

MEMORANDUM OF UNDERSTANDING
REGARDING REFORM OF THE CINCINNATI RETIREMENT SYSTEM

I. Cases and Parties

- a. The purpose of this Memorandum of Understanding (“MOU”) is to memorialize the terms by which the undersigned parties intend to fully and finally resolve the allegations and claims set forth in two consolidated cases pending before Honorable Judge Michael R. Barrett in the United States District Court for the Southern District of Ohio: (1) *Sunyak v. City of Cincinnati*, Case No. 1:11-cv-445; and (2) *Harmon v. City of Cincinnati*, Case No. 1:12-cv-329. In addition, upon final approval of the Collaborative Settlement Agreement and Consent Decree described herein, to which AFSCME shall be a party, the pending matter of *State ex rel. Council 8 AFSCME, et al. v. City of Cincinnati, et al.*, Hamilton County Common Pleas Case No. A1104791, shall be dismissed with prejudice.
- b. The aforementioned consolidated cases involve the level of retirement benefits which are or shall be available to future retirees of the City of Cincinnati (“City”). The aforementioned state court action addresses various aspects of the City’s obligation to fund its ERISA-exempt municipal plan, the Cincinnati Retirement System (“CRS”).
- c. The original Plaintiffs (“Original Plaintiffs”) in the two consolidated cases are: (1) Nick Sunyak, (2) Jeffery Harmon, (3) Jill Allgeyer, (4) Kim Kappel, (5) Waleia Jackson, and (6) Richard Ganulin.

- d. Several additional Plaintiffs filed a Motion to Intervene in the consolidated actions on March 17, 2014 (“Intervening Plaintiffs”). All of the Intervening Plaintiffs are former City employees who currently receive pension annuity and healthcare benefits from the City’s retirement system. The Intervening Plaintiffs are: Thomas A. Gamel, Sr., Donald C. Beets, Paul Smith, Mark K. Jones, Dennis Davis and Ely Ryder.
- e. The Defendants in these two consolidated actions are: (1) the City, (2) the Mayor of Cincinnati, (3) the City Manager, (4) the Vice-Mayor, (5) the City Council Members, (6) the CRS; and (7) the appointed Board of Trustees of the CRS (“Board”).
- f. The Original Plaintiffs, Intervening Plaintiffs, AFSCME and Defendants are collectively referred to as the “Parties.”
- g. **Current Employee Class:** The Original Plaintiffs seek to represent approximately 2,500 current City of Cincinnati employees as defined by the following Class: *All individuals who participated in the Cincinnati Retirement System with at least five years of creditable service prior to July 1, 2011, and who are members of “Group C,” “Group D,” “Group E,” or “Group F” as these terms are defined by Cincinnati Municipal Code § 203-1-M1(b), (c), (d), and (e).* This Class is referred to hereafter as “Current Employee Class.”
- h. **Retiree Class:** The Intervening Plaintiffs seek to represent approximately 4,700

retired employees as defined by the following Class: *All individuals formerly employed by the City of Cincinnati, the University of Cincinnati, the University Hospital f/k/a General Hospital and Hamilton County, who retired before January 1, 2012 and have received retirement benefits from the City of Cincinnati and they, their dependents and/or their surviving beneficiaries are entitled to those benefits.* This Class is referred to hereafter as the “Retiree Class.”

II. Original Plaintiffs’ Allegations

- a. Generally, the Original Plaintiffs allege their Amended Consolidated Complaint that the Defendants unlawfully revoked and impaired their vested retirement benefits by adopting and enforcing City Ordinance No. 84-2011 (“Ordinance”). The Ordinance became effective on July 1, 2011.
- b. The Original Plaintiffs seek declaratory and injunctive relief for themselves and all others similarly situated who participated in the CRS for at least 5 years prior to July 1, 2011 and who are members of Group C, Group D, Group E or Group F as these Groups are defined by Cincinnati Municipal Code § 203-1-M1(b), (c), (d), and (e).
- c. Jill Allgeyer is a member of Group C. Pursuant to the adoption and enforcement of the Ordinance, members of Group C no longer receive a death benefit of at least \$5,000. Ms. Allgeyer will represent the Group C Sub-Class of the Current Employee Class.

