**ATTACHMENT C**

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| **AMERICAN FEDERATION OF STATE,** | **)** |
| **COUNTY AND MUNICIPAL EMPLOYEES,** | **)** |
| **LOCAL 2384** | **)** |
| **Meet and Confer Representative for** | **)** |
| **Unit 2 Employees of City of Phoenix** | **)** |
| | **)** |
| **And** | **)** |
| | **)** |
| **CITY OF PHOENIX, ARIZONA** | **)** |
| **A Municipal Corporation City/Employer** | **)** |

**POSITION OF AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES,**
**LOCAL 2384**
**PURSUANT TO PHOENIX CITY CODE § 2-219(K)**

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## INTRODUCTION

American Federation of State, County and Municipal Employees, Local 2384 ("AFSCME Local 2384" or "the Union") hereby submits this position statement pursuant to Phoenix City Code §2-219(K). There are more than 1,700 authorized Unit 2 employees in the City.

Unit 2 employees serve vital roles in providing essential City services to the community and public and have done so throughout the COVID-19 pandemic. Unit 2 employees represent the skilled trades, mechanics and equipment operators who have kept the City running with vital water, sewer, streets and other municipal services to the public. They have worked throughout the pandemic to ensure that City services have kept running without fail. They have ensured the safety and security of the water supply, the airports and other vital services even as they faced more and more risk in the workplace.

## BACKGROUND

On April 1 and 2, 2021, a neutral factfinder, Najeeb N. Khoury, selected by the parties, held a combined factfinding hearing with AFSCME Local 2960 and AFSCME Local 2384. The factfinder heard extensive testimony and arguments and reviewed exhibits presented by both the Union and City management on the issues and proposal on which the parties were unable to reach agreement during negotiations. During the hearing, the City's witnesses included the City Manager Ed Zuercher, Assistant City Manager, Jeff Barton, City Budget Director Amber Williamson, and Chief Negotiators for the City Janice Pitts and Xavier Frost. The Union's witnesses included a labor economist, Laurie Ann Atenzia, the President of AFSCME Local 2384, Mario Ayala, the President of AFSCME Local 2960, Frank Piccioli, and the Vice President of

AFSCME Local 2960, Debra Novak Scott. The hearing was conducted jointly because there are some overlapping labor and management proposals regarding Units 2 & 3.

The recommendations by the neutral factfinder are attached hereto as Exhibit 1. These recommendations are fair and balanced and promote both the public and Unit employees' interests. AFSCME Local 2384 urges the City Council to accept the factfinder's report in its entirety. AFSCME Local 2384 respectfully urges City Council not to selectively adopt the factfinder's recommendations but to recognize that these recommendations, made after a two-day hearing, are part of a well-considered, thoughtful, integrated report that balances the City management's expressed concerns, the employees' expressed concerns and the impact on the public. Adopting the recommendations in toto is the most fair and reasonable way to promote the public purpose and ensure the integrity of the factfinding process that serves as a valuable part of the Meet and Confer Ordinance as a means of resolving impasse. Piecemealing the well-reasoned and considered factfinding recommendation and report would be counterproductive to that process.

Alternatively, should the Council not be inclined to adopt and implement that factfinder's report and recommendation in its entirety, AFSCME Local 2384 requests that Council accept the Union's proposals. AFSCME Local 2384 submits that the following compromises recommended by the neutral factfinder are fair and reasonable and in the public interest:

## I. The Factfinder's Recommendation on Wages Is Fair and Equitable

AFSCME Local 2384 recommends that City Council adopt the factfinder's wage recommendations. The factfinder offered a roadmap for a "cautious approach" that will "allow for

the opportunity for further economic enhancements during the life of the two-year agreement." Specifically, the factfinder recommended:

1. 2% ongoing wage increase and 3% one-time monetary payment for fiscal year 2021-2022;
2. 1.5% ongoing wage increase and 2.5% one-time monetary payment for fiscal year 2021-2022
3. Re-openers to meet and discuss wage enhancements following final guidance on the more than $400,000,000.00 the City will receive from the federal government under the American Rescue Plan Act ("ARPA") and following analysis of experience of tax revenues derived from recreational marijuana sales, revenues which are not budgeted but which the City already has begun to receive.
4. The factfinder recommended that these wage increases not be unfairly tied to adopting or implementing non-economic proposals such as discipline. See Exhibit 1, at 7 ("I do not believe any party calculated a precise monetary value for the 'transparency package,' but were simply using the monetary number as an incentive."). The increased wages will help offset the years of cuts and concessions by the hardworking employees of Unit 2 whose wages have not kept up with their peers or inflation in terms of wages and salary,

Since 2010, all City of Phoenix employees were asked to do more with significantly less pay and, as the City's own witnesses admitted, their wages have not kept up with the cost of living as reported by the United States Bureau of Labor Statistics. In a historical recession following the collapse of the real estate and securities markets, Unit 2 employees agreed to 3.2% compensation cuts. These compensation cuts in the 2010-2012 Memorandum of Understanding between the City

and Local 2384 were not fully restored until two years ago, in 2019.[1] In 2019, the City employees finally made it back to 2010 wage levels. The City has finally rounded the corner with a significant surplus of $153 million with substantial budgetary flexibility and a positive economic outlook. The City also has a very healthy contingency fund that the City did not need to use during the pandemic.

The factfinder's suggested modest increase to wages will be a step toward rewarding the employees' sacrifices and maintaining competitive levels of employee pay and benefits to attract new employees and retain existing employees who have provided loyal service in very difficult and stressful times. It will help maintain Phoenix's stature as one of the best-run cities in the country. To be sure, the factfinder's recommendation is less than what Unit 2 requested or wanted in negotiations and less than the Union believes the City can realistically afford to compensate its employees. At best, it is a modest increase; however, it is well deserved by the Unit 2 employees who have worked faithfully and tirelessly to provide vital public services in a time of financial and economic hardship. Now that the City and economy have recovered, Unit 2 employees should be compensated accordingly. As the factfinder recommended, such increases should not be tied to a non-economic proposal related to terms affecting discipline and other non-economic issues.

