BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

FRANKLIN PROFESSIONAL FIRE FIGHTERS ASSOCIATION LOCAL 2760, IAFF

and

CITY OF FRANKLIN

Case 67
No. 66432
MA-13525

Appearances:

John Kiel, Attorney at Law, Hawks Quindel Ehlke & Perry, appearing on behalf of the Association.

James Korom, Attorney at Law, von Briesen & Roper, appearing on behalf of the City.

ARBITRATION AWARD

The Union and Employer named above are parties to a 2004-2006 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties asked the Wisconsin Employment Relations Commission to appoint an arbitrator to hear and resolve the grievance of Burton Robertson. The undersigned was appointed and held hearings on February 15 and March 9, 2007, in Franklin, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs on June 6, 2007.

ISSUE

The parties ask:

> Did the City violate the collective bargaining agreement when it denied Burton Robertson post employment health insurance and severance benefits? If so, what is the appropriate remedy?

CONTRACT LANGUAGE

ARTICLE V
Grievance Procedure

Section 4. Step Three.

. . .

(c) Upon completion of this hearing, the arbitrator shall be requested to render a written decision within thirty (30) calendar days after the conclusion of testimony and argument to both the City and the aggrieved employee and/or Union, which shall be final and binding upon the parties. In making his decision, the arbitrator shall have no authority to grant wage increases or wage decreases. The arbitrator shall expressly confine himself to the precise issue(s) submitted for arbitration and shall have no authority to determine any other issues not so submitted to him or to submit observations or declarations of opinion which are not directly essential in reaching the determination. In any arbitration award, no right of management shall in any manner be taken away from the City, nor shall any such right be limited or modified in any respect excepting only to the extent that this Agreement clearly and explicitly expresses an intent and agreement to divest the City of such right.

ARTICLE XI
Severance Pay Benefits

Section 1. Upon retirement an employee shall be entitled to a minimum of thirty (30) days of severance pay. Severance pay shall be accumulated at the rate of two (2) days for each year of service, with the limitation that no additional severance pay over and above the minimum severance pay of thirty (30) days shall be paid unless the employee has accumulated sick leave corresponding to the severance pay he would be eligible for, to a maximum of sixty (60) days. Severance pay shall be based upon the rate of pay the employee is earning at the time of retirement.

Upon retirement the employee may apply the severance pay for payment of health insurance premiums by leaving the entire amount due with the City from which the City shall deduct monthly an amount equal to the employees portion of the then current health insurance premium until the funds are exhausted.

ARTICLE XIV
Hospital and Surgical Insurance

. . .

Section 2. Any employee who retires from employment with the City under a regular pension at statutory normal retirement age and who has attained twenty five (25) or more years of full time service (twenty (20) years effective January 1, 2006) with the City or retires under a disability pension shall be eligible for enrollment in the City's conventional hospital and surgical insurance program. The City shall pay seventy-five percent (75%) of the premium amount in effect on the date the employee retires, whatever that figure may be, and will continue to pay that amount toward the employee's health insurance coverage so long as the employee is retired and until the retired employee qualifies for Medicare. Coverage shall not be extended to the retiree while he is covered by another health plan of equal or better benefit at no additional cost to the employee. Coverage shall terminate in the event of the retiree's death.

BACKGROUND

This grievance is about the City's denial of health insurance and severance benefits to a firefighter who left the Fire Department because of a disability. The Grievant, Burton Robertson, suffered a medical condition that ended his career as a firefighter. He worked for the City's Fire Department between August of 1989 and September of 2006. He receives benefits under Sec. 40.65, Stats. The City refused to give him severance benefits or health insurance benefits. The Director of Administration, Mark Luberda, sent Robertson a letter on August 18, 2006, which states in part:

> As the duty disability determination was approved under Wis. Stat. 40.65(2)(b)3, it is the position of the City that the employment separation does not qualify as a "retirement" nor does it qualify as a "disability pension" as stipulated in the applicable labor agreement. A disability pension occurs with a retirement occurring under Wis. Stat. 40.63 which is a different ETF program from the one under which the ETF approved your disability. Therefore, you do not qualify for continued participation in a partially City-funded health insurance program, but will have access to health insurance in accordance with COBRA, as discussed below. Similarly, as the separation does not constitute a retirement, you do not qualify for Severance Pay Benefits (Article XI) as set for in the labor agreement.

