

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

Nick Sunyak, et al.,

Case No. 1:11cv445

Plaintiffs,

-vs-

Judge Michael R. Barrett

City of Cincinnati, et al.,

Defendants

OPINION AND ORDER

WHEREAS, this Court granted Preliminary Approval of the Class Action Settlement (“Settlement”) of these Actions on May 12, 2015, 2015 (Doc. #62) and this matter came on for approval of the Class Action Settlement in the instant litigation on September 24, 2015, pursuant to the Notice provided on May 11, 2015;

WHEREAS, the Court finds the Notice to be appropriate and sufficient by setting forth the status of the litigation and settlement, defining the appropriate classes, summarizing the proposed settlement items, and, importantly, informing class members of their rights and the procedures for objecting to the terms and conditions of the proposed settlement;

WHEREAS, the Current Employees Plaintiffs (Nick Sunyak, Jeffery Harmon, Jill Allgeyer, Kim Kappel, Waleia Jackson, and Finley Jones), the Retiree Plaintiffs (Thomas A. Gamel, Sr., Paul Smith, Mark K. Jones, Dennis Davis, Ely Ryder, and Ann DeGroot), the American Federation of State and Municipal Employees Ohio Council No. 8 (“AFSCME”), and the Defendants, The City of Cincinnati, Mayor John Cranley, City

Manager Harry Black, Vice-Mayor David Mann, Cincinnati City Council Members, the Cincinnati Retirement System, and the Board of Trustees of the Cincinnati Retirement System, (collectively, the “Parties”) have filed a motion seeking final approval of this Settlement (“Motion”) (Doc. #92);

WHEREAS, the Parties appeared with their attorneys of record at a Fairness Hearing on September 24, 2015 after all members of the Classes were given an opportunity to be heard in accordance with the Court’s Preliminary Approval Order, and the Court has given due consideration to the Parties’ Collaborative Settlement Agreement, including all attached exhibits and related materials, the Parties’ Joint Motion for Final Approval, including the attached Memorandum and all other papers filed in support, all objections to the Settlement, the complete record in this litigation, the information and arguments presented at the September 24, 2015 Fairness Hearing, and all other materials relevant to this matter including the Declaration of Laura Ortiz (Doc. #70) concerning the implementation and adequacy of the Settlement Notice Program as well as the actuarial testimony and all other witnesses who testified at the Fairness Hearing concerning the benefits and objections to this Settlement, including those who testified about the impact of this Settlement on the Cincinnati Retirement System (“CRS”) and the members of the Classes. In further explanation, this Court entered an Order Granting the Joint Motion of Plaintiffs, Intervening Plaintiffs and Defendants to Preliminarily Approve the Settlement Agreement and Conditionally Certify the two classes defined in the Order. (Doc. 62). The proposed settlement is the culmination of lengthy, extensive arms-length negotiations between all of the stakeholders in the Cincinnati Pension Retirement System (“CRS”).

This case was initiated in the matter of *Sunyak v. City of Cincinnati*, Case No. 1:11cv445 and *Harmon v. City of Cincinnati*, Case No. 1:12cv329. These cases were consolidated on May 21, 2012 and on March 17, 2014, the Retiree Class moved to intervene in this cause. Pending in State Court was *State, ex. rel. Counsel 8 AFSCME, et al. v. City of Cincinnati, et al.*, Case No. A1104791. As AFSCME is an interested stakeholder in the CRS, their participation in the settlement process was necessary for a successful conclusion.

The key issues involved in the settlement discussions included the cost of living adjustment, COLA delay or suspension, retirement eligibility, retirement benefit multiplier calculations, early retirement options, sub-group pension annuity adjustments, current employee class contributions, the City's annual contribution rate, the voluntary deferred retirement option plan (DROP Program), retirees' health care and current employees retiree health care. All of these points have varying degrees of importance and/or significance that are different to the members of the separate classes as they relate to each other and to the City. Each point and counter-point had an impact on at least one of the other stakeholders. Numerous mediations, in both group and one-on-one settings, as well as the voluminous exchange of information by and between the parties, occurred through the summer and fall of 2013 and continued through 2014, culminating in the Memorandum of Understanding by and among the parties reached on December 30, 2014. Counsel represented that over 99% of the class members received direct mail notice of the proposed settlement and the Fairness Hearing and approximately 16 objections were filed on behalf of 18 class members or .298% of those receiving notice.

