



City of Grand Island

Tuesday, November 26, 2013

Council Session

Item I-2

**#2013-376 - Consideration of Approving Settlement Offer in
Kortum vs City of Grand Island**

Staff Contact: Robert Sivick

Council Agenda Memo

From: Robert J. Sivick, City Attorney

Meeting: November 26, 2013

Subject: Consideration of Approving Settlement Offer in *Kortum v. City of Grand Island*

Item #'s: I-2

Presenter(s): Robert J. Sivick, City Attorney

Background

In April, 2013 former and now retired Grand Island Police Captain Peter E. Kortum filed a complaint against the City of Grand Island (City) alleging gender discrimination in the way his lump sum pension benefits were calculated under the Nebraska Police Officers Retirement Act. Specifically, Captain Kortum alleged such calculation resulted in an underpayment of those benefits. The matter was transferred from the Nebraska Equal Opportunity Commission to the United States Equal Employment Opportunity Commission (USEEOC) due to Captain Kortum's allegations the City violated Federal anti-discrimination laws.

In July, 2013 the USEEOC issued a determination Captain Kortum was subjected to gender discrimination by the City as a result of the manner in which his lump sum pension benefits were calculated. Since that time City legal staff, Captain Kortum's legal counsel, and Federal officials have engaged in settlement discussions with the goal of reaching an agreement on the matter rendering further litigation unnecessary. Last week Captain Kortum tendered to the City his last and best settlement offer in the amount of \$141,500.00.

Discussion

If the Council accepts Captain Kortum's offer by voting to approve Resolution 2013-376 Captain Kortum will release the City from his claim of discrimination and any and all other potential claims arising from his employment with the City.

Alternatives

It appears that the Council has the following alternatives concerning the issue at hand.
The Council may:

1. Move to approve.
2. Move to reject.

Settlement Agreement and Release

This Settlement Agreement and Release (“Agreement”) is made by and between PETER E. KORTUM (“KORTUM”) and The City of Grand Island, Nebraska. (“The City”), (collectively, the “parties”).

This Agreement is made with reference to the following facts:

Whereas, KORTUM filed a charge of discrimination with the US Equal Opportunity Commission – 32E-2013-00416 (the “Charge”). The EEOC issued a reasonable cause finding that The City of Grand Island, Nebraska discriminated against Kortum on the basis of his gender in the payment of his Lump Sum Pension Benefit in 2013;

Whereas conciliation efforts between the EEOC, KORTUM and THE CITY have occurred;

Whereas, the parties wish to resolve all claims between KORTUM and THE CITY with regard to all matters arising out of KORTUM’s employment with THE CITY, by entering into this Agreement on the terms set forth in this Agreement.

Now, therefore, the parties agree as follows:

1. No Admissions. By making this Agreement, THE CITY does not admit any wrongdoing or any violation of KORTUM’s rights. This Agreement is in compromise and settlement of disputed claims and may not be construed in any other matter.

2. Payment. In consideration for every one of KORTUM’S agreements and covenants set forth in this Agreement, each of which is an essential and indispensable part of this Agreement, THE CITY shall pay to KORTUM and his attorneys the Gross Sum of \$141,500.00 as described in paragraph 5 below. KORTUM understands and agrees that he would not receive the monies and benefits specified in this paragraph but for his execution of this Agreement and the fulfillment of the promises contained in this Agreement. The consideration identified in this paragraph shall be provided within 10 days of KORTUM’s execution of this agreement and after he and his legal counsel provide W-9s to THE CITY.

3. Release. As used in this Agreement, “THE CITY” shall include The City of Grand Island, Nebraska, any current or former elected or appointed official of the City of Grand Island, Nebraska any and all current or former employees of the City of Grand Island, Nebraska and any current or former insurers, trustees, directors, officers, employees, agents, predecessors, successors, and assigns, in both their individual, official and/or organizational capacities. In consideration for every one of THE CITY’s agreements and covenants set forth in this Agreement, each of which is an essential and indispensable part of this Agreement, KORTUM fully and forever releases

