 in pension benefits over his lifetime with the loss of the 27th pay period from his pension calculation.

The PPA's Grievance

27. On November 13, 2012, the PPA filed a grievance in which it asserted that the City violated Article 3 of the Agreement by changing the mandatorily negotiable standards of employment related to pension benefits by excluding the 27th pay period from the final pay calculation, without first reaching agreement with the PPA through collective bargaining.³ (Jt. Ex. 10.)

28. Article 3 of the Agreement states:

Standards of employment related to wages, hours and working conditions which are mandatory for collective bargaining except those standards modified through collective bargaining shall be maintained at not less than the level in effect at the time of the signing of this Agreement. Any disagreement between the Association and the City with respect to this section shall be subject to the grievance procedure.

29. Article 3 of the Agreement was unchanged in the current collective bargaining agreement (*see* Jt. Ex. 1 at 8), and has remained unchanged through a number of contract cycles since the early 1980s.⁴

30. In its grievance response, the City does not dispute that it changed the final pay pension benefit calculation by removing the 27th pay period under City Charter Section 5-303(b) as alleged by the PPA. Rather, the City asserts that it was not obligated to collectively bargaining with the PPA over the changes to the final pay calculation under City Charter Section 5-303(b) prior to implementing the changes.⁵ (Jt. Ex. 11)

³ In its grievance, the PPA also included two other changes to the final pay calculation—removal of “retroactive pay adjustments preceding the new 365-day look back period from pension calculations” and changes to “the base pay pension calculations to exclude qualifying premiums for certain PPA members who retire, die, or otherwise terminate employment with the Police Bureau and who were either on disability leave or were part-time employees during the look back period.” The PPA is not challenging those changes in arbitration.

⁴ During the last round of successor contract negotiations that resulted in the current collective bargaining agreement, the City proposed to exempt FPDR pension benefits from the purview of Article 3. The PPA rejected the City’s proposal, and Article 3 remained unchanged. (Jt. Ex. 9)

⁵ In its grievance response, the City asserts that the PPA’s grievance is not substantively arbitrable. The City has withdrawn its substantive arbitrability objection.

31. The PPA and City processed the grievance to arbitration. (Jt. Exs. 12-16)

Miscellaneous

32. Pursuant to a grievance settlement agreement at Jt. Ex. 17, the PPA and City have agreed that Arbitrator David Gaba's June 18, 2013, Decision and Award in a grievance brought by the Portland Police Commanding Officers Association (PPCOA), including the remedy granted by Arbitrator Gaba, is equally binding on the City and PPA.⁶

Position of the Union

The Union contends that this is another attempt by the City to evade its obligation to bargain pension benefit changes. The City's unilateral change to a pension benefit calculation in November 2012 yielded an estimated \$40 million reduction over a 25 year period in pension benefits for Union members. There was no agreement between the parties regarding this change. The City adopted Resolution 36948 and referred Measure 26-145 to the voters. At no time did the Union waive any bargaining or grievance rights regarding such changes.

The impact of the change is the exclusion of an additional pay period known as the 27th pay period from the final calculation of pension benefits. The exclusion of the 27th pay period reduces a Union member's final pay and pension benefit. While not all members chose to retire during one of the months that included 27 pay periods as the lookback to establish the final pay calculation it was available for a member's consideration prior to the 2012 City Charter changes. The Union provides a specific example of the financial impact by focusing on Sergeant Tom Perkins who will lose over \$60,000 in pension benefits over his lifetime with the loss of the 27th pay period from his pension calculation.

⁶ The Grievance Settlement Agreement at Jt. Ex. 17 is partially executed by the PPA. The City is currently gathering signatures on the agreement.

The City does not dispute that it has unilaterally changed the final pay calculation by removing the 27th pay period but rather the City asserts that it was not obligated to bargain with the Union over the changes prior to implementation.

According to the Union the City has violated Article 3 of the Agreement. The Union maintains that there are three elements that must be established:

- 1) Pension benefits are mandatory for bargaining;
- 2) The Union did not agree to the pension benefit change;
- 3) The City reduced pension benefit levels.