During the Fairness Hearing, in addition, to the arguments of counsel, the Court entertained information from Harry Black, the City of Cincinnati's Manager who discussed his understanding of the history of the CRS and its unfunded liability. He also described the City's recent history of credit down-grades and recently rebounded bond rating based upon the potential settlement of the pension issue. Hon. David Yost, Auditor of the State of Ohio informed the Court of his office's concern regarding the unfunded liability in the CRS Fund as well as the potential effects of Ohio House Bill 337. He discussed his office's options in terms of intervention. Mr. Edward Koebel from the actuarial firm of Cavanaugh McDonald reviewed the financial projections and ramifications of an approved settlement. Kim Nicholl of the actuarial firm Segal Consulting verified the projections described by Cavanaugh McDonald. Cathie Eitelberg of the actuarial firm of Segal Consulting verified the actuarial assessment and opined as to the fairness and propriety of the proposed settlement in light of the national public pension scene. The Court has also received and reviewed the powerpoint presentations provided by Segal Consulting and Kavanaugh McDonald.

Current Employee Class representatives, Nicholas Sunyak and Jeffrey Harmon, described their sense of the fairness, reasonableness and adequacy of the agreement and the benefit to the current employees class. Tom Gamel, Sr. and Ely Rider, Esq. each provided a historical prospective of the Retiree's Class' dealing with the City of Cincinnati, the current state of that relationship and the impact upon health care benefits as determined by the "*Gamel*" litigation in State Court. Each of these representatives informed the Court as to the fairness reasonableness and adequacy of settlement agreement and the benefit they saw to the members of the Retiree Class. In

addition to the above described information, the Court received twenty-five Stipulated Joint Exhibits, which supported the comments made by the aforementioned witnesses. In addition to the eighteen written objections, the Court received in-Court information from Barbara O. Olson and Reginald Olson, members of the Retiree Class, as well as Marzetta Goldsmith, also a member of the Retiree Class. Generally the objections were aimed at counsel fees (to be determined and discussed in a subsequent order), the objectors' understanding of the history between the City of Cincinnati and its former and current employees as well as their understanding of the City's obligations to them. The aforesaid objectors further discussed the financial impact upon them of the proposed settlement. Some objectors also expressed concern as to the length of the Consent Decree and the Court's participation. Generally speaking, the relationship between the City of Cincinnati and its pension benefits are not the result of contracts between the City and the Retirees but the product of ordinances. As to the individual items raised such as the COLA suspension, the Court was well informed as to the necessity of this and other measures to maintain the viability of the CRS. Thus, the Court recognizes that the Parties have litigated complex questions about the management of the CRS – and the respective rights of plan participants – for nearly five years, including issues related to benefits levels, eligibility requirements, healthcare packages, and funding mechanisms, and that while some of these lawsuits have been subject to conclusive appellate rulings, many pertinent legal and factual questions remain. The parties are well aware of the risk and expense associated with continued legal proceedings;

WHEREAS, the Court is satisfied that the terms and conditions set forth in the Collaborative Settlement Agreement and related Consent Decree were the result of

good faith, arm's length settlement negotiations between competent and experienced counsel for the Current Employees Plaintiffs, the Current Employees Class, the Retiree Plaintiffs, the Retirees Class, and Defendants; and

Lastly, the Court heard from Class Counsel and the City as to their attorney fees requests. This item will be addressed in a separate order;

NOW, THEREFORE, IT IS ORDERED THAT:

1. This Order approves, adopts, and incorporates by reference in their entirety the Collaborative Settlement Agreement and the Consent Decree which are attached hereto as Exhibits 1 and 2 respectively. The Collaborative Settlement Agreement and the Consent Decree are made part of this Order as if set out in full herein and shall be fully enforceable by this Court. Accordingly, the Parties are ordered to execute, implement and comply with all the terms of the Collaborative Settlement Agreement and the Consent Decree.

2. For purposes of this litigation, the Court has subject matter and personal jurisdiction over the Parties, including all Class Members, and has the power and authority to approve the Collaborative Settlement Agreement and Consent Decree, including all Exhibits thereto.

