

Attachment A

FACT FINDER'S REPORT AND ADVISORY RECOMMENDATIONS

IN THE MATTER OF:

**CITY OF PHOENIX
AND
AMERICAN FEDERATION OF STATE, COUNTY &
MUNICIPAL EMPLOYEES (AFSCME), LOCAL 2384**

DATE OF HEARING: March 27 & 28, 2019

PLACE OF HEARING: Phoenix, Arizona

FACT FINDER: Steven M. Guttell, Esq.

DATE OF REPORT: April 3, 2019

Filled with:

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INTRODUCTION

The parties to this Fact Finding are the City of Phoenix (“City”), and the American Federation of State, County and Municipal Employees Local 2384 (“AFSCME” or “Union”). AFSCME represents the City's employees in positions classed as "field" including labor, custodial, trades and equipment operation working in the Phoenix Convention Center Department; Aviation Department; Water Services Department; Engineering Department; Housing Conservation, Elderly Housing and Occupancy, Conventional Housing and Disbursed Housing Divisions of the Urban Neighborhood Improvement and Housing Department; Equipment Management and Facilities Maintenance Divisions of the Public Works Department; Library Department (library guards only); Management Information Systems Department; Real Estate and Materials Management Divisions of the Finance Department; Traffic Signal Construction and Maintenance Section of the Street Transportation Department, also known as "Unit II employees" in the meet and confer process. There are approximately 1,517 current employees in Unit II.

On March 11, 2019 the undersigned was selected by the parties to serve as fact finder pursuant to City of Phoenix City Code section 2-219 (H). The Code provides fact-finding as part of the meet and confer process over the terms of a memorandum of understanding ("MOU"). The fact finder is a neutral person who collects the facts and provides a report and advisory recommendation that the parties may accept, reject, or use as the basis for further negotiations. The report and advisory recommendations are a tool used within the meet and confer process to assist the parties' negotiations. The report and advisory recommendations are not a substitute for negotiations. If the parties fail to reach an agreement within five working days after the fact finder issues a report and advisory recommendation, the City Manager submits his own recommendation for settling the dispute to the Council. The Council, as the ultimate decision maker, may then impose written terms and conditions of employment that it deems to be in the public interest.¹

¹ The fact finder is advised that when the matter comes before Council both Management and the Union have the opportunity to present their position in written and verbal form. Consequently, this Report does not contain extensive recitations and attachments.

The fact finder convened the proceedings in the City of Phoenix, 300 Meeting Room, 300 West Jefferson, on March 27 and 28, 2019. Pursuant to the procedures to implement Code Section 2-219 (H) the fact finder's report is due on Wednesday, April 3, 2019 (Monday, April 1, 2019 being a City holiday). The parties agreed that the Report may be submitted electronically with an electronic signature.

Those present and/or participating for the City of Phoenix at the hearing included the following:

Alisa A. Blandford, Esq., Office of the City Attorney
Shannon Bell, Esq., Office of the City Atty.
Jeff Barton, Budget and Resources Department Director
Joe Jatzkewitz, Finance Department Deputy Director
Tracy Reber, Budget and Resources Deputy Director
Jim Wine, Chief Negotiator
Ed Zeurcher, City Manager

Those present and/or participating for AFSCME at the hearing included the following:

Nicholas J. Enoch, Esq., Lubin & Enoch, P.C.
Corey R. Feltre, Esq., Lubin & Enoch, P.C.
Christopher Fox, AFSCME Fiscal Policy Analyst
Mario Ayala, AFSCME Local 2384 President

Exhibits:

The City submitted the following exhibits:

Compensation Package, (Management's Economic Proposal), M-14.

1. Proposal Costing.
2. City Manager's Trial Budget.
3. Management's Trial Budget Council Presentation.
4. Five Year General Fund Forecast.

A. Attachment A: 5-Year General Fund Forecast (FY2016-17).

B. Dow falls 460 points as US recession indicator flashes red (March 22, 2019).

C. Summary of Total Pension (3/22/19).

5. 2017-18 Year-End General Fund Budget Results and 2019-20 Budget Calendar.