Furthermore, the factfinder's "cautious" approach to accounting for the over $400 million in ARPA funds that the City is certain to receive, and the revenue the City receives from

[1] See Exhibit 1, at 5 noting: "After the Great Recession, Unit 2 took 3.2% in concessions in its 2010-2012 MOU, had 1.6% of concessions restored in its 2012-2014 MOU; took an additional 2.5% in concessions in its 2014-2016 MOU; received 4.2% restoration of concessions in its 2016-2019 MOU; and finally received 3.5% wage increases in its 2019-2021 MOU. While the last MOU finally got Unit 2 past its concessions, the real dollar wages of its members are still well behind 2010 wages due to inflation."

recreational marijuana taxes also should be adopted by the Council. Implementing a requirement to meet and confer on allocations to employees from these new sources of substantial amounts of added revenue that are not reflected in the current budget or forecasts is entirely appropriate and in furtherance of the public interest by facilitating recruitment and retention of Unit employees.

The factfinder also recommended, and AFSCME Local 2384 respectfully submits, that Unit 2 employees should be given no less in terms of economic benefits than any other Unit. This is fair and equitable and consistent with the stated goals of the City to treat the bargaining units equitably compared to one another in terms of increases in wages and benefits.

Alternatively, there is no doubt that if the City wanted to, it has the budgetary flexibility to approve the more generous increases that AFSCME Local 2384 requested: 2.5% ongoing wage increase and a 3% one-time monetary enhancement for 2021-2022, and a 2.5% ongoing wage increase and a 3% one-time monetary enhancement for 2022-2023 with wage enhancements if projected revenues increase from the prior year. If the Council is not inclined to adopt the factfinder's recommendations in their entirety, the Council should consider and implement Unit 2's alternate wage proposal set forth immediately above.

## II. City Council Should Endorse the Neutral Factfinder's Recommendations to Reject City Management's Proposed Change to the Grievance Committee

The neutral factfinder's recommendation to retain the current composition of the grievance committee is well-reasoned and comports with common-sense. The Grievance Committee is currently made up of an appointee of the City Manager, a City department director and the president of the local or the president's designee of the Unit and employee(s) impacted by the grievance. The committee submits findings and advisory recommendations to the City Manager, who makes the final determination on the grievance.

Indeed, the evidence presented at the hearing was uncontested that the Grievance Committee, which is designed to resolve disputes efficiently and expeditiously under the MOU is functioning well and doing what it was designed to do – foster harmonious labor relations and efficiently resolve labor disputes under the MOU that arise from time to time. The neutral factfinder found that the only reason offered by City Management for changing the Committee – i.e., "optics" did not provide a rational basis for modifying a committee that has a successful and important role in resolving labor disputes:

> I recommend no change to the language. The City offered no evidence that there has been a problem in the current set-up other than potential optics. If a member of the public were to complain about the setup, it would provide an opportunity to educate that interested member of the public and explain why the setup serves the interest of the City. Notably, an election by the Union to use the Grievance Committee process saves the City and the Union the expense of going to arbitration, and the Union is more likely to select the Grievance Committee route if it has representation on the committee. Moreover, any concern that the Union is deciding its own disputes is offset by the fact that management has two representatives on the committee and that the committee ultimately just makes recommendations to the City Manager.

Factfinder Report, at 9. The factfinder also rejected City Management's proposal that some other union's president sit on the grievance committee for Unit 2's MOU, stating: "It is unclear why the president of a local that has no interest in the contract between the parties (and who is not a professional neutral trained in deciding contractual disputes) should have a role in the dispute resolution process." *Id.* The factfinder recognized that common sense dictates that the president of the local can provide unique knowledge and insight into the circumstances giving rise to the grievance and that in any event, it is ultimately up to the City Manager to make the final decision.

In the unlikely event that this Council decides a change is needed to the grievance language and decides to reject the neutral factfinder's recommendations, AFSCME Local 2384 suggests

that the Grievance Committee truly be a "neutral" committee and be comprised of mutually agreed upon neutral parties.

## III. The Neutral Factfinder's Recommendations Concerning the Use and Maintenance of Prior Discipline Is Amply Justified

Despite its proposals advocating for disciplinary changes in MOU language, Management presented no evidence that the current disciplinary terms and conditions and requirements present any issues other than "optics" for Unit 2. Citing a single isolated Unit 3 example of prior discipline of a police officer who kept his job and was demoted to Unit 3 and was then promoted, City Management claimed the entire disciplinary structure needed to be modified as a result of public scrutiny. However, as everyone knows, the current call from members of the public for increased scrutiny and transparency of public employees involves police officers whose missteps and misdeeds have resulted in unjustified use of deadly force and racial profiling. While taking no position on changes for sworn police officers that may impact other bargaining units, AFSCME Local 2384 submits that the same changes are unnecessary for the skilled trades employees who comprise Unit 2. These employees do not carry weapons on the job, do not detain or arrest members of the public, execute search warrants, use deadly force nor do they have the same kind of authority or responsibility of other dissimilar City employees whose mistakes or bad judgment have resulted in public outrage, demonstrations and calls for reform.

Nonetheless, although AFSCME Local 2384 does not entirely agree, the neutral factfinder made the following recommendations for a disciplinary package that AFSCME Local 2384 believes is relatively fair if adopted as part of the overall recommendations made by the factfinder and is willing to recommend to its constituents ratification of the following:

1. Employees should still be able to request that the City remove performance evaluations after ten years and move them to an inactive file. As the factfinder noted, there is simply no reason for using performance evaluations for Unit 2 employees that are more than a decade old.