Elements two and three are not in dispute. It is the first element that must be resolved. The Union contends that the weight of prior precedent reveals that pension benefits are mandatory for bargaining. The Oregon Employment Relations Board (ERB) has long held that the City's FPDR pension benefits are mandatory for bargaining. Additionally two different arbitrators, David Gaba and Timothy Williams, within the last two years have determined that the City's FPDR pension benefits are mandatory for bargaining. Both arbitrators fully analyzed the same basic question: are FPDR pension benefits mandatory for bargaining? The Union and the City have agreed that Arbitrator David Gaba's June 18, 2013 Decision and Award in a matter with the Portland Police Commanding Officers Association is binding on the parties. (Ex. J17) In spite of these rulings the City is now forum shopping in the hope that this Arbitrator will take a more sympathetic view toward the City. The Union cites Arbitrator Janet Gaunt who ruled in *PPA v. City of Portland* that "...prior arbitration awards are frequently given deference...to do otherwise would detract from the element of finality in arbitration awards and would invite forum shopping and wasteful re-litigation in hope of achieving a different result before a different decision-maker." (Gaunt 2012 at p. 13). With both Arbitrator Gaba and Arbitrator Williams there was a full and fair hearing, the very same issue that is before this Arbitrator was central in those prior two cases, and both Gaba and Williams issued clear and reasoned opinions. The issue should be considered resolved with finality. While the City may attempt to distinguish how the changes were accomplished the fact remains that pension benefits were changed and changes in FPDR

pension benefits are protected by Article 3 of the Agreement. No matter how the City tries to slice and dice this issue, the City cannot evade the reality that FPDR pension benefits are mandatory for bargaining.

Furthermore the City attempted to exempt FPDR pension benefits from the purview of Article 3 during the last round of contract negotiations. The City also sought a complete waiver from the Union of all State law collective bargaining rights surrounding FPDR pension benefits. (Ex. J9) This is a tacit admission by the City that FPDR pension benefits are mandatory for bargaining otherwise why would the City have sought a specific waiver?

Article 3 protects existing benefits that are mandatory for bargaining, including FPDR pension benefits. The Article protects the existence of the 27th pay period in the pension calculation. This is an existing condition that the City unilaterally changed through a Charter amendment without the Union's agreement.

The City's arguments that FPDR is an independent entity over which the City does not exercise control and that the City's FPDR pension plan is on equal footing with the State's PERS pension plan are both baseless arguments and without merit. The FPDR is not an independent entity and the City is recycling its argument regardless of ERB's prior rulings as well as the decisions of Arbitrators Gaba and Williams against the City on that very matter. Furthermore the City is not the State and may not exempt itself from State collective bargaining law. The City does not have the same legal sovereignty as the State and may not exempt its pension plan from bargaining obligations as the State may do. The City is recycling its reliance on ORS 237.620 to support its proposition that the City is like the State and that as a result the City FPDR pension benefits are prohibited subjects of bargaining. The Union cites segments of the City's briefs in both the Williams and Gaba cases to illustrate that the City is once again raising before this Arbitrator a previously decided matter. Notably ORS 237.620 is an enabling statute that requires that the City provide overall pension benefits to its police and fire employees that are no less than the floor set by the State of PERS pension benefits. The statute does

not exempt a local government's pension plan from bargaining. As stated by ERB in *PPA v. City of Portland* (23 PECBR at 869 n8 2010): "...local government bodies lack authority to exempt issues from the requirements of PECBA".

In 2013 the City introduced HB 3050 before the State Legislature seeking to place the City's FPDR plan as equal in sovereignty to the State's PERS plan, so that actions taken by the FPDR Board and Fund administrator are not subject to collective bargaining and to recognize the independent authority of the FPDR Fund. The City's legislative effort was not successful and it serves as a tacit admission by the City that FPDR pension benefits are mandatory for bargaining.