- d. Kim Kappel and Richard Ganulin are members of Group D. Pursuant to the adoption and enforcement of the Ordinance, members of Group D no longer receive a death benefit of at least \$5,000 and a three percent per year Cost of Living Adjustment (“COLA”) compounded annually. The Ordinance replaced the three percent compounding COLA with a simple indexed COLA not to exceed two percent. Members of Group D who did not retire on or before January 1, 2014 were automatically assigned to Group E. Ms. Kappel and Mr. Ganulin will represent the Group D Sub-Class of the Current Employee Class.

- e. Waleia Jackson is a member of Group E. Pursuant to the adoption and enforcement of the Ordinance, members of Group E no longer receive a death benefit of at least \$5,000, a three percent per year COLA compounded annually, and a retirement benefit amount calculated based on the highest 36 months final average salary with a 2.22 percent to 2.5 percent multiplier applicable to all years of creditable service (“Higher Benefit Amount”). The Ordinance replaced the three percent compounding COLA with a simple indexed COLA not to exceed 2% and replaced the Higher Benefit Amount with a less generous formula to calculate the benefit accrued from January 1, 2014 until retirement – limiting the multiplier applicable to such years to two percent and using the highest 60 months final average salary. Ms. Jackson will represent the Group E Sub-Class of the Current Employee Class.

- f. Nick Sunyak and Jeffery Harmon are members of Group F. Pursuant to the

adoption and enforcement of the Ordinance, members of Group F no longer receive a death benefit of at least \$5,000, a three percent per year COLA compounded annually, a retirement benefit amount calculated based on the highest 36 months final average salary with a 2.22 percent to 2.5 percent multiplier applicable to all years of creditable service (“Higher Benefit Amount”), and the right to retire with full benefits upon reaching 30 years of service – regardless of age. The Ordinance replaced the three percent compounding COLA with a simple indexed COLA not to exceed two percent, replaced the Higher Benefit Amount with a less generous formula to calculate the benefit accrued from January 1, 2011 until retirement – limiting the multiplier to 2.2 percent for years of service up to 30 and two percent for years of service over 30 and using the highest 60 months final average salary, and replaced the 30 years of service requirement with a requirement that such employees also must be 60 years of age to receive full benefits. Mr. Sunyak and Mr. Harmon will represent the Group F Sub-Class of the Current Employee Class.

III. Intervening Plaintiffs’ Allegations

- a. Generally, the Intervening Plaintiffs, all of whom are former employees of the City of Cincinnati who are now retired and currently receiving retirement or pension benefits (including healthcare benefits), allege that the City of Cincinnati has threatened to suspend or significantly curtail retiree health benefits, reduce the Intervening Plaintiffs’ COLA from the current three percent compounding COLA

with a simple indexed COLA not to exceed two percent and to suspend the COLA for a period of years. The Intervening Plaintiffs' concern is based, in part, on an ordinance introduced on February 18, 2014 before City Council.

- b. The Intervening Plaintiffs are also concerned that the adjudication of the Original Plaintiffs' claims in the Amended Consolidated Complaint will prejudice them by affecting adversely the financial viability and ability of the CRS to pay benefits, and that any settlement related to the Original Plaintiffs' Amended Consolidated Complaint could prejudice the Intervening Plaintiffs' ability to independently assert their claims at a later date. The Intervening Plaintiffs are also concerned that, in the absence of a global resolution, the CRS, which is more than 38 percent underfunded, is likely to be unable to pay out future benefits. Consequently, the City is likely to eliminate or substantially modify and reduce the Intervening Plaintiffs healthcare benefits. Such has been expressly contemplated in numerous City communications and discussions.
- c. Thomas A. Gamel, Sr., Donald C. Beets, Paul Smith, Mark K. Jones, Dennis Davis and Ely Ryder will represent the Retiree Class.