2. Certain serious disciplinary infractions that result in suspensions may remain permanently in an employee's disciplinary file subject to the following:

a. Only serious violations resulting in suspensions as a result of violations of certain specified disciplinary rules (Rules 21b2, 21b4, 21b5, 21b13, 21b14, 21b15, 21b18, and 21b20) that are not overturned by the Civil Service Board should remain in the file unless there is an agreement to the contrary. However, as the factfinder recommended, the MOU should also specify that to the extent Rule 21b2 is included, this rule should not include discipline for behavior as it applies to stewards and officers of AFSCME Local 2384 engaging in union activities because of the potential chilling effect of such discipline and potential for misuse.

b. The rule changes to maintenance of discipline should not apply retroactively. Applying the rule retroactively to discipline already imposed is unfair and creates serious due process concerns. Employees had rights to challenge prior discipline that has expired, and they had no notice that the discipline might remain in their file in perpetuity despite prior MOU language and past practice to the contrary. Employees who had prior discipline may have challenged either the type of discipline (i.e., a suspension of one day versus a written reprimand) or the alleged rule infraction (which are often listed with multiple rule violations) and elected not to do so with the understanding and upon the reliance that this

discipline would have limited future relevance or application after expiration of certain periods of time. As the factfinder found:

> I find the argument that employees relied on the current MOU language in making decisions regarding entering settlements or contesting discipline to be persuasive. While the employer is not proposing a retroactive imposition of discipline, the employees did rely on the rules as they were at the time, and ***it would be unfair to change the rules retroactively***.

(emphasis supplied).

c. There should be new and expanded rights afforded to employees under investigation that the parties should work out. If certain, serious discipline is going to remain in their files forever, employees should have a right to know the charges, know the evidence that has led to the charges and know the witnesses who have accused them and what they have to say. These are basic due process elements and should be afforded to employees. See Factfinder Report, at 14 ("I recommend that the parties work together to agree upon language that reflects the current practice of investigations, with the understanding that any newly agreed upon language should clarify current rights and should not curtail any existing rights.").

d. Employees should be notified when prior discipline over five years old is used in promotions.

Alternatively, AFSCME Local 2384 maintains that the current disciplinary scheme is working and that no changes are needed or should be imposed. None of the changes City Management proposed were supported by examples of any disciplinary problems that became public issues because of Unit 2 employees. The current nationwide and local public attention regarding sworn police activity does not justify the mass, draconian changes proposed by the City

for Unit 2 employees. A wholesale revision of disciplinary procedures should be preceded by an in-depth, conclusive study and further discussion between the parties.

## IV. The City's "Four Corners" Proposal is Unnecessary and Could Have Unintended Consequences

The neutral factfinder rejected the City's proposal that purports to abrogate any agreements – written or otherwise – unless specified in the MOU. As the factfinder recognized, this is a purported solution to a nonexistent problem and could have unintended consequences by unknowingly abrogating existing rights stemming from other independent, yet legally binding sources. The City could not identify any agreement at the factfinding hearing that it claimed needed to be superseded. To the extent City Management feels it necessary to eliminate a particular agreement, it should bring that agreement to the Union. As the factfinder found: "My recommendation is for the City to identify any old agreements it has with the Union and discuss them on a case-by-case basis rather than asking the Union to waive unidentified rights." Factfinder Report, at 14. As the City has identified no such agreements, its proposed language should not be imposed.

## V. Management's Proposal to Abrogate Sick Leave Rights Should Be Rejected

It is rather astonishing that given the current, ongoing COVID pandemic, City Management chose to try to reduce – rather than expand – available sick leave. Management's proposal to abrogate sick leave rights (without any make-up compensation or credit) hurts employees just when they need sick leave the most. Although Management tried to insist that the language it had proposed did not abrogate any current rights to sick leave, the factfinder rejected this argument based, in part, on the acknowledgment by a Management witness that the City's leave policy is

more generous than the state statute the City was advocating should be substituted. *See* Factfinder Report, at 15 (finding it "clear" that "the current language covers situations not covered by the new state law and that the contractual language provides other additional rights"). In line with the Factfinder Report, Management's proposal to abrogate and reduce certain sick leave rights should be rejected.

## VI. The City Should Ensure Fair and Competitive Compensation and Proper Bargaining Unit Alignment by Conducting Compensation and Classification Studies and Providing Advance Notice and a Meeting with the Union to Confer on any Reallocations or Reclassifications

The Union's proposal to conduct additional classification and compensation studies, which are designed to ensure that Unit 2 employees are properly compensated is certainly fair and reasonable. In response, Management cited the fact that it was engaging in an upcoming classification study. Although Management claims the study will be performed soon, the contract it signed with the outside compensation consulting company gives that company ***five years*** to complete the study. In the interim, the Union believes that Unit 2 employees are being paid well below market rates. Although the Union believes that multiple job classifications are well below market salaries and trends and asked for eight compensation and classification studies per contract year, the Union believes that combined with the factfinders recommended wage package and other non-economic components, an additional compensation study (for a total of 2 per year) that the factfinder recommended, while not far enough to address suppressed and submarket wages, is an adequate compromise. Factfinder Report, at 16 ("I recommend that the parties agree to two classification studies per year. This should not overwhelm the City and acknowledges the importance of classification studies.").

The proper alignment of bargaining units is an integral component of the Meet and Confer Ordinance. AFSCME Local 2384 also requests that City Council adopt the factfinder's recommendation to require the City to provide 30-days advance notice of any reclassification or reallocation of bargaining unit work and to hold a meeting to discuss the reallocation or reclassification. This will assist in reducing the potential number of unit clarification petitions filed with the Phoenix Employment Relations Board. The Union's expertise in knowing the jobs and actual work performed and suggestions about the work will also help the City conserve resources and use its available resources more efficiently.