Luberda started working for the City in 2006, following Gary Petre and James Payne. Petre held the position of Director of Administration from 2000 to 2005, and Payne held the position between 1986 and 2000. Currently, Dana Zahn is the Human Resources Coordinator and assists Luberda in labor relations.

The City did not contest a determination by ETF or the Department of Workforce Development that Robertson would qualify for duty disability under Sec. 40.65, Stats. Luberda understood that if Robertson were granted benefits under Sec. 40.65, Stats., he would not qualify for retirement or severance benefits from the City. Luberda reviewed the contract language, the situations of employees who received retirement benefits despite being out on a Sec. 40.65 disability, the statutes involved, ETF documents and WRS documents. On September 18, 2006, Luberda gave the Personnel Committee a memo on the grievance which stated reasons for denying the grievance. It reads, in part:

> **Reason 1. The intended definition of "Disability Pension" can be determined from WRS and ETF and that definition should apply within this labor contract.**
>
> *Reason 1-A. The Union's interpretation of the phrase, on its face, is not reasonable in light of WRS and ETF documents.* For the Union's argument to be true, the phrase "disability pension" must be interpreted in a generic manner applying a presumed logical combination of the dictionary definition of the words "disability" and "pension." Together this is not a common phrase. I am not aware of its usage in this generic fashion in other labor relations settings or contracts. Additionally, for the Union's argument to be true, statements in WRS and ETF documents would have to be ignored. Ignoring WRS and ETF documents that conflict with such a contrived dictionary interpretation would fly in the face of the labor contract.
>
> *Reason 1-B. The interpretation of the phrase should be as made clear in WRS and ETF documents.* Employees covered under the Franklin Professional Firefighters Association Local 2760 I.A.F.F. 2004-2006 contract, in accordance with Article XVII, participate in the Wisconsin Retirement Fund. This fund is administered by the Wisconsin Retirement System (WRS) and its Employee Trust Fund (ETF). As such, the WRS and ETF documents should be used to aid in interpretation of this term, and, where not in clear conflict with the labor contract itself, should be applied to the contract.
>
> The "Glossary of Terms" of the ETF (available on line at http://etf.wi.gov/glossary.htm) include the following definitions

> **40.63** Disability retirement benefits under section 40.63 of the Wisconsin Statutes for participating employees who are totally and permanently disabled from gainful employment in any occupation. This assumes that the employee has reached normal retirement age and uses the employee's retirement account for funding.
>
> **40.54** Duty disability benefits under section 40.65 of the Wisconsin Statutes for protective occupation participants who are injured or contract a disease due to their occupation. The disability must be permanent and cause them to no longer be able to work full duty.
>
> **Disability Benefit** Benefits payable to eligible members under disability retirement (40.63), duty disability (40.65), Income Continuation Insurance (ICI) or Long-Term Disability Insurance (LTDI) plans.
>
> **Retirement** The receipt of retirement benefits after the member has made an application and has fulfilled all requirements for a retirement benefit.

Additionally, the ETF handbook for Section 40.65 Duty Disability and Survivor Benefits (available on line at http://etf.wi.gov/publications/et5103.htm) includes the following statements at the locations as noted.