6. Wage and Benefit Projections.

A. 2019-2020 Wage and Benefit Projection for General Positions.

B. 2019-2020 Wage and Benefit Projection for Sworn Positions.

7. Personal Service Information 2009-10 through 2019-20.

8. Pension Cost History 2007-08 through 2019-20.

9. B&R Sample Employee: Increased Costs to City.

10. Comprehensive Annual Financial Report (CAFR) Excerpts.

11. Moody's Investors Service Credit Opinion (October 11, 2018).

12. Proposed Pension Plans Funding Policy.

A. Pension Systems Funding Policy (March 19, 2019).

Wages (Union's Economic Proposal) U-2.

13. Proposal Costing.

Additional Economic Proposals (M-13/U-8.).

Contract Length M-2/U-16.

Side Agreements M-17.

Release Time and Release Positions M-3/U-26.

14. Janus Excerpt.

Fair and Impartial Language M-4.

Overtime M-6.

Grievance Procedure M-11.

Remove Expired Language M-15.

The MOU, Memorandum of Understanding 2016-19.

And other information.

The Union submitted the following exhibits:

1. Report of Christopher Fox, Fiscal Policy Analyst.
2. Excerpts of the 2016-2019 MOU for Units I, III, PLEA, PFFA, Unit 6, and Unit 7.

BACKGROUND

The current MOU commenced on July 1, 2016, and expires on June 30, 2019. The parties have been negotiating proposed revisions to their MOU for a number of months. Some revisions were adopted and some were dropped by one party or the other. When the fact finder was retained there were nine issues outstanding. The parties conferred prior to and during the fact finding with the result that there are five issues currently outstanding addressed in seriatim below:

1. Compensation Package (M-14/U-2) and Contract Length: 3 v. 2 years (M-2/U-16).²
2. Side Agreement Language (M-17).
3. Fair and Impartial Treatment Language (M-4).
4. Grievance Procedure (M-11).
5. Overtime (M-6).

MANAGEMENT/UNION PROPOSALS & , EXPLANATIONS **AND** **FACT FINDER'S ADVISORY RECOMMENDATIONS**

The fact finder has considered all of the information submitted and sets forth below the parties' proposals and explanations, and his discussion of the issues and advisory recommendation.

² The Compensation Package and Contract Length issues are addressed together as that is how they were presented at the fact finding.

Issue One
Compensation Package (M-14/U-2)
And
Contract Length: 3 v. 2 years (M-2/ U-16)

Management Proposal and Explanation:

Proposal - Compensation Package

The City's last and best offer before fact finding was a first year 2% ongoing total compensation increase, and a second year 1% ongoing total compensation increase.

During fact finding testimony was elicited that the City was prepared to make a proposal of a first year 2% total compensation increase with a 1% one-time payment, and a second year 1% ongoing total compensation increase with a 1% one-time payment. There was also testimony that a .25% ongoing total compensation "sweetener" would be provided to the first unit that signed an agreement and did not go to fact finding.

Proposal - Contract Length

The City is only willing to sign a two-year contract with its labor groups. Since the 1970's, the City has only had one, three-year contract period with its labor groups - the current contracts. The City seeks to return to its normal practice and has already signed one, two-year contract with a labor group for a 2019-2021 contract period.

City Explanation – Compensation Package and Contract Length

The overriding concern of the City is the current and future state of the economy. While the economy is expanding the economic consensus is that a downturn is on the horizon. Within a few months, the current expansion will have surpassed the length of all post-recession expansions in the history of the United States.

The City's proposal utilizes a significant percentage of the current surplus for compensation but does not dip into contingencies and reserves that need to be maintained for the

fiscal integrity of the City; particularly, the unfunded pension liability for civilian and public safety employees. The City has one of the largest unfunded pension liabilities of any major city in the country.

There is a surplus of \$55 million available to the City; 60% of the surplus is going to employee compensation, 10% to pensions and 30% to service restorations.

The City's proposal is a prudent proposal and reflects the principal that all City employees be treated the same with regard to compensation; i.e. that all employees receive the same percentage increase.