The Union further emphasizes that the fact that voters approved the City Charter change is of no consequence. The City may not escape its collective bargaining obligations by delegating the subject to voters. If a local government seeks a voter-approved change to its charter that will affect a mandatory subject of bargaining it must first bargain the proposed change with the union before referring it to the voters. The Union cites several legal authorities to support this premise as well as the ERB findings in *PPA v. City of Portland* in which ERB rejected the City's attempt to escape its bargaining obligations by delegating collective bargaining matters to third parties. (23 PECBR at 870 n9) The City cannot avoid its PECBA responsibilities by vesting voters with decision-making over mandatory bargaining subjects. The Union notes that the City and its FPDR Bureau were the driving force behind the Measure that appeared on the ballot. The pension benefit change was recommended by the FPDR Board including the Mayor's designee on the Board. The Measure was approved by the Mayor and the City Council by Resolution and the City Council advocated for voter approval of the Measure in its communications with voters. (Ex. J3, pp. 95-96)

None of the above is intended to say that the City cannot seek changes to pension benefits through the collective bargaining process. Article 3 provides for such modification. As with any change to mandatorily negotiable monetary benefits, the City may propose changes to pension benefit levels at the bargaining table. If the Union

agrees to the change or if an interest arbitrator awards the City's proposal, the City may then garner voter approval for the pension benefit change.

The remedy sought by the Union is that the City cease and desist from reducing pension benefits in violation of Article 3 of the Agreement and that the City make whole any impacted current or former Union member who retired or will retire after the effective date of the Charter change that removed the 27th pay period from the final pay pension calculation. The Union is seeking a remedy from the City not the FPDR given that the Agreement is between the Union and the City. The City is free to implement a remedy by whatever means that would make impacted current or former Union members whole.

Position of the Employer

The City contends that the FPDR system only exists as a legislatively authorized alternative to the PERS system. As that alternative it is subject to the oversight and approval of PERS and therefore the City was not required to bargain over the enactment of voter approved Measure 26-145. Just as changes to PERS are not subject to bargaining nor are changes in FPDR benefits subject to bargaining. The FPDR Board is separate from the City Council and has independent responsibility to "supervise and control the fund and the Reserve Fund." The FPDR is only permitted to exist because of the State statute that makes FPDR a legislatively authorized alternative to PERS that is subject to oversight and approval of the PERS Board. FPDR is on equivalent footing with PERS for purposes of bargaining under PECBA.

The City cites ERB cases dating back to 1989 to support its contention emphasizing that ERB has held that an employer is not required to bargain over state based decisions over which it has no control and which it cannot countermand, particularly including changes to PERS benefits. The City provides an overview of the decision in *OSPOA v. State of Oregon*, 11 PECBR 332 (1989) in which ERB concluded that the State's Department of General Services had the exclusive statutory authority to manage and control parking facilities and to establish parking rates. ERB notes that the

State's statutory bargaining authority could not lawfully set the parking rate through collective bargaining when the legislature had directed the State to establish the rates through an independent instrumentality and process.

ERB has long recognized that while retirement benefits generally constitute a mandatory subject of bargaining PERS created a special situation that mandated an exception. ERB has recognized that once an employer joined PERS it could no longer negotiate over benefit levels and costs because the legislature determined the benefit level. As set forth in *Deschutes County Sheriff's Association v. Deschutes County*, 13 PECBR 223 (1991) because the PERS Board had the exclusive power and authority to manage the PERS system only it, and not the employer, could decide the appropriate classification for employees.

The City also provides an overview of *AFSCME v. State*, 14 PECBR 180 (1992) in which ERB concluded that the State Employees Benefits Board (SEBB) had the exclusive authority to design and procure health benefits. The law governing SEBB was specific and preempted PECBA's general requirement that health insurance be subject to collective bargaining. ERB rejected the argument that SEBB and the State's authorized bargaining agent, the Executive Department, should be considered one entity because SEBB was situated organizationally within the Executive Department. The Executive Department did not constitute a majority of SEBB's board nor was SEBB subject to the Executive Department's control. The most convincing evidence of operational independence can be found in the statutes that define SEBB's authority to design benefit plans, determine terms and conditions of eligibility, devise specifications, contract for and terminate benefit plans—all of which are incompatible with the Executive Department's duties under PECBA.

The City maintains that these cases along with the others that it has cited illustrates that ERB has concluded that public employers with police and firefighters covered by PERS are prohibited from bargaining over PERS retirement benefits because the legislature has delegated the subject matter exclusively to PERS. PERS establishes

the type and level of benefits available, eligibility, employer and employee contributions, cost-of-living increases and service credit.