> "This booklet is for protective occupation participants who have questions about the disability benefits that are available from the duty disability program.…The duty disability program provides a lifetime disability benefit under Wis. Stat. 40.65. This disability benefit is similar to Worker's Compensation benefits and is administered by the Department of Employee Trust Funds. The benefit is not based on your Wisconsin Retirement System (WRS) account. **It is not a pension.**" (page 1, emphasis added)

The phrase "disability pension" must have been intended to refer to a specific program or, possibly, group of programs. The programs available under WRS as administered by the ETF are, however, the only programs that can be considered as having any applicability to the labor contract and therefore, to the term "disability pension." As far as this author is able to determine, the precise phrase "disability pension" is not set forth in WRS and ETF documents. Nonetheless, what is clear is that the phrase "disability pension" cannot apply to a 40.65 Duty Disability because a 40.65 Duty Disability is clearly and specifically "not a pension."

> The resulting conclusion is that "disability pension" must be presumed to apply to Section 40.63 Disability Retirements. On their face, even applying the Union's contention of a dictionary definition, the terms "disability pension" and "disability retirement" are much more closely related than "disability pension" and "duty disability." As discussed below, additional evidence within the contract and the ETF programs support that this is the correct interpretation.
>
> *Reason 1-C. Mr. Robertson has received a disability benefit, not a retirement benefit.* The definitions noted above clearly distinguish between a disability benefit and a retirement benefit. A disability award granted under Wis. Stat. Section 40.63 is a disability retirement, and although it has a disability component, it is a retirement nonetheless. A disability award granted under Wis. Stat. Section 40.65 is a disability benefit and does not have any retirement component. . . .

Luberda listed other reasons for denying the grievance, including his analysis of the history of changes to the contract language, the lack of a past practice despite the City's extension of benefits to two people below normal retirement age, the availability of insurance through other sources, and the inconsistency with other labor contracts in the City. Luberda also testified that the Secs. 40.63 and 40.65 benefits come from different funds. The Sec. 40.63 benefit is a component of the regular retirement system payments and there is no additional cost to the City. The Sec. 40.65 benefits are paid through the retirement percentage as calculated by the WRS, and it is rated by experience or the amount of claims. The City's costs go up proportionately based on Sec. 40.65 claims.

The parties stipulated that:

> 1. Thomas Gutzke, Richard Ignatowski and Edward Pipp were all employees of the City of Franklin Fire Department and members of the bargaining unit.
> 2. Gutzke, Ignatowski and Pill all are receiving Sec. 40.65, Wis. Stats., benefits either in whole or in part.
> 3. All three of those individuals received all severance benefits under the collective bargaining agreement at the time of separation.
> 4. All three of those individuals received post-employment health insurance benefits at 75 percent of the rate in effect on the date of separation.

Gutzke was a firefighter with the City, starting as a paid-on-call firefighter in 1970 and becoming full time on May 1, 1973. He worked for the City for almost 25 years. He received two on-the-job injuries when he was 52 years old. When he left

his job, he was not eligible for retirement health insurance under the labor contract, because at that time, he had to be 52 years old and have 25 years of service. He had 24 years and 10 months of service, and his last work day was March 1, 1998. While there is a commendation in his personnel file acknowledging him for almost 28 years of service, the three years difference includes his work as paid-on-call before becoming full time. The change of status form of March 1, 1998, indicates that the reason for change is duty disability.

Gutzke talked to the City Clerk and the Deputy City Clerk, Sandy Claus, whose last name later became Wesolowski. Gutzke testified that Claus told him that because he was disabled in the course of his employment, his health insurance would continue as though he was a regular retiree. He thought Claus had said something like – this has happened previously and this is how we've handled it in the past and will continue to handle it. He recalled that he understood the City would provide health insurance under the contract's terms of a duty disability clause. He understood that he would be receiving a duty disability pension. About six months later, he was contacted by the State and notified that because of his age and years of service, he had to apply for a regular pension to be supplemented by his duty disability payment. Currently, he receives a regular pension and a duty disability benefit, with 50 percent pension and 25 percent duty disability payment for a total of 75 percent of his final three-year average compensation. Gutzke believed that he used the term "disability pension" when talking to Claus, and he did not recall any other terms used.