3. Pursuant to Federal Rules of Civil Procedure 23(a), 23(b)(1), and 23(b)(2), the Court confirms its previous certification, and for purposes of effectuating the Settlement, grants final approval to the following two Classes:

Current Employees Class: All individuals (and/or their Dependents or Surviving Beneficiaries) who participated in the Cincinnati Retirement System with at least five years of creditable service and who were actively employed or otherwise qualified for benefits on 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-MI (b), (c), (d), and (e).¹

Retirees Class: All individuals (and/or their Dependents or Surviving Beneficiaries) formerly employed by the City of Cincinnati, the University of Cincinnati, the University Hospital f/k/a General Hospital and Hamilton County, who retired on or before July 1, 2011 and have received retirement benefits from the City of Cincinnati and their Dependents and/or their Surviving Beneficiaries who are entitled to those benefits.

4. Pursuant to Federal Rule of Civil Procedure 23(a), (b)(1), and (b)(2), and for purposes of settlement only, the Court makes the following findings of fact and conclusions of law:

a. The Current Employees Class and the Retirees Class are sufficiently definite and identifiable;

b. The Current Employees Class and the Retirees Class are so numerous that joinder of all members is impracticable;

c. There are questions of law and/or fact common within the Current Employees Class including but not limited to: (1) whether the members of the Current Employees Class were fully vested in their CRS benefits on July 1, 2011; (2) whether Defendants improperly revoked and/ or impaired Current Employees Class Members' vested CRS benefits when they enforced Ordinance No. 84-2011; (3) whether Defendants impaired contractual rights of the Current Employees Class when they enforced Ordinance No. 84-2011; (4) whether Defendants are estopped from enforcing Ordinance No. 84-2011 so as to revoke and/or impair the employment agreement with Current Employees Class

¹The Current Employees Class also includes City of Cincinnati employees who had at least five years of creditable service prior to July 1, 2011 and who retired after July 1, 2011, as well as veterans who purchase service credit sufficient to satisfy the five years of service requirement prior to July 1, 2011.

Members; and (5) whether Defendants' enforcement of Ordinance No. 84-2011 operated as an unconstitutional taking of the vested property interest of Current Employees Class Members;

d. There are questions of law and/or fact common within the Retirees Class including but not limited to: (1) whether Defendants' offer of retirement benefits to the Retirees Class Members created a fundamental property right, giving each of them a vested right in those retirement benefits which cannot be reduced, impaired, revoked, or eliminated; (2) whether Defendants' actions as explained in the Retirees Class Complaint constitute an unlawful taking of the Retirees Class Members' property rights in violation of the United States Constitution and/or the Ohio Constitution; (3) whether the Defendants have a contractual obligation to provide the Retirees Class Members with certain retirement benefits, which cannot now or afterwards be reduced, impaired, revoked, or eliminated; (4) whether the unilateral reduction, impairment, revocation, and/or elimination of the Retirees Class Members' retirement benefits constitutes a breach of the Defendants' fiduciary duty; and (5) whether the Defendants are estopped from reducing, impairing, revoking, or eliminating the retirement benefits owed to the Retirees Class;

e. The Current Employees Plaintiffs' claims are typical of the claims of the Members of the Current Employees Class as all subgroups were represented and no conflict exists between or among the subgroups, and the Retirees Plaintiffs' claims are typical of the claims of the Members of the Retirees Class;

f. Current Employees Plaintiffs and the Current Employees Class

Counsel have and will fairly and adequately represent and protect the interests of the Current Employees Class, and the Retiree Plaintiffs and the Retirees Class
Counsel have and will fairly and adequately represent and protect the interests of the Retirees Class;

g. Current Employees Plaintiffs' interests do not conflict with the interests of the Current Employees Class in the maintenance of this action and this Settlement, and the Retiree Plaintiffs' interests do not conflict with the interests of the Retirees Class in the maintenance of this action and this Settlement;

h. Certification of the Current Employees Class and the Retirees Class is appropriate because prosecuting separate actions by individual members of these Classes would create a risk of inconsistent and varying adjudications with respect to individual members of the Classes that would establish incompatible standards of conduct for the Defendants;

i. Certification of the Current Employees Class and the Retirees Class is appropriate because adjudications with respect to individual members of the Classes, as a practical matter, would be dispositive of the interests of the other Members not parties thereto and would substantially impair or impede their ability to protect their interests; and

j. Certification of the Current Employees Class and the Retirees Class is appropriate because the Defendants have acted or refused to act on grounds that apply generally to the Classes, so that final injunctive relief or corresponding declaratory relief as agreed to by the Parties is appropriate

respecting the Classes as a whole.