## VII. Unit 2 Employees Should Be Ensured a Process and Procedure for Receiving Fair and Equitable Treatment

AFSCME Local 2384 has serious concerns about inequities and unfairness in the treatment of bargaining unit employees. The factfinder recommended that the Union's proposal to put a fair and equitable treatment requirement that can be enforced through the grievance procedure in the MOU should be the subject of tracking and addressed in further discussions - but not put in the MOU. In addition, the factfinder recommended that the City and Union work together to track, and address concerns the Union has about supervisor misconduct outside of the grievance process. Given that the City witnesses testified that the City "highly values a respectful workplace" and wants to address concerns about unfairness or inequity in the workplace, City Council should further this goal by implementing the factfinder's recommendations that there should be a requirement and process for the City and Union to work together to track these concerns and implement ways to address them. This can be handled through a mandatory requirement that the parties meet and confer on this issue through the Labor-Management Committee.

While AFSCME Local 2384 submits that there is no reason that these concerns should not be addressed in the MOU itself, it is willing to defer on this issue as recommended by the factfinder if the entirety of his report and recommendations are adopted as a whole. Local 2384 requests that Council order City management to meet and confer in good faith with AFSCME Local 2384 to work on a process for tracking and addressing concerns regarding the handling of allegations of unfair treatment of any Unit 2 employee.

## VIII. The Grievance Language Should be Clarified to Ensure the City Responds to Grievances

The factfinder recommended that City Council adopt the Union's language in the MOU that the City is required to process and to provide reasons for denying or dismissing grievances. Under the current language, which says that a grievance is "null and void" if it does not allege a violation of the MOU, the City has simply been not responding to grievances. This leads to the lack of resolution for issues that arise and fails to give the Union or Unit 2 employees any basis for understanding the City's handling of the grievance or refusal to process it. Requiring responses furthers the City's goals of harmonious labor relations. Further, as the factfinder noted, the City's labor relations representative testified at the hearing that all grievances should be responded to. It is not clear, therefore, why the City opposed in the first instance the proposed requirement that they do so.

In addition, if the City Council does not adopt the factfinder's recommendations, it should further the City's labor relations goals by adopting the Union's proposed provision that release time should be counted as time worked for purposes of probationary and promotional requirements. Although the factfinder labeled the concern "hypothetical," the time spent on

release time, which benefits the City and the employees and public should not be counted as a negative factor in promotions and probationary periods.

## IX. The Side Letter Regarding a Potential Adverse Ruling in the Pending Release Time Case Should Contain an Alternative Dispute Resolution Procedure so City Council Has a Full Record and Opinion

While both City Management and the Union oppose any challenge to release time, they both recognize that there is a potential, however remote, for the current challenge to release time pending in the Maricopa County Superior Court to be resolved unfavorably. Accordingly, the proposed side letter contains a mechanism for dealing with that possibility. The sole difference between the parties is that if the parties cannot mutually agree on how to address an unfavorable ruling by a court or how to restructure release time, there should be some factfinding or alternative dispute process preliminary to bringing the matter before Council. AFSCME Local 2384 suggests that the dispute should be submitted to factfinding so that City Council will have a neutral recommendation from a qualified factfinder to consider. This can be accomplished quickly with relatively little expense and will give the City Council a firm basis on which to make decisions regarding the parties' MOU should it need to be modified in light of a possible adverse ruling.

## CONCLUSION

As set forth herein, the factfinder's report was considered and fair and provides an equitable compromise that benefits the City, the employees and the public. AFSCME Local 2384 requests that the City Council adopt the factfinder recommendations in their entirety and if any are rejected, to adopt AFSCME Local 2384's proposals instead.

Respectfully submitted this 21st date of April, 2021.

**MARTIN & BONNETT,PLLC**

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## CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2021, I transmitted the foregoing to the following individuals via email:

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/s/Kathy Pasley
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EXHIBIT 1

IN THE FACTFINDING PROCEEDINGS

PURSUANT TO PHOENIX CITY CODE

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|---|---|
| AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, LOCAL 2384 (UNIT 2)<br>Union,<br>&<br>CITY OF PHOENIX,<br>Employer | FACTFINDING REPORT<br>AND<br>ADVISORY RECOMMENDATIONS |

| | |
|---|---|
| Factfinder: | Najeeb N. Khoury |
| Appearing For the Union: | Jennifer Kroll & Dan Bonnett, Martin & Bonnett, P.L.L.C. |
| Appearing For the City: | Heidi Gilbert, City Attorney's Office |
| Hearing Dates: | April 1 & 2, 2021 |

**BACKGROUND**

This factfinding proceeding involves the City of Phoenix's Unit 2. Unit 2 consists of skilled trades positions, and is represented by AFSCME Local 2384 ("AFSCME" or "Union"). There are approximately 1,700 budgeted positions in Unit 2. The parties are bargaining for a Memorandum of Understanding (MOU) that will run from July 1, 2021-June 30, 2023. Pursuant to the City's Code and the Phoenix Employment Relations Board's Rules, the parties submitted their disputes to factfinding and selected me as the factfinder. The factfinding hearing occurred on April 1 & 2, 2021 in Phoenix, Arizona.

## ANALYTICAL FRAMEWORK

Unlike interest arbitration, where a third-party neutral sets the terms of a new contract, a third party neutral in a factfinding simply provides recommendations. This in essence makes factfinding an extension of bargaining. Ultimately, absent an imposition of terms by the employer, the parties must persuade one another of their positions, and the neutral factfinder provides an outside perspective to help the parties along.

For non-economic issues, neutral factfinders have typically required the party seeking a change to the *status quo* to carry the burden of persuasion, and I will follow that convention. In analyzing each non-economic issue, I will be asking two questions. First, should the *status quo* be changed? The party proposing the change must demonstrate that there is a problem with the *status quo* or that the *status quo* can be improved. Second, does the proposed language solve the problem or enhance the *status quo*? If the answer to this second question is no, I will either recommend the *status quo* or provide a different proposed solution that better addresses the issue identified in the first question.