IV. Defendants' Response to Allegations and Purpose Ordinance No. 84-2011

- a. The City of Cincinnati contends that it faces several imminent fiscal challenges that require action to stabilize the CRS. These include:
 - i. The potential negative impact on the City's general obligation bond rating

if the City cannot structurally balance the General Fund. To structurally balance the General Fund, the City must control pension-related costs.

- ii. A recent budget forecast for FY 2015 showing a \$22 million budget deficit.
 - iii. The concern that the Ohio Auditor could place the City on fiscal caution, watch, or emergency.
 - iv. The concern that the Cincinnati Retirement System has an unfunded liability in excess of \$850 million and is only 61% funded.
 - v. The pending legislation in the Ohio General Assembly, which if approved, will require pension systems in the State to be 100% funded within a 30-year period.
- b. While the City is willing to guarantee a minimum contribution rate for the next 30 years, the pain attendant to any serious reform of the CRS system unfortunately must be shared among the City, active City employees and current retirees. That said, the provisions set forth in this document are designed to ensure the long-term stability of the CRS Fund while lessening, to the extent possible, any negative impact on the City employees – past, present and future.

V. Joint Recognition of Substantial Risk

- a. The parties recognize that the City is in a position of substantial fiscal challenge which may adversely affect its long-term ability to sustain the CRS. Recent jurisprudence involving retiree healthcare may limit the ability of the Retiree

Class to effectively litigate their rights to any such benefits. Moreover, recent Ohio and federal jurisprudence has raised questions about common law and statutory entitlement to set COLA levels and other ancillary retirement benefits . Thus, there is risk to both parties concerning the possible result of litigation. The parties agree that a one-time, judicially-supervised collaborative resolution of all issues concerning CRS benefits and benefit levels is in the best interest of the active City employees, retirees and the City.

- b. This MOU is intended to form the basis from which the Parties shall draft and finalize for Court approval a comprehensive Collaborative Settlement Agreement and Release and a Consent Decree.

VI. Agreed Terms of Settlement

- a. **Class Certification:** The Parties agree, for settlement purposes only, to: the certification of the Current Employee Class and the Retiree Class pursuant to Federal Rule of Civil Procedure 23(b)(2) and/or 23(b)(1)(b), the appointment of the Original Plaintiffs as class representatives of the Current Employee Class, and the appointment of counsel for the Original Plaintiffs (Marc D. Mezibov, Esq., Robert D. Klausner, Esq., Christian A. Jenkins, Esq., and Jeffrey S. Goldenberg, Esq.) as class counsel for the Current Employee Class pursuant to Federal Rule of Civil Procedure 23(g), the appointment of Thomas A. Gamel, Sr., Donald C. Beets, Paul Smith, Mark K. Jones, Dennis Davis and Ely Ryder. as the class representatives of the Retiree Class and the appointment of Robert A. Pitcairn, Jr.,

Esq. as class counsel for the Retiree Class pursuant to Federal Rule of Civil Procedure 23(g). The Defendants shall be responsible for the cost of issuing notice and implementing and administering the terms of this Settlement.

- b. COLA Calculation (All Classes):** Effective January 1, 2016, the new retiree COLA will be 3.00 percent fixed simple. The simple COLA shall be applied as follows: Assume a retiree has an annual pension \$10,000 per year. The 3.00% COLA is equal to \$300.00. Each succeeding COLA amount is aggregated with the prior COLA payment. In the first year in which a COLA is applied, the annual benefit would be \$10,300. The next COLA payment of \$300.00 would take the annual benefit to \$10,600. The third COLA payment of \$300 would take the annual payment to \$10,900. This process would continue annually.
- c. COLA Deferral Period (All Classes):** It is the intent of the parties to establish criteria upon which the deferral in the second and third years may be restored.
- i. **Current Employee Class** : Three year COLA deferral period.
1. For those members of this Class yet to retire, the three year COLA deferral period begins on the date of retirement. These individuals shall not receive a COLA in their second, third and fourth years of retirement, but shall receive a COLA in all other years.
 2. For those members of this Class who retired after July 1, 2011, the three year COLA deferral period begins to run on January 1, 2016 and will be implemented in the same manner as the retiree class

under (ii) of this section.