5. The Collaborative Settlement Agreement, the Consent Decree, and the terms contained therein are hereby finally approved as fair, reasonable, adequate, in the best interests of the Current Employees Class and the Retirees Class, and in compliance with all applicable requirements of the Federal Rules of Civil Procedure, the Class Action Fairness Act, the United States Constitution (including the Due Process Clause), the Rules of the Court, and any other applicable law.

6. Pursuant to Rule 23(g), the following are hereby finally designated and approved as Current Employees Class Counsel: (1) Christian A. Jenkins, Esq., Minnillo & Jenkins, Co. LPA, 2712 Observatory Avenue, Cincinnati, Ohio 45208; (2) Marc D. Mezibov, Esq., Law Office of Marc Mezibov, 401 E. Court Street, Suite 600, Cincinnati, OH 45202; (3) Jeffrey S. Goldenberg, Esq., Goldenberg Schneider, LPA, One West Fourth Street, 18th Floor, Cincinnati, Ohio 45202; and (4) Robert D. Klausner, Esq., Klausner, Kaufman, Jensen & Levinson, 10059 Northwest 1st Court, Plantation, FL 33324. The Court's designation and approval of Current Employees Class Counsel is based upon: (1) the work they have done to identify and investigate the claims in this litigation; (2) their experience handling class actions and other complex litigation, including employee benefits litigation; (3) their knowledge of the applicable law and their familiarity with the complexities of this type of pension benefits litigation; and (4) the resources they committed and are willing to continue to commit to this litigation and the implementation of the Consent Decree going forward.

7. Robert A. Pitcairn, Esq., James F. McCarthy, III, Esq., and Peter O'Shea, Esq. of the law firm of Katz Teller Brant & Hild, 255 East Fifth Street, Suite 2400,

Cincinnati, Ohio, 45202 are hereby finally designated and approved as Retirees Class Counsel pursuant to Rule 23(g). The Court's designation and approval of Retirees Class Counsel is based upon: (1) the work performed to identify and investigate the claims in this litigation; (2) their experience handling class actions and other complex litigation, including employee benefits litigation; (3) their knowledge of the applicable law and their familiarity with the complexities of this type of pension benefits litigation; and (4) the resources they committed and are willing to continue to commit to this litigation and the implementation of the Consent Decree going forward.

8. Nick Sunyak, Jeffery Harmon, Jill Allgeyer, Kim Kappel, Waleia Jackson, and Finley Jones are designated and granted final approval as the Current Employees Class Representatives. Jill Allgeyer is designated and granted final approval as the Sub-Class C representative. Kim Kappel and Waleia Jackson are designated and granted final approval as the Sub-Class D representatives. Finley Jones is designated and granted final approval as the Sub-Class E representative. Jeffrey Harmon and Nick Sunyak are designated and granted final approval as the Sub-Class F representatives.

9. Thomas A. Gamel, Sr., Paul Smith, Mark K. Jones, Dennis Davis, Ely Ryder, and Ann DeGroot are finally designated and approved as the Retirees Class Representatives.

10. The Parties have provided direct mail notice to the Classes in a manner consistent with the Order Granting Motion for Preliminary Approval of Class Action Settlement. The Notice Plan, as implemented, satisfied the requirements of due process and was the best notice practicable under the circumstances. The Notice Plan was reasonably calculated, under the circumstances, to apprise Class Members of the

terms of the proposed Settlement, their right to object or exclude themselves from the proposed Settlement, and their right to appear at the Fairness Hearing. Further, the notice was reasonable and constituted due, adequate, and sufficient notice to all persons entitled to receive notice. Also, Defendants, through Class Action Administration, Inc., notified the appropriate federal official (the Attorney General of the United States) and the appropriate State of Ohio officials (the Auditor of the State of Ohio and the Attorney General of the State of Ohio) pursuant to the Class Action Fairness Act of 2005 (“CAFA”), 28 U.S.C. § 1715. Accordingly, the Defendants’ notification complies fully with its obligations under CAFA, and the notice met all applicable requirements under the Federal Rules of Civil Procedure, the United States Constitution (including the Due Process Clause), the Rules of the Court, and any other applicable rule or law.

11. Class Action Administration, Inc. (“Settlement Administrator”) was retained to disseminate the Notice Plan in accordance with the terms of the Collaborative Settlement Agreement and the Court’s Order Granting Motion for Preliminary Approval of Class Action Settlement. It is apparent from the Declaration of Laura Ortiz (Doc.#70) that the Notice Plan was properly implemented and was effective.