Wesolowski has been with the City since 1985, starting as Deputy City Clerk and then became City Clerk in 1999. The title has now changed to Director of Clerk Services. She testified that she did not have a conversation with Gutzke or assured him that he would get health insurance benefits. She had no knowledge of the Pipp and Ignatowski cases. She acknowledged that she knew Gutzke because he may have come to the Clerk's office about insurance benefits.

Gutzke had been a Union officer for most of his time with the City. Although the bargaining unit members were affiliated with the IAFF, they negotiated the collective bargaining agreement on their own without a representative from the IAFF present.

Kenneth Mootz has been a firefighter with the City since August 1, 1989. He is a firefighter paramedic and has held positions with the Union. He was the vice president of the Union for 1991 and 1992 and the president from 1992 through 2000. He served on the bargaining committee for the 1991-1993 contract and was the lead negotiator up to 2000. Mootz reviewed the 1989-1990 contract in order to negotiate the successor to it. He asked the Union president, James Hutler, if the disability pension meant the same thing as duty disability, and he was told that it did. The 1989-1990 bargaining agreement stated in Article XII:

> Any employee who retires from employment with the city under a regular or disability pension at age fifty-five (55) or older and who has attained fifteen (15) or more years of continuous full-time service with the City shall be eligible for enrollment in either the city's standard hospital and surgical insurance program or in a City H.M.O. program, provided that the employee pays the full premium therefor in advance. Such retirees are encouraged to elect an H.M.O. Any employee who retires from employment on a disability pension who is under age fifty-five (55) and who has attained fifteen (15) or more years of continuous full-time service with the City shall be eligible for enrollment in a City H.M.O. program, provided that the employee pays the full premium therefor in advance. Such retirees shall be allowed to remain in the above programs after retirement unless eligible for Medicare or another group insurance program.

During the 1989-1990 contract, no one left the job due to a duty disability. In the 1991-1993 bargaining agreement, the parties made a change to have the City pay 50 percent of the premium amount in effect upon one's retirement date. The language stated in Article XIV:

> Any employee who retires from employment with the City under a regular or disability pension at age fifty-two (52) or older and who has attained twenty (20) or more years of continuous full time service with the Fire Department shall be eligible for enrollment in either the City's standard hospital and surgical insurance program or the City H.M.O. program. The City shall pay fifty percent (50%) of the premium amount in effect on the date the employee retires, whatever that figure may be, and will continue to pay that amount toward the employee's health insurance coverage so long as the employee is retired, and until the retired employee qualifies for Medicare. Coverage shall not be extended to the retiree while he is covered by another health plan of equal or better benefit at no additional cost to the employee. Coverage shall terminate in the event of the retiree's death.

Mootz recalled lowering the age from 55 to 52 and raising the years of service from 15 to 20 in order to have the City pay 50 percent of the premiums in effect at the time of retirement or leaving the department. Mootz said the parties discussed what would happen to employees who were disabled because of an injury on the job. He thought the City's negotiating team consisted of its labor lawyer, Jeffrey Hynes, the City administrator, James Payne, the City Clerk or Assistant City Clerk, Sandy Claus Wesolowski, two aldermen, and two citizens, one of which was Mary Franken. Wesolowski testified that she did not serve on the City's negotiating team until the fall of 2005. The Union team included the president, the vice president, the secretary

treasurer, and one or two firefighters. The Union's team explained most of the contract to the citizens who were unfamiliar with firefighters' work and schedules. The citizens seemed concerned that anybody could get a disability pension, and Mootz said the Union explained that it was only if one was hurt on the job and could not perform the duties of a firefighter anymore and would have to retire under a duty disability. No one from the City objected to that interpretation and agreed that the provision meant just what the Union said it meant. The City drafted changes in the contract language and the Union reviewed it. If there was any disagreement in the wording, they would meet before drawing up the full contract and signing off on it. The Union did not have any expert labor lawyers or its international association review the language. When the Union got a copy of the Article XIV language changes back for review, the disability pension wording was missing. The mistake appeared to be unintentional and the disability pension wording was put back in.

During the negotiations for the 1994-1996 collective bargaining agreement, the parties talked about retiree health insurance again, but they made no changes regarding the retirees' insurance or those on disability.