The FPDR system is exempt from ORS 237.620(2) provided the City's retirement system for its police officers and firefighters provides benefits equal to or greater than those required by PERS. PERS retains oversight and ultimate control over the benefits provided by the FPDR system and over the very existence of the City's FPDR system. The legislature has circumscribed the City's ultimate control over the ability to set benefits levels and put the City's FPDR system on a legislatively authorized equal footing with PERS. This statutory scheme is irreconcilable with a PECBA obligation to bargain.

The City further reminds the Arbitrator that she is not bound by prior arbitration awards. Arbitrators are free to make their own decisions particularly when an arbitrator finds the rationale and/or analysis of prior decisions lacking. Specifically neither the Gaba nor the Williams decision address an issue that is similar to the one in this matter. Neither decision addressed an FPDR charter change enacted by the voters. Furthermore both arbitrators incorrectly concluded that FPDR benefits are subject to bargaining.

In conclusion the City maintains that it was not obligated to bargain over the voter approved clarifications to the FPDR Charter language related to the final pay or "lookback" calculation and requests that the grievance be denied.

Union's Reply

The Union emphasizes that the City is shopping its arguments before this Arbitrator in the hope that she will adopt an argument that has been rejected by ERB and arbitrators on at least four prior occasions. Ignoring these prior rulings would lead to an absurd result. The City is also seeking to distance itself from Arbitrators Gaba's and Williams' prior rulings arguing that they are not binding and are distinguishable given the nature of the pension change in this case. No matter how the City parses the prior

decisions and their analyses there is overwhelming prior precedent that resolves the core issue: FPDR pension benefits are mandatory for bargaining. The City cannot exempt itself from bargaining obligations by delegating pension benefits to its own FPDR Fund. The City is not on equal footing with the State and there is nothing within the PERS enabling statutes that support the City's position. The statutory scheme empowers the City to have its own pension system subject to the "equal to or better than" benefits floor but this floor is no different than the minimum wage floor set by state and federal law. The existence of a minimum wage floor does not exempt wages from collective bargaining nor does the pension benefits floor exempt pension benefits from bargaining. PERS is limited to ensuring that the pension benefits are equal to or better than the retirement benefits that would be provided to the equivalent classes of employees under the Public Employees Retirement System. (ORS 237.620(2) and (3)) That is its only role. It is the City's FPDR Board that sets and administers FPDR pension benefits.

The City's reliance on prior ERB decisions that were issued in matters involving the State of Oregon have no bearing in this matter. The City is not the State of Oregon and the City cannot exempt itself from bargaining obligations. The *Deschutes County* case cited by the City also has no bearing in this matter given the fact that the PPA is not seeking the same outcome as was being sought by the union in *Deschutes*. Notably *Deschutes* did state: *retirement benefits are monetary benefits that are mandatory for bargaining under the Public Employee Collective Bargaining Act.* As determined by Arbitrator Gaba with respect to the PPCOA, *Deschutes County* in no way limits the PPA's contract rights under Article 3 of its collective bargaining agreement.

The City's own FPDR Fund and not the State PERS dictated the pension benefit change at issue in this case. The City is responsible for maintaining FPDR benefits for PPA members under Article 3 of the Agreement. The PPA is not seeking to countermand anything that the FPDR Board or the voters have approved but rather is seeking to uphold the City's contractual agreement under Article 3 of the Agreement: to maintain FPDR pension benefit levels, including the inclusion of the 27th pay period in the final pay calculation. The remedy sought by the PPA is a make whole remedy from the City.

ANALYSIS

Article 3, Existing Standards, has been in the Collective Bargaining Agreement between the parties since the 1980s and has remained unchanged through a number of contract cycles since that time. (Fact Stip. ¶ 29)

Standards of employment related to wages, hours and working conditions which are mandatory for collective bargaining except those standards modified through collective bargaining shall be maintained at not less than the level in effect at the time of the signing of this Agreement. Any disagreement between the Association and the City with respect to this section shall be subject to the grievance procedure.