and discharges THE CITY from any and all claims, demands, causes of action, and liabilities that exist as of the date he signs this Agreement, including, but not limited to, any and all claims, demands, causes of action, and liabilities arising out of or in any way connected with KORTUM's employment with THE CITY, whether presently asserted or unasserted, known or unknown, for acts or omissions of THE CITY prior to the date this Agreement is executed, and specifically including, but not limited to, claims, demands, causes of action, or liabilities alleging retaliatory discharges in violation of Nebraska public policy, promissory estoppel, breach of contract, breach of the covenant of good faith and fair dealing, negligent misrepresentation, intentional interference with contractual relations, fraudulent misrepresentation, per se tort, violations of the Fair Labor Standards Act, the Nebraska Wage Payment Collection Act, the Pregnancy Discrimination Act, the Family Medical Leave Act of 1993, U.S.C. §2615, Title VII, the Civil Rights Act of 1964, 42 U.S.C. §1981, the Americans with Disabilities Act, the Employee Retirement Income Security Act, 29 U.S.C. §1001 et. seq., including §510, the Nebraska Fair Employment Practices Act, the Older Worker Benefit Protection Act, the Age Discrimination in Employment Act, as amended; the Nebraska Age Discrimination in Employment Act, Sections 1981 through 1988 of Title 42 of the United States Code, as amended; the Immigration Reform and Control Act, as amended; the Workers' Adjustment and Retraining Notification Act, as amended; the Occupational Safety and Health Act, as amended; the Sarbanes-Oxley Act of 2002, as amended; the Consolidated Omnibus Budget Reconciliation Act (COBRA); the National Labor Relations Act, wrongful discharge, general retaliation or violation of public policy, torts-including tortious interference, intentional or negligent infliction of emotional distress or mental anguish, assault and battery, defamation, libel, slander, invasion of privacy, false public light; violation of HIPAA; any claim alleging discrimination under federal, state or local law on the basis of race, color, religion, sex, national origin, disability, age, or other protected category; or any other claim based on any federal, state, or local constitution, statute, ordinance, or common law; and all claims for attorney fees, liquidated or punitive damages, and costs in connection with any claim, demand, cause of action, or liability. KORTUM intends by this release to eliminate completely and permanently all claims of every nature whatsoever against THE CITY for acts or omissions prior to the date of this Agreement and this release shall be broadly construed to that end. Finally, KORTUM affirmatively represents that he has not been involved in any work-related accidents not previously reported and has suffered no other work-related injuries not previously reported while THE CITY employed him.

4. Affirmations. Other than his claim for pension benefits (as set forth in EEOC complaint 32E-2013-00416), KORTUM affirms that he has been paid and/or received all leave (paid or unpaid), compensation, wages, bonuses, commissions, and/or benefits to which he may be entitled and that no other payment is due him, except as provided for in this Agreement.

5. Distribution. The gross payment of \$141,500.00 shall be distributed as follows: Within 10 days of KORTUM's execution of this agreement, THE CITY shall deposit \$91,100.21 in the City of Grand Island, Nebraska's Police Retirement/Pension cash account for the benefit of Peter E. Kortum. This amount shall thereafter be rolled over to a Qualified 401(k) account as to be designated by KORTUM. It is intended that

the deposit and transfer be treated in the same manner as the retirement benefits previously paid to KORTUM in February, 2013 in order to make this a non-taxable event for KORTUM. THE CITY agrees to pay an additional \$3,233.13 to Kortum with a 1099 to be issued to him by THE CITY in this amount; THE CITY agrees to pay Vincent M. Powers & Associates the sum of \$47,166.66 for attorney's fees and to issue a 1099 to the firm in said amount.

6. Tax Liability. THE CITY agrees to makes payments to Kortum and his legal counsel as noted in paragraph 5 above. THE CITY makes no representation regarding the tax consequences or liability arising from the payment. KORTUM understands and agrees that any and all tax liability that may become due because of the payments contained within this Agreement are his responsibilities. KORTUM agrees to bear all tax consequences, if any, attendant upon the payment to him.

7. Complete Agreement. This Agreement sets forth the complete agreement between the parties relating to the subjects in this Agreement. There are no other representations, terms, or agreements concerning this Agreement, whether oral, written, express, or implied, which are not contained in this Agreement. KORTUM acknowledges and agrees that, in executing this Agreement, he has not relied upon any representations or statements not set forth in this Agreement.

8. Warranty of No Liens/Claims Against Settlement. KORTUM further expressly warrants that no other person or entity has asserted or is able to assert any lien, claim, or entitlement to any portion of the consideration recited above which has not been satisfied or will not be satisfied immediately out of the above-recited consideration for the release being paid.

9. Governing Law and Jurisdiction. The substantive laws of the State of Nebraska, without regard to its or any state's choice of law provisions, will govern this Agreement.

10. Interpretation. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the parties. This Agreement has been negotiated by and among the parties' attorneys and shall not be construed against the "drafter". If any provision of this Agreement is determined to be illegal, invalid, or unenforceable by any court of competent jurisdiction, and cannot be modified to be legal, valid, or enforceable, the remainder of this Agreement shall not be affected.

In witness of this Agreement, the parties have executed this Agreement as follows:

PETER E. KORTUM

DATE

JAY VAVRICEK, MAYOR

DATE

RESOLUTION 2013-376

BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE CITY OF
GRAND ISLAND, NEBRASKA,

That the City accept the settlement offer of former and now retired Police Captain Peter E. Kortum and enter into a Settlement Agreement with him in the matter of *Kortum v. City of Grand Island* (U.S. Equal Employment Opportunity Commission – 32E-2013-00416) and disburse to Captain Kortum and his attorneys the sum of One Hundred, Forty-One Thousand and Five Hundred Dollars (\$141,500.00).

That the Mayor is authorized to execute on behalf of the City a settlement agreement in *Kortum v. City of Grand Island*. That said agreement will include a complete release by Captain Kortum in favor of the City of Grand Island for any claims or potential claims arising out of his employment with the City of Grand Island.

Adopted by the City Council of the City of Grand Island, Nebraska, November 26, 2013.

Jay Vavricek, Mayor

Attest:

RaNae Edwards, City Clerk

Approved as to Form	▣ _____
November 22, 2013	▣ City Attorney