The Union's proposal seeks \$11 million out of the \$55 million surplus; that is too much. Further, Unit II employees are paid at the high end when compared to other cities.

The Union wants the City to draw down its reserves. The City does not believe that that approach is prudent due to bond rating agency concerns, economic uncertainty and the effect that such action would have on other City Units.

Notwithstanding the current economic uncertainty, if the economy stays strong the City and Union will be able to bargain again in two years. If the Union is wrong and the economy contracts, employees will be laid off, services will be reduced, city maintenance will be deferred, and there could be public safety repercussions.

The current three-year contracts were entered into to give the City time to restore the concessions necessary due to the recession. The three-year contracts were a unique situation. The City is not comfortable forecasting out three years; particularly in the current economic environment.

Union Counterproposal and Explanation:

Proposal – Compensation

The Union proposes a first year 7% ongoing total compensation increase with a one-time payment of \$1,000, a second year 7% ongoing total compensation increase, and a third year 5% ongoing compensation increase.

Proposal – Contract Length

The Union proposes that the MOU remain in effect for three years.

Union Explanation – Compensation Package and Contract Length

Employees have gone a very long time without a pay raise.

The amount of revenue available to the City at any one time is a political issue. The City can raise taxes and fees. It is simply a question of political will as to whether the City is willing to increase compensation to employees after they gave concessions in the past.

The City's economic outlook is too glum. There are funds available to the City in various contingency and reserve funds that should be made available for employee compensation.

A three-year contract is appropriate. All of the City's other bargaining units currently have three-year MOUs (2016 - 2019 MOUs) and there is simply no sound reason to change. With a two-year MOU the parties are essentially in a perpetual state of negotiation with resultant increased costs for both sides due to more frequent negotiations. A large number of peer cities in the southwest operate with contracts of three or more years.

The current MOU is effective for the period July 1, 2016, to June 30, 2019; a three-year period. The three-year contract duration is a negotiated benefit, which was proposed by the Union and accepted by the City in the last round of negotiations. The extra year was a compromise that allowed the City to restore concessions to Unit II workers over a longer time frame in

consideration of the City's budgetary constraints. The three-year contract duration allowed the City time to prepare for the additional financial commitment to its workforce and provide restored wages and benefits, ultimately making it a more attractive and competitive employer increasing its ability to retain high quality staff. In addition, the option for the three-year contract duration was attractive due to the extraordinary amount of time and effort required of the parties for each round of contract negotiations. By extending the duration of the contract by one year, the parties could settle into one contract before starting to negotiate the next. These factors have not changed since the last negotiation. With the negotiated change to three years in 2016, a new prevailing practice was established that should be maintained.

Fact Finder's Recommendation: Compensation Package (M-14/U-2)

Discussion:

The City's budget reflects a \$55 million surplus. The City proposes to use that surplus for employee compensation (60%), pensions (10%) and services restoration (30%). The City expects to also increase the number of civilian employees.

The City's proposal in large measure treats all employees the same with regard to percent of compensation increase. That appears to be a major tenant of the City's employee compensation policy.

The Union's proposal for Unit II would utilize \$11 million of the \$33 million (60% of the \$55 million) available for all employees. Simply stated, that is too much money considering that there are other units seeking raises, the City's unfunded pension obligations and the need to restore services.

The City is right to be concerned about the current state of the economy. The general view is that the country is heading into recession within the next 12 to 24 months. While Phoenix may not be hit as hard as other parts of the country, it is just as conceivable that it could be hit harder.

If a recession does not occur and the City has done well financially, there will be a surplus available to pay down pension costs and for future contracts; if the Union's demands are met and the economy contracts, the City could be left in a precarious financial condition.

The Bond rating agencies have not rated Phoenix negatively, however, Moody's rating places the City "on watch" reflecting at least some level of concern. Unfunded pensions are of great concern to financial analysts and can give rise to negative outlooks that have an adverse effect on Bond ratings and lead to an increase in borrowing costs. Phoenix has one of the largest unfunded pension liabilities of major cities in the country. The City is just now starting to aggressively pay down its pension obligations. Taking monies from contingencies or reserve funds, as suggested by the Union, is not economically prudent.