## ISSUES AND RECOMMENDATIONS

**Article 3, Section 3-1 (Wages):**

The City's last offer was a 2% ongoing wage increase and a 3% one-time monetary enhancement for 2021-2022, and a 1.5% ongoing wage increase and a 2.5% one-time monetary enhancement for 2022-2023 plus language stating that the City Council could consider using American Rescue Plan Act ("ARPA") money for further enhancements. However, .5% of ongoing money and .5% of one-time money in 2021-2022 is contingent on the Union accepting what the City has called its transparency package.

The Union's last offer was a 2.5% ongoing wage increase and a 3% one-time monetary enhancement for 2021-2022, and a 2.5% ongoing wage increase and a 3% one-time monetary enhancement for 2022-2023. The Union also asks that there be additional wage enhancements if projected revenues increase year-over-year. The Union further proposes that the parties meet and confer regarding any ARPA money that will be used for wage enhancements.

By way of background, a 1% increase in total compensation for all bargaining units costs the City approximately $18.8 million across all funds and approximately $11.8 million to its general fund; a 1% increase in total compensation for Unit 2 employees costs the City approximately $1.7 million across all funds and approximately $360,000 to its general fund.

**City's Position On Economics:**

The City argues that its proposal is generous and in keeping with what other units have agreed upon. The City acknowledges that it is in a fiscally sound position, having a $153 million surplus in its general fund. The City, however, emphasizes that $98 million of the surplus is in one-time money and only $55 million is ongoing, and that one-time money should not be used to pay ongoing costs. The City states that this surplus only reached its current level because federal regulations allowed it to transfer one-time funding from the Coronavirus Relief Fund (CRF) to the general fund to offset public safety salaries.

The City produces a yearly trial budget after receiving initial input from community stakeholders and City Council members. After a trial budget is presented, the community is allowed to provide input on the trial budget, which then turns into a proposed budget and ultimately an adopted budget. There are often significant changes between a trial budget and the adopted budget. City Manager Ed Zuercher testified that the current Trial Budget for the 2021-2022 budget year seeks to balance community needs for service, organizational needs for

infrastructure to provide those services, and fair compensation for City employees. He also noted that the City's population is growing, and that the City anticipates needing to hire more employees to provide services. The City's current Trial Budget dedicates 77% of its general fund surplus or $118 million to employee compensation enhancements, which is in excess of the 70% of its surplus that it dedicated to enhanced compensation in the previous round of negotiations.

In addition to employee compensation enhancements, the Trial Budget dedicates funds to Public Safety Reform & Responsiveness, COVID Relief & Resiliency, Climate Change & Heat Readiness, Affordable Housing & Homelessness, Building Community and Responding to Growth, and Administrative Accountability. Assistant City Manager Jeff Barton testified that any economic enhancements beyond the current offer would require the City to make commensurate cuts to its other priorities which are reflected in the Trial Budget, as the City is legally required to have a balanced budget. Barton also noted that the City has long-term pension obligations which are projected to worsen, with approximately 26% of general fund costs going to pension obligations by 2025-2026.

The City also points out that other bargaining units have already agreed to the offer currently before Unit 2 and that they have "Most Favored Nations" language in their agreements, meaning that the City would be obligated to give the other units increases beyond what their current agreements contemplate.

Budget and Research Director Amber Williamson testified that the City exercises best practices in its budgeting. Therefore, it does not include new or additional revenue streams that have not been realized. She further testified that the City's projected and actual numbers have been historically close, and that the City of Phoenix prides itself on its budgeting accuracy. She

acknowledged that revenues from recreational marijuana sales and ARPA money are not in the 2021-2022 Trial Budget, as these are new sources of revenue.

**Union's Position on Economics**

AFSCME argues that its members were asked to sacrifice in hard times, and that they did so willingly; therefore, now that there is a sizeable surplus it is only right that the City offer a better economic package. After the Great Recession, Unit 2 took 3.2% in concessions in its 2010-2012 MOU, had 1.6% of concessions restored in its 2012-2014 MOU; took an additional 2.5% in concessions in its 2014-2016 MOU; received 4.2% restoration of concessions in its 2016-2019 MOU; and finally received 3.5% wage increases in its 2019-2021 MOU. While the last MOU finally got Unit 2 past its concessions, the real dollar wages of its members are still well behind 2010 wages due to inflation. AFSCME points out that the current offer of 3.5% on-going money over two years will not keep up with CPI, which is projected to be about 2% a year, and that while one-time money is good, it does not help keep up with inflation.

AFSCME notes that increases to Unit 2 do not have the same impact on the general fund as increases to other units, especially sworn units. AFSCME has worked with the City on pension reform for the civilian pension system. Consequently, the civilian pension system is not projected to grow appreciably as a percentage of the general fund in the next five years. Further, a good percentage of Unit 2's salaries are not charged to the general fund, as many employees work in non-general fund, enterprise departments.

Laurie Ann Atienza, Labor Economist for AFSCME, testified that the City's audited financials demonstrate that the City is financially healthy, and that revenues show steady, healthy growth with consistent surpluses. Atienza opined that the City's audited financial statements demonstrate that it can absorb compensation enhancements especially in light of its $153 million

surplus, the $416 million ARPA money coming to the City, and the expectations that the Phoenix area will continue to experience population, employment and income growth.

Finally, AFSCME notes that the Trial Budget does not account for any increases in revenue due to recreational marijuana sales, which were recently legalized in Arizona, and does not include the $416 million in ARPA funds; therefore, AFSCME believes there should be more money available for economic enhancements, especially in the second year of the MOU.