Pension benefits have been long established as a mandatory subject for collective bargaining. Several authorities have reminded the City of this mandate over the years. Nonetheless the City has searched for ways in which it can make modifications to the pension benefits without having to negotiate the modifications with the Union. None of the efforts by the City have been successful. It has argued before two different arbitrators without success. It has argued before the Oregon Employment Relations Board without success. It has attempted to modify the Collective Bargaining Agreement without success. (Ex. J9) It has even approached the legislature for statutory changes without success. Its latest effort is now before this Arbitrator for review.

On August 8, 2012 the Portland City Council adopted Resolution 36948, referring a charter amendment measure to Portland voters at the November 6, 2012 General Election ballot. (Ex. J3, p.1) Within that resolution it stated that “this measure clarifies how retirement benefits are calculated” and is clearly intended to change the determination of what constitutes “Final Pay”. (J3, pp. 3 & 23) The question that was put forward to the voters was: *Shall limited provisions of the retirement and disability system for police and fire be changed?* This proposed charter amendment was expected “to decrease FPDR taxpayer liabilities by \$46 Million over a 25 year period”. (J3, pp. 67, 68 & 73) The change in the Final Pay determination yielded the bulk of the savings: \$40 million over a 25 year period. (J3, p.90) In the past when the City has sought modifications to the FPDR system through changes to the charter the:

City Council created an FPDR Reform Committee to propose changes to the FPDR system to refer to the voters in the November 2006 elections. City Council charged the Reform Committee to work collaboratively with all stakeholders in analyzing and recommending changes to the FPDR system and to draft comprehensive reform recommendations addressing both the pension and disability programs. Members of the Reform Committee included: the citizen member of the FPDR board who was nominated by the Mayor and appointed by City Council; two representatives selected by the PPA; two representatives selected by the PFFA; one representative selected by the PPCOA; three citizen representatives from the IRC; a representative from City Club appointed by the Mayor; and representatives from the offices of the Mayor, the Commissioners and the City Auditor. The FPDR Reform Committee agreed that the composition of the FPDR board required change. The committee proposed a five-member board of trustees consisting of the Mayor or his designee, one member elected by the PFFA, one member elected by the PPA, and two citizen members unaffiliated with the FPDR and either the Police and Fire Bureaus, with relevant experience in disability or pension system management. **Only after reaching consensus with the affected unions did City Council refer the Charter reform of FPDR to the citizens of Portland.** (Emphasis added) The major reforms included:

1. Prefunding the pension system by placing all new hires after January 1, 2007 into OPSRP;
2. Eliminating the Board's responsibilities to make disability determinations; and
3. Changing composition and duties of the FPDR Board.⁷

There was no explanation as to why the City did not seek consensus from the affected unions in the matter before this Arbitrator prior to referring the matter to the voters. The City is now attempting to hide behind a so-called voters' mandate to change the determination of Final Pay. It is relying upon the overwhelming voter approval of its charter amendment to support its claim that it can make modifications to the Final Pay. The City however cannot abdicate its management responsibilities and obligations to the voting public. Even if it had so abdicated at what point was the voting public provided full and complete information about the proposed amendment? The Arbitrator can find nothing within the information that was put forward by the City to the voting public that clearly delineates how the change would affect long serving police and fire fighters. The emphasis is placed on the \$45 million dollar savings and a decrease in taxpayer liabilities. Human nature in today's volatile political environment leads most voters to support anything that smacks of a tax reduction. To put an issue as important as pension benefits

⁷ Appendix G of PPA post hearing brief at p. 23: Employer's Post Hearing Brief in the matter before Arbitrator Timothy Williams.

before the voters without a full and honest explanation of the effect of the change is unconscionable. And to put an issue that is a mandatory subject of bargaining before the voters without first reaching agreement with the unions constitutes bad faith. The City's assertion that it is merely proceeding "to implement clarification of the 'lookback' period mandated by the voters" belies the fact that it actively pursued and disingenuously presented to the voters a change in an existing standard that is a mandatory subject of bargaining. Furthermore, the City put forth testimony from its own witness in its post hearing brief in the Williams arbitration matter:

As Ms. Deckard's [Mayor's appointee to the FPDR] testimony reflects, collective bargaining and FPDR administration operate in two, mutually exclusive arenas: The pension plan cannot undo what the City has [negotiated], nor can the City undo what the pension fund is doing or has done. Jt-27, p. 18 (Deckard testimony).⁸

Deckard's testimony in the Williams' matter as put forth by the City represents an understanding by FPDR that it cannot make modifications that would undo a negotiated agreement entered into by the City. In this matter the City entered into an agreement with the Union in the 1980s that guarantees:

Standards of employment related to wages, hours and working conditions which are mandatory for collective bargaining except those standards modified through collective bargaining shall be maintained at not less than the level in effect at the time of the signing of this Agreement.