The Union's position that the City has flexibility if a challenging situation arises does not appear reasonable under the present circumstances. The flexibility suggested by the Union - layoffs, furloughs or midterm bargaining with concessions to avoid layoffs - may not be possible. The City's current economic situation was in some measure due to a lack of restraint in earlier years. If reserve funds and contingencies are reduced to pay for the Union's proposal there would be less flexibility going forward.

Returning to a two-year MOU would appear to be the prudent course of action. There will be a new census in 2020. The percentage of state funds available to the City is based upon its percent of the population in the State. Phoenix could lose significant state funds, not necessarily because it lost population, but because other municipalities have grown faster. While increased

population and greater economic activity in the state generally may increase the amount of money available to local governments, if the economy contracts, where the State has in general stated that it will not increase taxes, there could be a significant adverse effect on City finances.

The reference to other cities in the southwest having three-year contracts does not assist the analysis. Those contracts were all negotiated in mid-2018 or earlier - other than Albuquerque's that was negotiated in December 2018 and looks like it is the remainder of a two year contract. Further, the fact finder was provided no information about factors such as the other cities' political structure, ability to tax its residents, state funding availability and other matters that may reflect significant differences from Phoenix.

A principal tenant of the City's compensation policy is that all employees be treated the same with regard to compensation increases. While various employees may receive different pay due to their pay scale, the City does not differentiate in terms of percentages. The City does, however make available what it calls an incentive of .25% to the first unit to sign an agreement without going to fact finding. This offer was given to all units. Although characterized as an incentive by the City it can also be characterized as a penalty applied to units that exercise their rights - granted under the City Ordinance - to negotiate to impasse and seek fact-finding. A unit should be allowed to exercise rights under City ordinances without fear of penalty.

The amount of money for a .25% added increase is not great; approximately \$82,500 of the \$33 million available for compensation from the surplus.³ The City's "incentive" is counter to its professed policy that all units are treated the same. It is also an ongoing increase; not a one-time payment. The fact finder recommends that if the .25% is provided to one unit that it should

³ \$33,000,000 x .0025 = \$82,500.

be provided to all units without regard to whether a unit was the first to sign without going to fact finding.

Advisory Recommendation- Compensation Package (M-14/U-2)

It is the fact finder's recommendation that a fair and equitable compensation package would provide for a first year 2.25% total ongoing compensation increase with a 1% one-time payment, and second year 1% ongoing total compensation increase with a 1% one-time payment.

It is the fact finder's recommendation that the MOU be for a period of 2 years; 2019 – 2021.

Issue Two
Side Agreement Language (M17)

Management Proposal and Explanation:

At the present time there is no formalized structure in the MOU to deal with side agreements. The City believes that there needs to be a process and policy in place for managing side agreements during the term of the MOU so that both union and management know what side agreements are in effect at any given time. The City's proposal requires a mutually agreed upon expiration date for side agreements signed during the course of the MOU that could be extended past the expiration date if necessary. Any side agreements now in existence would continue in perpetuity. The proposal also provides that side agreements be signed by an authorized representative of the City Manager and the Union. The issue arose because, in a unit other than Unit II, an old side agreement that the City was not aware of was used in a grievance.

Union Counterproposal and Explanation:

The City's proposal would result in a change to the status quo. The current side agreement process is working fine. The City can direct management not to sign side agreements without an expiration date and direct management to centralize all side agreements.

Fact Finder’s Recommendation: Side Agreement Language (M17):

Discussion:

As suggested by the Union, this proposal appears to be a solution seeking a problem. In one unit on one occasion a side agreement, not known to exist by management, was raised by an employee in a grievance. This is an internal City management issue and not one with which the Union - unless it sees a need, which it does not here - need be involved.

Advisory Recommendation- Side Agreement Language (M17).

The fact finder recommends that the City’s proposed change be rejected.