Retiree Class: Three-year COLA deferral period, implemented in the following years; 2016, 2017 and 2018. The deferral period will begin on January 1 or each of these years, unless deferral should not be applied that year pursuant to section c above.

- d. **COLA Poverty Exception (All Classes):** – Those Class members who retired with at least 25 years of service and whose household income is below 150% of the federal poverty guideline will continue to receive the current three percent compounding COLA without being subject to any COLA deferral until their household income exceeds 150 percent of said guidelines. At such time, these retirees will receive the COLA set forth in Section VI (b) above.
- e. **Retirement Eligibility (Current Employee Class Only):** Current Employees with at least 5 years of service as of July 1, 2011 can retire with full benefits upon reaching 30 years of service or at age 60 with five years of service.¹
- f. **Retirement Benefit Multiplier Calculation (Current Employee Class Only):**
 - i. When calculating a retirement benefit, a 2.5 percent multiplier shall be utilized for the greater of: (a) 20 years or (b) the number of years of service prior to July 1, 2011 for members of group F and prior to January 1, 2014 for members of group E.

¹ Those employees who are veterans shall be permitted to purchase service credit for their years of military service prior to July 1, 2011 in accordance with existing CRS policies. Any years of service purchased in this manner will count toward obtaining five years of creditable service prior to July 1, 2011 thereby enabling veterans to vest for purposes of the benefits afforded under this settlement regardless of when purchased or otherwise accrued.

- ii. 2.2 percent multiplier for all years in excess of section f(i) above.²
- iii. The Parties agree that the two percent multiplier for years of service in excess of 30 as provided by the July 1, 2011 Ordinance shall be superseded by the foregoing multipliers as set forth in the Consent Decree which is to follow pursuant to Cincinnati Ordinance 201400313.

g. Final Average Salary Calculation (Current Employee Class Only):

- i. The Parties agree that final average salary calculation shall be computed using each Class member's highest five-year final average salary.³

h. Early Retirement Eligibility (Current Employee Class Only):

- i. The Parties agree that the age 57 and 15 years of service requirement formula established by the July 1, 2011 Ordinance shall be superseded by the Consent Decree to be entered pursuant to Cincinnati Ordinance 201400313.
- ii. The Parties agree that Defendants the age 55 and 25 years of service requirement that existed prior to the July 1, 2011 Ordinance shall be reinstated by the Consent Decree to be entered pursuant to Cincinnati Ordinance 201400313.
- iii. The Parties agree that the City will reinstate the early retirement option for those employees who reach age 60 and have at least 5 years of service that existed prior to the Ordinance.

² Except for members of Group C who are entitled to a higher multiplier for such years under the Ordinance.

³ This provision shall not apply to members of Group C who have not retired prior to the effective date of the Consent Decree who shall continue to be entitled to a calculation based on the three-year final average salary.

- i. **Annuity Adjustments (Current Employee Class Only)**: The pension annuity benefits of members of groups D and E, and members of Group F who retired before the effective date of any resulting Consent Decree, will be adjusted prospectively by being increased on the effective date of any resulting Consent Decree, and they will receive a payment designed to fairly compensate for the amount they would have received had the Consent Decree been in effect on the date they retired.
- j. **Employee Contributions (Current Employee Class Only)**: Active employee contributions to the CRS shall not exceed nine percent of pensionable wages during the term of the Consent Decree.
- k. **Group C Settlement Payment (Group C Sub-Class Only)**: Because members of the Group C Sub-Class, upon their retirement, would have been entitled to a three percent compounding COLA from July 1, 2011 until January 1, 2016,⁴ they shall receive a one-time “Group C Settlement Payment” pursuant to an equitable formula based on years of service and retirement dates as agreed to by the parties during the mediation, to be paid no later than 90 days after the effective date of this Settlement.
- l. **City’s Annual Contribution to Pension (All Classes)**: The Parties agree that the City of Cincinnati shall be obligated to contribute 16.25% of payroll annually for the duration of the Consent Decree (30 years). The City may make an additional contribution equal to the remaining liability on the Early Retirement