There has been no change to the language since the 1980s. The standard in existence in 2010 was the availability of the 27th pay period. The City's own document provided to Sergeant Tom Perkins on July 14, 2010 (Ex. J7) illustrates the application of the 27th pay period. It is that standard that may not be modified by the City, by the FPDR, or by the voters without bargaining with the Union. The City is bound by Article 3 of the Agreement and the City must provide the same level of benefits regardless of what the FPDR chooses to do and regardless of what the voters determine.

Contrary to the City's assertions, FPDR is not separate from the City Council with an independent responsibility to supervise and control the fund and the reserve fund. The

⁸ Ibid at p. 29.

FPDR Board of Trustees is composed of five members: the Mayor or the Mayor's designee; two citizens of the City of Portland nominated by the Mayor and approved by City Council; and one Active Member serving in the Bureau of Fire elected by the Active Members and one Active Member serving in the Bureau of Police elected by the Active Members. The majority of the Board represents the City of Portland. It is the City Council that levies the taxes each year that are "sufficient to produce and provide a sum equal to said required amounts so prepared and transmitted by the Board". (Ex. J3, p. 13, 12) And it is the City of Portland that distributed the Bureau of Fire and Police Disability and Retirement document dated February 10, 2010 that at page 4 of 7 answers the question *Is there a best time of year to retire?* in the following manner:

This depends on your individual circumstances. The two most popular dates are: July 1st or January 1st, but this may change based on the number of pay periods in a given 12-month lookback period for final pay. January 2-February 1 was very popular in 2009 because the lookback period had 27 pay dates instead of the usual 26. (Ex. J8)

Furthermore it is the City of Portland that referred Measure 26-145 to the voters and it is the City of Portland that prepared the explanatory statement for the Measure. (Ex. J3, pp. 92 and 93) The FPDR is a department within the City not an independent entity over which the City has no control. In fact the City exercises considerable control through its membership on the Board. As ERB noted in its 2010 decision⁹ upholding its 2009 decision in *Portland Fire Fighters' Association, Local 43, IAFF v. City of Portland*, 23 PECBR 43, 76-77:

...FPDR is a department of the City, "created by the City, funded by the City, staffed in accordance with City policies, and advised by the City Attorney's office".

ERB further found in that same 2010 decision:

The Fund is also a bureau of the City. The Fund administrator is a City employee, as are her subordinates. The Fund uses City letterhead, City contracting and human resource forms and procedures, and has access to the services of the City attorney and City Auditor. The City Attorney's office has advised the Fund Board that, for purposes of the Fund Board and administrator indemnification required by the charter, Fund trustees are agents of the City covered by the City's risk management program. The City pays the rent for the Fund's office, and does

⁹ *PPA v. City of Portland*, 23 PECBR 856, 869 n8 (2010)

not charge the fund for using the City Council chambers for Fund meetings. The City Treasurer holds the Fund's money.

ERB's 2010 decision was affirmed by the Oregon Appellate Court in 2012. (248 Or App 109)

The City's assertion that FPDR is only permitted to exist because of State statute that makes FPDR the legislatively authorized alternative to PERS that is subject to oversight by and the ultimate approval of the PERS Board and therefore FPDR is on equal footing with PERS for purposes of bargaining under PECBA is a significant misrepresentation of the statute. The City relies on ERB cases that have held that an employer is not required to bargain over state based decisions over which it has no control and which it cannot countermand, particularly including changes to PERS benefits. The majority of the cited cases however involve State government entities. Given the fact that the State Legislature created PECBA, it may in turn exempt issues from the requirements of PECBA. As noted by ERB in *PPA v. City of Portland 23* PECBR 856, 869 n8 (2010), a local government has no similar authority to exempt issues from the requirements of PECBA. ERB went further to state:

A public employer simply cannot avoid its PECBA responsibilities by creating a bureau or department and attempting to vest with the department decision-making over *any* mandatory subject of bargaining, whether that subject be wages, retirement benefits, or disability benefits...