12. The Court has determined that notice and full opportunity has been given to the Classes to object to the terms of the Settlement. The Court also has determined that notice and full opportunity has been given to the Classes to object to Current Employees Class Counsel’s and Retirees Class Counsel’s request for attorneys’ fees and expenses. The Court has considered all of the objections to the Settlement that were submitted by members of the Classes as well as Class Counsel and Defendants’

responses to those objections, and has determined as follows:

a. the Current Employees Plaintiffs, the Retiree Plaintiffs, the Current Employees Class, and the Retirees Class face significant risks if this litigation were to proceed, including the real possibility of losing this litigation;

b. the possibility of a greater ultimate recovery is highly speculative and any such recovery would only occur after considerable delay, if at all;

c. the terms of the Collaborative Settlement Agreement and Consent Decree provide substantial and meaningful benefits to the Classes;

d. the Collaborative Settlement Agreement and Consent Decree are the product of vigorous, highly-contested litigation that included meaningful investigation into the facts and the law underlying the claims at issue;

e. the Settlement occurred after the litigation was substantially developed, including the exchange of voluminous actuarial data and other information during the mediation process and due diligence following the execution of the Memorandum of Understanding on December 31, 2014;

f. the Settlement negotiations were extensive, arms-length, and under the direction of the Court through a collaborative and agreed-to process that occurred without any collusion;

g. the reaction by the Classes has been overwhelmingly in favor of the Settlement; and

h. experienced Class Counsel support the Settlement.

13. Accordingly, having considered the foregoing, the costs and risks and delays of continued litigation versus the benefits provided by the Settlement, and based

on this Court's knowledge of the Actions, the Court finds and concludes that the Settlement is in the best interests of the Classes and is fair, reasonable, and adequate to all members of the Classes. Further, the Court has fully evaluated and hereby overrules all of the objections for the reasons put forward by the parties in their respective filings with the Court.

14. This Settlement, including the terms of the Collaborative Settlement Agreement and Consent Decree, is accordingly granted final approval and is confirmed as fair, reasonable, adequate, and binding upon all members of the Classes.

15. The Parties are hereby directed to proceed with and complete the implementation of the Settlement. Therefore, the Court hereby orders and directs the Parties and their counsel to proceed with and complete the implementation and consummation of this Collaborative Settlement Agreement and Consent Decree according to its terms and provisions.

16. The Court enters judgment in accordance with the Collaborative Settlement Agreement and further declares the Collaborative Settlement Agreement binding on all the Parties.

17. Except as provided in the Collaborative Settlement Agreement and Consent Decree, all Parties are barred, estopped, and enjoined from asserting claims or interests arising under or out of, in connection with, or in any way relating to the claims set forth in the Litigation as defined in the Collaborative Settlement Agreement ("Barred Claims").

18. AFSCME warrants and acknowledges that it will dismiss with prejudice *State ex rel. Council 8 AFSCME, et al. v. City of Cincinnati, et al.*, Case No. A I 104791,

within 10 days of Finality as defined in the Collaborative Settlement Agreement pursuant, and to the terms of the separate settlement agreement entered into between AFSCME and the Defendants.

19. All Parties are bound by this Order Granting Final Approval, the Collaborative Settlement Agreement, and the Consent Decree. The Court declares that the Collaborative Settlement Agreement and related Consent Decree are incorporated into this Order Granting Final Approval, each of which shall be binding on all Parties. Further, the Collaborative Settlement Agreement, the Consent Decree, and this Order shall be preclusive for the 30 years following the Effective Date, as defined in the Collaborative Settlement Agreement, in all other pending and future lawsuits or other proceedings relating to the Barred Claims in these Actions.

20. Consistent with the above paragraph, the Court also orders that the Barred Claims are fully and finally resolved as of the date of Finality, as defined in the Collaborative Settlement Agreement, and that the City, CRS and related City Defendants are forever discharged and released from the Barred Claims and that the Current Employees Plaintiffs, the Retiree Plaintiffs, and the members of the Classes are permanently barred and enjoined from filing, commencing, prosecuting, intervening in, participating in (as Class Members or otherwise), or receiving any benefits or other relief from, any other lawsuit, arbitration, or administrative, regulatory, or other proceeding or order in any jurisdiction based on the Barred Claims, except as set forth in the Re-Opener provisions in the Collaborative Settlement Agreement and Consent Decree.

21. The Court takes under consideration the requests of Current Employees