⁴ Members of the Group C Current Employee Sub-Class were entitled to retire with full benefits (other than the retirement death benefit) as of July 1, 2011 but remained employed by the City.

Incentive Program (ERIP) through a funding source to be determined by the City within 30 days of the date of this Agreement. The parties agree that, during the 30 days following execution of this MOU, the City may explore additional financing or funding options to potentially reduce its annual contribution.

- m. **DROP (Current Employee Class Only):** Beginning with the completion of 30 years of creditable service, members may freeze their accrual of years of service in the plan and defer receipt of normal retirement benefits for a period not to exceed five years while continuing City employment. Individual employee contributions during such period will be administered by a third party administrator at the expense of the participants. At the end of the five-year deferral period, such employees must separate from service. The deferred amount either must be distributed or rolled over into a qualified account within 90 days of said separation from service.

- n. **Retiree Healthcare Modifications (All Classes) (effective January 1, 2016):**
 - i. The City agrees to establish an Employer Group Waiver Plan (“EGWHP”) to maximize prescription-drug-related reimbursements from federal healthcare programs.
 - ii. The City and the Retiree Class agree to implement a medical expense reimbursement program (MERP). The Retiree Class agrees to encourage its members to utilize the MERP.
 - iii. The Parties agree to alter future retiree healthcare eligibility requirements

- to 60 years of age and 20 years of service or at least 30 years of service
- iv. The Retiree Class is to continue receiving its current healthcare plan pursuant to the provisions of the decree.
 - v. The City may seek to re-open the Consent Decree with respect to retiree health care benefits. Any changes relating to the funding or administration of retiree healthcare are considered a material part of the Consent Decree and shall occur only with the express approval of the Court taking into account their cost to the City, effect on Retirees and the availability of alternative vehicles providing similar benefits.
 - vi. All projected savings from the healthcare modifications shall be realized and applied toward the pension unfunded liability of the CRS on or about January 1, 2016.
 - vii. The City shall develop and implement a proper funding policy for the new healthcare trust.
 - viii. Future retirees shall be covered under the plan applicable to active employees.
 - ix. The remainder of the healthcare assets in the CRS 401(h) account shall be transferred to a Section 115 trust.
- o. **Consent Decree Duration:** The Parties agree that the Consent Decree shall remain in force for 30 years from its effective date.
- p. **Assumed Rate of Return:** The Parties agree that a 7.5 percent assumed rate of

return shall be applied to any and all actuarial calculations related to the valuation of the CRS Fund.

- q. **Reopeners**: The Parties agree that the following events or circumstances shall constitute sufficient reason to re-open any Consent Decree which results from the terms set forth in this MOU. In such circumstance, the Parties agree to negotiate in good faith, subject to the Court's oversight, management, and administration, and to attempt to reach an amicable resolution regarding any necessary modifications to Fund operations, benefits levels, funding sources or any other related issue:
- i. There is an unexpected market downturn that decreases the funding ratio by at least ten percent or there is an extraordinary decrease in City tax receipts;
 - ii. Market performance of the CRS Fund or some other factor(s) results in an unexpected and extraordinary excess funding ratio;
 - iii. The Defendants seek to transition retiree healthcare benefits to a Medicare exchange portal/HRA model effective no earlier than January 1, 2020;
 - iv. CRS becomes subject to the so-called "Cadillac Tax" (as defined by the Affordable Care Act) to retiree healthcare benefits;
 - v. A merger of the CRS functions with another public pension plan becomes possible;
 - vi. If otherwise agreed upon by all the Parties and for good cause shown; or

- vii. If there is a pending, threatened or actual significant reduction in City payroll of ten percent or more for any reason including, without limitation, termination of City responsibility for Metropolitan Sewer District operations.