**Recommendation on Economics**

One can certainly understand each side's position. The Union believes it has sacrificed a great deal to help the City during hard times, and that it is not the source of the City's long-term pension problems, having agreed to pension reform initiatives. The City wants to treat all of its bargaining units equitably when it comes to across-the-board total compensation increases, and will not agree to provide higher total compensation increases to civilian employees even if those increases have a less dramatic impact on its long-term projections than increases to sworn employees. The Union wants on-going increases that, at a minimum, keep up with inflation. The City wants to maintain as much long-term flexibility as possible, and is therefore offering large one-time sums, which do not have a compounding impact on its future budgets and are not pensionable.

Further, the City does not want to give economic enhancements beyond what it has agreed to with other units given that those other units have "Most Favored Nations" language; however, Unit 2 believes it is not similarly situated to those other units given many of its unit members are not paid through the general fund. The City is following what it believes is budgeting best practice by not including the unrealized ARPA and recreational marijuana funds; the Union responds that there is certainty that those funds will be realized during the life of this

MOU. The City argues that nothing precludes the Council from dedicating some ARPA money to economic enhancements, but the Union counters that it wants an opportunity to meet about any such enhancements.

Given the uncertainty of the times we are in (with the pace of re-openings and increased economic activity not being certain), I recommend that the parties take a cautious approach but allow for the opportunity for further economic enhancements during the life of the MOU. It is also not lost on me that other units have already settled for what the City is offering the Union, and that it is difficult for the City to offer more to one unit than what other units have agreed upon. Therefore, I will recommend that the parties settle on a 2% ongoing wage increase and a 3% one-time monetary enhancement for 2021-2022, and a 1.5% ongoing wage increase and a 2.5% one-time monetary enhancement for 2022-2023 with reopener language to allow for discussion of further enhancements.

This recommendation, however, is not contingent on the Union accepting the City's "transparency package." This is because I will not be recommending those proposals as drafted. Further, I do not believe any party calculated a precise monetary value for the "transparency package," but were simply using the monetary number as an incentive. Therefore, I will be making my recommendations on those proposals as stand-alone recommendations and based on what I believe makes sense for each proposal.

The facts do support a finding that with the ARPA money and, to a lesser extent, the recreational marijuana revenue, there will be additional revenues during the MOU that can help bridge the gap between the parties' proposals, and that these additional revenues are not accounted for in the Trial Budget, meaning additional economic enhancements based on these revenues will not impact the City's other priorities outlined in the Trial Budget. I recognize that

it is hard to know the precise allowable uses for ARPA money at this point and that the amount of revenue to be generated by recreational marijuana sales is an open question. For this reason, any concrete economic enhancements tied to these new sources of revenue are premature.

I, therefore, recommend that the parties agree to an economic reopener allowing the parties to discuss further enhancements based on acceptable uses of ARPA money and any realized revenue from recreational marijuana sales. I do not recommend adopting the City's language that it will evaluate the ARPA money and unilaterally provide a non-specified percentage of premium pay. It is a fundamental right of unions to be able to meet and confer with employers over economic enhancements. Finally, I do not recommend that the parties agree to AFSCME's language that economic enhancements will automatically be tied to increased revenue. Rather, the re-opener language should be clear that the parties are required to meet over further economic enhancements based on the new revenue, but no negotiated outcome is predetermined by such language.

**Article 2: Section 2-1(C): (Grievance Committee)**

This is part of the City's transparency package. The City proposes altering the Grievance Committee language so that the President of AFSCME Local 2384 or his/her designee does not sit on the committee that reviews Unit 2 grievances. Under the MOU, AFSCME may select to have a grievance heard by an arbitrator or through the Grievance Committee. The Grievance Committee is currently made up of an appointee of the City Manager, a City department director and the president of the local or the president's designee. The committee submits findings and advisory recommendations to the City Manager, who makes the final determination on the grievance.

The City worries that the optics of the AFSCME Local 2384 president hearing Unit 2 grievances is troublesome; therefore, the City proposes having the president of a different union sit on the committee to hear AFSCME Local 2384 grievances. The Union provided some counter language but is essentially advocating no change to the language.

I recommend no change to the language. The City offered no evidence that there has been a problem in the current set-up other than potential optics. If a member of the public were to complain about the setup, it would provide an opportunity to educate that interested member of the public and explain why the setup serves the interest of the City. Notably, an election by the Union to use the Grievance Committee process saves the City and the Union the expense of going to arbitration, and the Union is more likely to select the Grievance Committee route if it has representation on the committee. Moreover, any concern that the Union is deciding its own disputes is offset by the fact that management has two representatives on the committee and that the committee ultimately just makes recommendations to the City Manager.

Additionally, the City's proposal of having a different union president sit on the committee is highly unorthodox. The MOU is a contract between AFSCME Local 2384 and the City. It is unclear why the president of a local that has no interest in the contract between the parties (and who is not a professional neutral trained in deciding contractual disputes) should have a role in the dispute resolution process. Certainly, in my experience, I have never seen such a setup before.

**Article 1: Section 1-4(E): (Purging Evaluations--10 years)**

The City proposes eliminating language that says: "Upon request, performance evaluations over 10 years old will be purged from a unit member's personnel file after 10 (ten) years as an active employee." In its proposal, the City states the reason for the proposal is " to

mirror the current practice of maintaining performance evaluations electronically." The Union counters that the language should say that a unit member could still ask that "all performance evaluations 10 years old be placed into an inactive file, prohibiting them from being utilized for any performance evaluations or promotional opportunities."

I recommend adopting the Union's language. Placing old performance evaluations in inactive status eliminates any concern that physical documents are required to be produced and then destroyed. There is no reason why electronic documents cannot be marked inactive. Further, there is no reason why 10-year-old performance evaluations (as opposed to serious discipline) should be used for any purpose.