The City also relies on the ERB decision in *Deschutes County Sheriff's Assoc. v. Deschutes County*, 13 PECBR 219, 222 (1991). The City contends that *Deschutes* illustrates that while retirement benefits generally constituted a mandatory subject of bargaining, PERS created a "special situation" which mandated an exception. The City's contention however fails to take into consideration that ERB recognized that once an employer joined PERS it could no longer negotiate over benefit levels. In this matter the City of Portland has a separate retirement system for PPA members hired by the City between 1990 and 2006 who are referred to as "FPDR Two" members. FPDR Two members are not members of Oregon's Public Employees Retirement System (PERS). (Fact Stip. ¶ 9) For purposes of the FPDR Two system, the City has not joined PERS but rather through the enabling statute, ORS 237.620(2) the City "...provides retirement

benefits to ...[police officers or firefighters]...that are equal to or better than the retirement benefits that would be provided to the equivalent classes of employees under the Public Employees Retirement System...” The enabling statute further provides at Subsection (3) a review by the Public Employees Retirement Board of “...the retirement benefits provided by a public employer of police officers or firefighters that does not provide retirement benefits for those employees under the Public Employees Retirement System”. The review determines whether the employer is complying with the requirements of Section (2) of the statute and if the employer is not in compliance mandates that the employer must provide adequate benefits to meet the requirements. Nothing within the enabling statute exempts the employer from the requirements of PECBA. The City of Portland has not joined PERS for purposes of the FPDR Two system and therefore unlike the ERB determination in *Deschutes* the City is not exempt from negotiations over benefit levels. Furthermore, nothing within the statute gives PERS ultimate control over the benefits provided except to the extent that a public employer may be mandated to comply with the requirements of the statute and a failure to do so may result in a circuit court action by an employee to compel compliance. The statute does not put the City’s FPDR system on equal footing with PERS but rather allows an exception to the requirement at Subsection (1) that “...all public employers of police officers or firefighters shall provide retirement benefits to those employees under the Public Employees Retirement System” . When the statute is reviewed concurrent with the ERB determinations in *City of Portland v. PPCOA*, 16 PECBR 43,50 (1995) and *Petition for Declaratory Ruling filed Jointly by PFFA Local 43 and the City of Portland*, 10 PECBR 931 (1988) there can be no other conclusion than FPDR pension benefits are mandatory for bargaining.

The City has reminded this Arbitrator that she is not bound by the prior arbitration decisions issued by Arbitrators David Gaba and Timothy Williams and this Arbitrator has never been reluctant to issue decisions contrary to decisions issued by other arbitrators when the rationale and/or analysis in prior decisions may be suspect however she can find no reason to do so in this matter. Both Williams and Gaba found that FPDR pension benefits are mandatory for bargaining. Williams determined that the City is required to

protect bargaining unit members from a unilateral reduction in what is a substantial financial benefit. Gaba determined that the City must maintain a monetary pension benefit which it had eliminated without bargaining with the union. Both Williams and Gaba relied upon the ERB rulings cited herein which encapsulate the notion that “the legislature intended the PECBA to control over a city’s local legislation regarding employment relations”. The City’s attempt to distinguish the issues in the Williams and Gaba matters as having addressed different underlying issues than the issue that is at the heart of the grievance before this Arbitrator fails to consider that regardless of how a change is made to the retirement benefits, be it by a decision by the FPDR Board or an FPDR charter change enacted by the voters, it is still a change to a mandatory subject of bargaining that cannot be accomplished without negotiations with the Union. It is also irrelevant that the Williams decision involved a different union given the fact that the determination was based upon a decision by the same FPDR Board that has responsibility for the PPA retirement system which coexists with the PFFA retirement system. As evidenced on Joint Exhibits 3, 4, 5, 7, 8, 18 and 19 it is the *Fire and Police* (emphasis added) Disability and Retirement plan or system.