In the 1997-1999 bargaining agreement, the parties changed the 50 percent premium payment by the City to 75 percent and raised the years of service from 20 to 25. They also changed the wording by separating the disability pension wording from being in front of the age and years of service, so that someone would not interpret it to mean that one needed to be a certain age and have so many years of service for receiving post employment benefits under a duty disability pension. Thus, the contract stated in Article XIV:

> Any employee who retires from employment with the City under a regular pension at age fifty-two (52) or older and who has attained twenty-five (25) or more years of full time service with the City or retires under a disability pension shall be eligible for enrollment in either the City's conventional hospital and surgical insurance program or the City HMO program. The City shall pay seventy-five percent (75%) of the premium amount in effect on the date the employee retires, whatever that figure may be, and will continue to pay that amount toward the employee's health insurance coverage so long as the employee is retired, and until the retired employee qualifies for Medicare. . . .

Mootz testified that the Union negotiators again explained the disability matter to new alderman and different citizens on the City's bargaining committee by stating that if they got injured on the job and were not able to work as firefighters anymore, they were eligible for duty disability and would receive the post employment health insurance benefits and severance benefits. Gutzke was the first person to go out under that contract after injuring his shoulder. Although he was 52 years old, he was two months short of obtaining the requisite 25 years of full time service.

Mootz believed that the City's negotiating team for the 1997-1999 bargain consisted of City Administrator James Payne, labor attorney Jeffrey Hynes, and Alderman Thomas Taylor. According to Wesolowski's records, Taylor did not become an alderman until April of 1999 and did not participate in bargaining in late 1996 or 1997. The other Alderman may have been Patty Hogan, although Mootz was not sure, and he did not know the names of the citizens. No one from the City objected to the Union's understanding of the disability phrase in the contract, including Alderman Taylor who was the lead negotiator for Milwaukee County at that time, according to Mootz.

The last contract that Mootz helped to bargain was the 2000 contract. The parties made a quick deal for wages only with no other changes. Ignatowski left the job under this contract after injuring his back. He got his post employment health insurance and severance package. Although Mootz used the term "duty disability" in his testimony instead of "disability pension," he added that the understanding between the Union and City was that the only person eligible to receive the benefit was someone injured on duty, not off duty. He and others assumed that duty disability was the same as a duty disability pension or disability pension. Mootz has not distinguished the terms duty disability, disability pension, duty disability annuity to mean anything other than duty disability. His understanding of the term in the 1989-1990 contract and other contracts that refer to disability pension is that if he gets injured on the job and cannot perform the duties of a firefighter and has to leave the job, he would get some type of pay from somewhere that is called duty disability pay.

Greg Muth is a fire lieutenant and was elected to be Union vice president in 1999 and then served as Union president from 2000-2004, and was the vice president at the time of the hearing. He was on the Union's bargaining committee in the negotiations for the 2000 contract, the 2001-2003 contract, and the 2004-2006 contract. As the lead negotiator for the 2001-2003 contract, Muth explained to the City what the benefits were for insurance if someone were injured on the job. Muth was not sure if Hynes was involved in that contract, but Fire Chief David Bublitz was there, as well as some aldermen, two citizens and Human Resources Coordinator Becky Schermer. The City Administrator was Gary Petre. During this bargain, the Union tried to decrease the number of years of service and increase the percent that the City paid. However, that proposal did not go anywhere, and the language in the 2001-2003 contract remained the same as the 2000 contract.

Pipp went out on a duty disability during the 2001-2003 contract and received health insurance and severance benefits.

Bublitz was the Fire Chief from 1989 until 2002. He was not at the bargaining table when the words "disability pension" were first put into the labor contract. He was on the bargaining team for the City one time, probably for the 2000 contract.