**Article 1: Section 1-4(E): (Purging Discipline--5 years)**

The MOU currently precludes the City from considering discipline that is over five years old in any process, i.e., discipline that is over five years old cannot be considered in making progressive discipline or promotional determinations. The City argues that this has created problems both with the public wanting accountability and with other employees who are losing out on promotional opportunities despite having clean records. Specifically, the City points to some embarrassing or egregious acts of misconduct that have occurred that the City believes should not be disregarded after five years. The City emphasizes that its proposal would just give it the discretion to review old discipline.

The Union responds that the City has the authority to bypass progressive discipline for serious misconduct and that if the City chooses to give an employee a second chance, the employee should have a chance at a clean slate. The Union also argues that the push for transparency is due to cases involving police officers, and there have not been serious problems with Unit 2 members and old discipline. Moreover, the Union notes that unit members have

relied on this MOU language in either settling or choosing not to challenge discipline in the past, knowing that the discipline had a shelf life.

The parties did make steps toward each other on this proposal. The City agreed that only suspensions over five years (and not any type of discipline) should be used. The City also stated it would respect settlement agreements containing the five-year limitation language, it would exclude discipline that is defined as moral turpitude, it would consider the frequency and severity of misconduct, and it would notify an employee if the old discipline was a factor in non-selection for a promotional opportunity.

The parties were still in disagreement over whether certain types of suspensions should fall under the five-year language. Namely, the parties were in disagreement over whether discipline should last past five years if it is based on abusive or threatening behavior, on intentionally falsifying records, or on actions that bring discredit or embarrassment to the City.

The Union made clear that its movement was tied to certain economic enhancements that the City did not make.

Given the increased public focus on police misconduct, "me-too" issues, and other changing workplace expectations, it makes sense to change the *status quo* and allow the City to be able to consider serious misconduct despite its age. However, it also makes sense that not every type of discipline should be "evergreen." Moreover, employees who are bypassed for promotions based on discipline that is over five years old should have an avenue to contest the issue.

Of the types of suspensions that the parties had not come to a conditional agreement on, I believe that falsifying records is the type of misconduct that should not have a sunset date on it. I have some concern regarding the language involving abusive or threatening behavior,

specifically as it applies to stewards engaged in union activities. It is well-established that stewards have wide latitude when representing union members: "Many disciplinary actions are set aside or reduced because the cause for the discipline (often abusive language in heated exchanges with supervisors) emerged from, or was related to, union steward duties." Of course, this does not mean than anything goes and "while a steward's conduct in the course of union business is protected, the immunity is not absolute, and discipline of stewards in extreme situations has been upheld even though the basis for the discipline was related to the employee's conduct as a steward." *See* Elkouri & Elkouri, *How Arbitration Works*, 5-74 to 5-75 (Kenneth Mays, ed., BNA Books 8th Ed. 2016). The City's response to this concern undoubtedly is that only discipline that is upheld can be used five years down the line; however, the Union's response is that this language might chill the steward's activity. I think a compromise is to include this language (as discouraging abusive behavior in the workplace is extremely important) but have some clarifying language about protected union activity. I, however, do not recommend the inclusion of discipline based on actions that bring "discredit or embarrassment to the City." This is new language from the Personnel Rules, and there are no cases yet that explain what type of conduct falls under this language. One can easily argue that any misconduct brings embarrassment to the City, and including this language might then mean all suspensions that are over five years can be used.

Moreover, if an employee is notified that old discipline was a factor in non-selection for a promotional opportunity, the employee should have the right to question whether the decision makes sense so that the employee is not forever precluded for future promotions without an ability to raise a defense.

Finally, I find the argument that employees relied on the current MOU language in making decisions regarding entering settlements or contesting discipline to be persuasive. While the employer is not proposing a retroactive imposition of discipline, the employees did rely on the rules as they were at the time, and it would be unfair to change the rules retroactively.

For these reasons, I recommend that the parties adopt language allowing the City on a moving forward basis to use suspensions that are over five years and are based on Personnel Rules 21b2 (with some mention of union steward rights), 21b4, 21b5, 21b13, 21b14, 21b15, 21b18, and 21b20; that any settlement agreement which mentions the five-year limitation be respected; and that any employee who is notified that discipline over five years old is a factor in a denied promotion be able to submit a non-binding appeal on the matter.

**Article 1: Sections 1-4(A) and (B): (Investigations and Discipline)**

The City proposes replacing the entire sections dealing with investigations and discipline. It claims that this is cleanup language and meant to create consistency with the process that occurs with other civilian units. The City argues that no rights are being lost or protections curtailed by the new language. The Union counter proposed with language that would require the City to provide a unit member with all materials in the City's possession before conducting an investigatory interview. The Union basically is asking that civilians receive the protections afforded in the Police Officer Bill of Rights.

I do not recommend that civilians be given the same rights as the Police Officer Bill of Rights. There are many variables in an investigation and there may be legitimate reasons why management does not want to share all documents during the investigation stage. In terms of adopting the City's proposed changed language, it is unclear to me whether the Union had any objections to the proposal or if the parties simply needed more time to iron out acceptable

language. Therefore, I recommend that the parties work together to agree upon language that reflects the current practice of investigations, with the understanding that any newly agreed upon language should clarify current rights and should not curtail any existing rights.

**Article 1: Sections 1-4(E) and (G): (Purging/Inactive Reference)**

As I understand the proposal, the City wants to replace text with a graph that shows when various documents can be removed from certain files and made inactive from other files. Xavier Frost, Deputy Human Resources Director—Labor Relations, testified that the City is simply trying to have whatever process is agreed upon be reflected in the chart. I am sure that the point of confusion for the Union is that the proposed chart incorporates the proposed changes to the five-year old discipline discussed above. My recommendation is that the parties adopt a chart that reflects whatever the parties ultimately agree upon in the other sections of the MOU. However and to be clear, the move from text to a chart by itself is not meant to change anything substantively.