The City has made numerous attempts at reducing pension benefits without having to negotiate with the Union. In 2007 there was what appears to be the initial attempt to change the lookback period:

In March, 2007, the Fund Board reviewed the method the Fund Administrator had been using to calculate an employee’s “final pay”. Part of that calculation requires the Administrator to determine the lookback period. The Fund Board determined that the Administrator was using the wrong lookback period. The City Charter specifies that the lookback period ends in the month preceding an employee’s retirement date; the Fund Administrator instead used the actual month the employee retired. As a result, any salary increase in the final month of work was typically included in the pension calculations. On March 27, 2007, the Fund Board directed the Administrator to end the lookback period in the month preceding the month the employee retired. On May 8, the Fund Board learned that the Administrator had not yet implemented this decision, and ordered the Administrator to do so immediately, which she did.¹⁰

¹⁰ *PPA v. City of Portland*, op cit.

In the years following its 2007 attempt the City:

- 1) In 2013 proposed a change during negotiations to Article 3 that would have excluded the FPDR pension plan as a “standard of employment for purposes of article 3”. (Ex. J9, Fact Stip. ¶29);
- 2) Also in 2013, introduced HB 3050 before the State Legislature which would have guaranteed that “the actions of the FPDR Board and Fund administrator are not subject to collective bargaining and to recognize the independent authority of the Fund”. (Appendices H and I of Union’s post hearing brief)

Meanwhile, the City was putting forward the exact same arguments before Arbitrators Williams and Gaba that it has put forward in the matter before this Arbitrator.

The City has been unsuccessful in all of its prior attempts and has also been unsuccessful in this current attempt.

CONCLUSION

When the City enacted Measure 26-145 it was not merely proceeding to implement a clarification of the lookback period mandated by the voters but rather it was disingenuously attempting to evade its responsibilities and obligations under PECBA. The words of Arbitrator Gary Axon in his 1991 Interest Arbitration Award captured the importance of the language that he placed in the existing conditions provision of the PPCOA Agreement with the City. At that time Arbitrator Axon stated:

The long term employees who make up the membership of this unit should not see working conditions that they have enjoyed for many years swept away because of political considerations.¹¹

Arbitrator Axon’s wisdom remains applicable today. While the language he drafted in 1991 was for a different bargaining unit within the City it is substantially similar to the language contained within the Agreement between the parties in this matter. Political considerations have no place in collective bargaining. A collective bargaining agreement is between the City and one of its respective unions. While there are certainly political forces that may attempt to influence negotiations between the parties it is ultimately the agreement struck by the parties that is binding. Any attempt to make modifications to the terms of the agreement must be accomplished through collective bargaining.

¹¹ Ex. J17, p. 10 of 35.

The overwhelming weight of prior precedents indicates that pension benefits are a mandatory subject of bargaining. Article 3 of the Agreement in this matter requires that benefits must be maintained at the level in effect at the time of the Agreement. The standard in effect in 2010 is exemplified in Exhibit J7 and it is that standard that cannot be modified without negotiations. The City signed a collective bargaining agreement with the Union which under Article 3 requires the City to maintain pension benefits levels, including the 27th pay period as part of the final pay calculation, regardless of what the FPDR chooses to do or what the voters mandate.

The City of Portland's 2012 changes to rules regarding Fire and Police Disability and Retirement Fund ("FPDR") pension benefit final pay calculations violated Article 3 of the collective bargaining agreement.

REMEDY

The City is ordered to cease and desist from reducing pension benefits in violation of Article 3 of the Agreement. The City shall make whole any affected current or former PPA member who retired or will retire after the effective date of the City of Portland's 2012 changes that removed the 27th pay period from the final pay pension calculation.

As stipulated by the parties, the Arbitrator shall retain jurisdiction of this matter for a period of ninety (90) days to resolve any remedial issues.

Respectfully submitted on March 16, 2016 by

A handwritten signature in black ink, appearing to read "Sylvia P. Skratek", with a long horizontal line extending to the right.

Sylvia P. Skratek, Arbitrator