Bublitz was responsible for administering the contract and signed off on post employment benefits. He authorized a change in status for Gutzke, Pipp and Ignatowski. When Bublitz looked at the contract language that called for benefits for someone retiring under a disability pension, he interpreted the words "disability pension" to mean a duty disability annuity under Sec. 40.65, Stats. He did not check with an attorney or receive any legal opinion about the meaning of the language in dispute in this case.

Bublitz considered the term "duty disability" to be synonymous with "disability pension." Before coming to the City, he was involved with the Union movement and served on the state board as a member with the Professional Firefighters of Wisconsin, and he was active in promoting and protecting disability benefits for firefighters.

In the 2004-2006 bargaining, the City's team – according to Muth – was Petre again, Chief Jim Martins, Schermer, two citizens, Alderman Timothy Solomon and another alderman. Muth did not think that the City's labor attorney was there. The Union again attempted to reduce the number of years of service and increase the City's percent to pay for insurance. Schermer told the Union negotiators before the negotiations that the City would be interested in getting rid of the age requirement for retiree insurance, because having ages in the contract could be discriminatory. The Union agreed to do that, and changed the age of 52 to "statutory normal retirement age." The City agreed to change 25 years of service down to 20 effective January 1, 2006.

Muth said that when they changed the years of service, they wanted to make sure it did not affect someone going out on duty disability, because that person could be younger and the Union wanted him to be covered. The City was concerned that a person could technically start getting a pension at age 50, and it did not want to pay insurance longer. The City suggested a cap of 13 years on insurance for anyone going out on retirement. The Union objected to the 13 year cap because someone out on duty disability could have a problem with 13 years. If someone went out on disability at age 35, the 13 years of insurance would not be long enough to get them up to the age for Medicare.

Muth recalled giving aldermen the example that if a firefighter went into a burning building to save one of their constituents and fell through a floor or roof and was injured so that he could not return to work, he should have health insurance for his family. The aldermen agreed and made a proposal to exclude duty disability coverage from the 13-year cap.

Muth asked Robert Manke, a firefighter paramedic since 2000, to take notes at the bargaining table. Manke's notes show that the parties discussed the 13-year cap excluding disability, which the Union negotiators always understood to mean duty disability. Manke testified that they were concerned that if someone fell through a roof

on the job, their family would be in trouble for insurance under the City's cap, and the City said it would not do that to the bargaining unit members. Manke used the term "disability" to mean the same thing as "duty disability."

Another Union member that took notes in the 2004-2006 bargain was Craig Langowski, a lieutenant in the Fire Department. He recalled that Muth brought up the issue that if a firefighter fell off a roof or got injured in the course of fighting a fire and became disabled, he would only get health insurance for 13 years under the City's proposed cap of 13 years. Langowski testified that the City said it did not want to hurt that person, and that person would not be included in the 13-year cap. His notes reflect that people getting a disability would not be capped at 13 years, and he understood "disability" to mean the same thing as "duty disability."

Alderman Solomon did not believe that he was involved in the negotiations for the 2004-2006 collective bargaining agreement, and the last contract that he was involved in was in 2003. However, he was not sure whether in 2003, they were looking at a contract for the future or the past. He recalled the 13-year cap proposal, so presumably, he was involved in the negotiations for the 2004-2006 contract. He recalled a question about what would happen is someone was disabled, and he said that if they were on full disability, they would be on social security and Medicare and health insurance would not apply. He did not recall the Union members of the bargaining team talking about someone injured in a burning building or crashing through the roof. He also did not recall telling Union negotiators that in case someone was injured on the job, that they would get the health insurance payment from the City. The parties did not agree to the cap for retiree insurance or disabled employees.

The Grievant, Robertson, was a fire lieutenant paramedic when he left, and he also held several positions with the Union, including secretary-treasurer, secretary, and vice president. Robertson was involved in negotiations for the 2004-2006 collective bargaining agreement. His notes from that bargain show that the parties discussed dropping the years of service of 25 to 20 and a 13-year cap with an exclusion for disability. Robertson recalled that when the City wanted to limit its exposure for health insurance to 13 years, Union negotiators asked how that would affect people who left on a duty related disability, and the City agreed to cover employees injured on duty.