**Article 6: Section 6-7(F) (Four Corners)**

The City is proposing language that would eliminate any past written or verbal agreement. Janice Pitts, Deputy Human Resources Director—Employee Relations, testified that there have been occasions when unions have called upon old agreements. Yet, no specific examples were given. Further, the City did not provide a list of agreements it was asking the Union to forego. My recommendation is for the City to identify any old agreements it has with the Union and discuss them on a case-by-case basis rather than asking the Union to waive unidentified rights. Therefore, I am recommending the *status quo* language.

**Article 5: Section 5-9B: (Benefits)**

The City proposes eliminating language for use of sick leave in certain situations. The City stated in its proposal that it wanted to eliminate the language because it was "no longer applicable with Earned Paid Sick Time State Law." However, it became clear from the testimony of Mario Ayala, President of AFSCME Local 2384, that the current language covers situations not covered by the new state law and that the contractual language provides other additional rights. Xavier Frost testified that the different types of sick leave usages could lead to confusion and abuse; however, there were no concrete examples presented of abuse. I, therefore, recommend maintaining the *status quo* language.

**Article 1: Section 1-6: (New Positions/Classifications)**

The City's proposal struck out the entirety of the existing language and proposed new language. However, it is not clear why it did this. The City did include new language stating it would give written notice to the Union thirty days in advance of a position being reallocated or reclassified out of the unit. It appears from the testimony of Ayala that the Union, in addition to notice, wants an opportunity to discuss the reallocation or reclassification of such positions. The Union is not asking for a meet and confer or any veto power.

The Union proposed that it be allowed eight classification studies per year for the unit rather than the one study provided for in the current language. Janice Pitts testified that the City does not have the resources to conduct that many studies, and that the City is in the process of doing a high-level classification study of all its positions. The Union responds that such a citywide study will take a long time to complete and many of its positions are paid below market rates.

I recommend that the parties work together on cleanup language. I also recommend that the City give 30 days' notice of reallocations or reclassifications which will take positions out of the unit and meet with the Union within that 30-day time period to discuss the reallocations or reclassifications. Any such meeting shall not prevent the reallocation or reclassification. Moreover, as a compromise, I recommend that the parties agree to two classification studies per year. This should not overwhelm the City and acknowledges the importance of classification studies.

**Article 1: Section 1.3 J (Janus Related Litigation)**

The parties are discussing the inclusion of new language to account for a possible court order related to litigation involving release time. From the presentations at the hearing, the outstanding issue seems to be whether the Union will have a chance to meet with the City to discuss implementing any court order that might require a change in how release time is given. The Union acknowledges that any process for giving input would have to be expedited given the need to be in compliance with an enforceable court order, if one exists. My recommendation is that the parties agree to meet and discuss ways of implementing an enforceable court order if one is issued. While the Union's written proposal called for any dispute going to arbitration, it is unclear that the arbitration process could move fast enough to ensure the parties are in compliance with a court order in a timely manner. The parties should discuss alternative methods by which they might meet and come to a speedy resolution. This might include agreeing to factfinding.

**Union Proposal #27: Fairness Agreement**

AFSCME Local 2384 is asking for a "Most Favored Nations" clause that will ensure it is treated equitably to other units. The written proposal indicates the "Most Favored Nations"

proposal was contingent on the parties not going to factfinding; however, at the hearing, the Union made clear the proposal is still on the table. I see no reason why AFSCME Local 2384 should not receive the same protection that other units received. I certainly see no reason why such a clause should be conditioned on a unit not exercising its right to go to factfinding. For this reason, I recommend inclusion of a "Most Favored Nations" clause.

**Article 1, Section 1-3(I): (Fair and Impartial Grievance Language)**

The Union proposes allowing all unit members to grieve any treatment that is not fair and impartial. The City acknowledged at the factfinding that it highly values a respectful workplace and has methods for addressing allegations of unfair treatment. However, the City's position, which is not an uncommon one, is that the grievance process should be limited to contractual violations. My recommendation is that the parties discuss a way outside the grievance process that the Union can bring forth and track concerns regarding unfair treatment.

**Article 2, Section 2-1(B): Grievance Language**

The Union seeks to expand the definition of a grievance to include unacceptable workplace conduct and abuse of title or authority. The City stated that it does not tolerate such behavior but that addressing these issues through the grievance process is not the proper forum. Again, my recommendation is that the parties discuss a way outside the grievance process that the Union can bring forth and track concerns regarding abusive supervisors or managers.

The Union also seeks language that the City be required to give an explanation should it dismiss a grievance on procedural grounds. Xavier Frost testified that this should be occurring. I recommend adopting this part of the Union's proposal so that reasons are consistently given for denials of grievances.

**Article 1, Section 1-3: (Union Rights)**

The Union seeks language making Union release time count as time worked in the unit member's job classification. The Union stated that it has concerns that a steward who goes on release time during a probationary period after a promotion and is on release time for a lengthy period of time risks not passing probation upon return from release time due to someone not approving of his/her union activity. The City responds that if there is evidence of such a thing occurring, the Union steward could file a charge with PERB. The Union responds that proving someone did not pass probation due to union animus is a difficult proposition.

The Union poses a hypothetical but there is no evidence of a steward returning from release time and then failing probation. For this reason, I recommend the *status quo* language. I also make this recommendation because I am hesitant to recommend language that might impinge on the Civil Service Board's jurisdiction and because a union steward would be able to file a charge with PERB if there is evidence of union animus.

## CONCLUSION

I discussed the issues that the parties focused on at the hearing. I recommend that the *status quo* remain if there any issues on which the parties did not orally present and on which I did not comment. I sincerely hope that these recommendations assist the parties in reaching a negotiated settlement.

Date: April 7, 2021

Najeeb N. Khoury