Issue Three
Fair and Impartial Treatment Language (M-4)

Management Proposal and Explanation:

The City acknowledges that an employee should not suffer reprisal for exercising their rights granted by the MOU. The City's proposed language provides consistency with the MOU's current definition of a grievance, which involves a violation of the specific express terms of the MOU “for which there is no Civil Service or other specific method of review provided by State or City law”. The proposal does not take away an avenue of complaint since grievances can only be brought under the MOU in any event. Other grievances can be brought under personnel rules, administrative regulations, or discrimination claims to the extent those processes apply.

The City's proposed language is also consistent with that in other labor agreements.

Union Counterproposal and Explanation:

This issue has not been a problem in the past. As written, the proposal would eliminate an avenue of complaint for employees. The language of the proposal provides that the fair and impartial protection and prohibition against reprisal only applies to a “specific expressed term” of

the MOU. The City would be making a unilateral determination on what is a “specific expressed term” of the MOU.

Fact finder’s Recommendation: Fair and Impartial Treatment Language (M-4):

Discussion:

The existing language provides that unit members have a right to be treated in a fair and impartial manner. The City’s proposed language, considered in conjunction with the City’s proposal to change the definition of “Grievance” in Issue Four discussed below, could have the effect of limiting this protection.

The English language is ambiguous. In a document such as an MOU there are rights derived by implication from other rights explicitly set forth in the document. Any limitation on existing language could have the effect of Unit members losing protections that currently exist.

Advisory Recommendation- Fair and Impartial Treatment Language (M-4).

The fact finder recommends that no change be made to the current language.

Issue Four

Grievance Procedure (M-11)

Management Proposal and Explanation:

The City's proposal adds clarity on what can be grieved under the terms of the MOU to streamline and better manage the City's grievance process. The City's proposal aligns dates to be more consistent with the grievance language being adopted by the other units. Aligning the unit's grievance dates makes it operationally more efficient for Labor

Relations to manage grievances as they move through the process. This would permit the employee and supervisor to mutually agree to move a grievance forward to the next step, or if the issue is not in the purview of the supervisor, it would allow the employee to move the grievance forward to expedite the issue. The City's proposal also adds MOU Step 2.5 which is an informal process that Union and Management have already been practicing.

The City's proposal will help to eliminate from the grievance management procedure those items under the MOU specifically not allowed to be grieved. The proposed change in dates will make it operationally more efficient for Labor Relations to manage grievances as they move through the process as the time changes occur at all levels and include both the supervisor as well as employee.

Union Counterproposal and Explanation:

The Union's counter offer was withdrawn.

The Union's concerns relate to a number of changes to the current MOU, four of which are addressed here.

1. The proposal changes the definition of Grievance. The proposed definition adds the word "administrative" to the term "methods of review", a word not previously included, and that the Union sees as limiting an employee's right to grieve.
2. The Union is concerned that the language providing that a grievance step can be skipped is vague and confusing (a concern with which the City seemingly agrees).
3. The Union is concerned that the proposed language could result in a grievance being found against an employee even if the rule violated by the employee is a violation of law.

The existing language provides that the arbitrator “shall neither add, detract from, nor modify the language of the Memorandum or of Department rules and regulations”

That language does not prevent an arbitrator from determining that a rule is void as a matter of law. The proposed language binds the arbitrator to rules and regulations, and State and City law.

The Union is concerned that if the rules and regulations are violative of federal law the City’s proposal would mandate that the arbitrator must rule for the City, even if the rule or regulation violated federal law (and possibly also State and City law given the ambiguity in the language of the proposal).⁴

4. The Union is concerned with the reference to “Employer Grievances”. That provision allows the City to go outside the MOU, while the changes to the MOU sought by the City limit the employee’s ability to do the same.

Fact finder’s Recommendation: Grievance Procedure (M-11):

Discussion:

The fact finder sees a number of issues with the new grievance procedure language. The fact finder addresses the issues in the order set forth above.