- r. **Pension Board Reforms**: The Parties agree to continue to negotiate reforms of the CRS Board, including revisions to its organization, administration, by-laws, constitution and educational requirements.

- s. **Attorneys' Fees and Expenses**: To be negotiated for Class Counsel based on the value of the benefits conferred on the class subject to approval by the Court and for AFSCME based on its reasonable hours and expenses once all other material terms are agreed upon.

- t. **No Disgorgement**: This MOU and any resulting Consent Decree shall not require any retirees to repay or otherwise disgorge any amounts received from the CRS. No monthly pension benefits received prior to the effective date of this agreement shall be reduced as a result of this MOU or any resulting Consent Decree.

- u. **Agreement and Consent Decree Subject to Actuarial Confirmation**: The Active employees and the Retirees have requested confirmation of the actuarial data utilized during the mediation process. The City has agreed to provide this information on an expedited basis. Any dispute as to whether confirmation has occurred shall be resolved by the Court.

- v. **Enforcement:** This MOU, and the Collaborative Settlement Agreement and Consent Decree which are to follow shall be final and binding on all parties and enforceable by the U.S. District Court. Neither the City, City Council nor the CRS Board shall have any authority to take any action contrary to any of these agreements or which would in any way undermine, obviate or otherwise avoid any of the material provisions contained therein. Should the City fail to take any action or make any payment required under these agreements, the City waives any and all defenses, including without limitation all jurisdictional defenses, and the Court's judgment shall be immediately enforceable through all means available under applicable law.

- w. **Contingency and Lack of Severability:** Given the unique nature of this MOU and the interlocking nature of its Terms, the Parties hereby expressly agree that no single provision of this MOU or any subsequent Collaborative Settlement Agreement or Consent Decree shall subject to individual enforcement. That is, the terms and provisions set forth in this and any subsequent agreement are contingent upon one another. The reforms contained herein are cumulative, iterative and based upon actuarial projections, and must be enforced *in toto* in order for the CRS Fund to survive.

VII. Proposed Timing to Implement Settlement:

- a. On or before January 30, 2015 - Finalize Collaborative Settlement Agreement and Consent Decree
- b. Seek Preliminary Approval of Settlement – to be determined
- c. Seek Final Approval of Settlement (includes Fairness Hearing to hear testimony

from any Objectors) – at the earliest possible date pursuant to the provisions of Rule 23.

The Parties, as demonstrated by their signatures below, agree to the above terms and further agree to work in good faith to finalize a Settlement Agreement and a Consent Decree incorporating the above terms and to move this Settlement toward final approval by the Court as soon as practicable.

Executed this 30th day of December, 2014

Counsel for Original Plaintiffs

/s/Marc D. Mezibov

Marc D. Mezibov, Esq.

/s/Robert D. Klausner

Robert D. Klausner, Esq.

/s/Christian A. Jenkins

Christian A. Jenkins, Esq.

/s/Jeffrey S. Goldenberg

Jeffrey S. Goldenberg, Esq.

Counsel for AFSCME

/s/R. Sean Grayson

R. Sean Grayson

Counsel for Intervening Plaintiffs

/s/Robert A. Pitcairn

Robert A. Pitcairn, Esq.

Counsel for Defendants

/s/Steven P. Goodin

**Steven P. Goodin, Esq.
Of Counsel for the City Solicitor**

City of Cincinnati Mayor

/s/Hon. John Cranley

Hon. John Cranley

City of Cincinnati Solicitor

/s/Paula Boggs

Paula Boggs Muething, Esq.

City Manager, City of Cincinnati

/s/Harry Black

Harry Black