1. The new language deletes from the definition of grievance the reference to “State or City law”. The elimination of “State or City law” from the definition results in a clause that broadly provides that if there is any method of review provided anywhere by any entity a grievance is not allowed. So, as suggested as a hypothetical by the Union in the fact finding hearing, if an employee in the Aviation Department were directed to change the lights on an active runway (presumably a violation of Federal Aviation Administration

⁴ See M-11, proposed language at Section 2-1, C. 4. B. i. and iii.

regulations) that possible safety violation (presumably in violation of the MOU) could not be grieved because it would be subject to “[an]other specific administrative method of review provided.”⁵

2. The City acknowledges that the language allowing the parties to agree to skip a step is unclear.
3. The proposed language binding the arbitrator to the MOU and departmental rules and regulations is problematic. The current language binds the arbitrator to State and City law but does not address what occurs if there is a conflict between rules and regulations, and State and/or City law – or federal law. The Union is concerned that if a City rule or regulation is violative of federal law that the arbitrator would be bound by the City rule or regulation. The City’s witness suggested that if there were an inconsistency between federal law and a rule or regulation that presumably the arbitrator would be bound by federal law as a matter of the “Law of Arbitration”. (Fact finder quotes). The fact finder leaves it to counsel to address this issue in light of U.S. Supreme Court decisions regarding the scope of review and arbitrator authority, and the general proposition that an arbitrator is bound by the terms of the parties’ agreement.
4. The Union is correct that the City’s proposal limits the ability of the employee to grieve, while not limiting the City. Simply on the basis of fairness that proposal should be rejected.

Advisory Recommendation- Grievance Procedure (M-11)

The fact finder recommends that the City’s proposal be rejected.

⁵ M-11, Section 2-1 B. 1.

Issue Five
Overtime (M-6)

Management Proposal and Explanation:

The City's proposes calculating overtime on a weekly basis after 40 hours of work versus on a daily basis. . This will allow the City to go to a time and labor system in the future. The City's proposal also allows the opportunity for employees to flex their time within the week.

The City's proposal is an effort to provide flexibility for the employees to use flex time within the work week and to provide consistency of flex time across departments as well as employee units. To ensure that the flex time is optional, both the employee and supervisor must agree and execute a flex time agreement form.

Union Counterproposal and Explanation:

The Union's counter offer was withdrawn.

The Union notes that this proposal has not been costed by the City. The Union is concerned that the proposed provision would give a supervisor discretion to allow – or more importantly not allow - an employee to take flex time. The concern is that a supervisor could favor friends and disfavor others. The denial of flex time could not be grieved since it would be a matter of “discretion” granted to the supervisor. Granting such broad discretion in light of other City proposals to limit and employee's ability to file a grievance could prevent a grievance based on a denial of flex time.

The Union's proposal at the fact finding hearing is that the current language remain in place.

Fact finder's Recommendation: Overtime (M-6):

Discussion:

The Union's concern regarding an abuse of discretion by a supervisor in granting or denying flex time is well taken, particularly in light of other City proposals that appear to limit grievances. Further, to the extent the matter has been not been costed, and where overtime expense to the City may be reduced, the acceptance of this proposal could result in cost savings to the City that could be the subject of additional compensation discussions between the parties.

Advisory Recommendation- Overtime (M-6).

The fact finder recommends that no change be made to current MOU language.

CONCLUSION

The fact finder has reviewed the pre-hearing statements of the parties, and all facts and exhibits presented at the hearing. In addition, the fact finder has given due consideration to the positions and arguments presented by the parties regarding each issue at impasse.

This Fact Finder's Report and Advisory Recommendations only applies to those issues and sub- issues addressed in this Report and to no others.

Respectfully submitted and issued this 3rd day of April, 2016.

/s/ Steven M. Guttell
Steven M. Guttell, Esq.
Fact Finder

Certificate of Service

I hereby certify that in this 3rd day of April, 2019, a copy of the foregoing Fact-Finder's Report and Advisory Recommendations was served by electronic mail upon the persons set forth above; Kathy Schmidt, Alisa A. Brandford, Esq. and Nicholas J. Enoch, Esq.

/s/ Steven M. Guttell
Steven M. Guttell, Esq.
Fact Finder