Robertson testified that the big concern of citizens was that firemen often have side jobs, such as roofing or building decks, and they didn't want to pay health insurance for someone putting up a roof and falling off the roof while he was on his day off from the City. Robertson said that unequivocally, over the years he was involved with the Union, the Union negotiators said that it was never their intent that someone working on a side job would be covered. The intent was always to cover employees injured in the line of duty. Once Union negotiators explained that to the citizens, they were okay with that interpretation. So there was always an understanding that the benefits did not apply to someone injured while off duty. Robertson also noted that they used the term "disability" to mean "duty-related disability." The Union never attempted to get insurance for someone disabled while off duty from the City.

When Robertson was hired, Chief Bublitz had him sign a form which stated that "….special privileges are granted to firefighters regarding disability retirements under State Statute 40.65 (Heart and Lung Bill)." While Union negotiators were familiar with duty disability under the state statutes, they were not familiar with the term "disability pension" under the statutes.

THE PARTIES' POSITIONS

The Union

The Union asserts that the City's denial of severance benefits to Roberts violated Article XI of the contract. It asserts that the City's determination that Robertson's separation was not a retirement flies in the face of state law. Section 40.65(4)(c) states: "The Disability causes the employee to retire from his or her job." The legislature treated an employee's separation from employment due to a duty related injury or illness as a retirement. Similarly, the Department of Employee Trust Funds application for duty disability recognizes that separation from employment due to a duty related injury or illness is a retirement. The City itself has concurred in the past, when in 1998, the fire chief, mayor and personnel coordinator/business administrator all signed a change of status form for Gutzke and marked it "retirement" and by way of explanation, offered "duty disability." Further, in a commendation, the Common council noted that Gutzke was injured in the performance of his duties and subsequently retired as a result of that injury. The City certified that Gutzke was retiring because of the duty related injury when it completed Gutzke's Employer Certification Duty Disability form. Similarly, the City's fire chief and mayor signed a change of status form for Ignatowski and marked the reason for change as "disability" and "retirement." It also certified that Ignatowski was retiring because of the duty related injury when it completed his Employer Certification Duty Disability form. Once more, the fire chief and mayor signed a change of status form for Pipp and marked the reason for change as "resignation" and "disability." The City certified that Pipp was retiring because of the duty related injury when it completed Pipp's Employer Certification Duty Disability form. The pre-employment agreement between the City and employees shows that the City understood and treated duty disability separations to be retirements. It states ". . . special privileges are granted to firefighters regarding disability retirements under State Statue 40.65 . . ." Zahn's records show Gutzke, Ignatowski and Pipp as retirees and the date of their separation is treated as a date of retirement.

In the past, such separations have qualified employees for Article XI Severance Pay. The Union contends that the City should not be allowed to unilaterally eliminate a duty disabled employee's entitlement to severance benefits.

The Union also asserts that the City has violated the contract by denying Robertson post-employment health insurance benefits under Article XIV of the bargaining agreement. The City argued that the contract language is crystal clear, that nothing in the law defines the term "disability pension" to include a Sec 40.65, Stats., benefit, and that those benefits are not "pension" benefits. The City claims that the entitlement to post-employment health insurance benefits runs to employees eligible for a disability annuity under Sec. 40.63 rather than a duty disability benefit under Sec. 40.65. While the City admits that the phrase "disability pension" is not found anywhere in Sec. 40.63, it argues that the contract language regarding post-employment health insurance excludes individuals who receive a duty disability benefit under Sec. 40.65. The City tries to explain the benefits given to Gutzke, Pipp and Ignatowski as errors.

Contrary to the City's claim, the term "disability pension" has been used and read to refer to duty disability benefits under Sec. 40.65. In September 1996, the Wisconsin Court of Appeals, District IV, used the term "disability pension" to refer to Sec. 40.65 benefits. More importantly, the parties themselves have considered the term "disability pension" to refer to Sec. 40.65 benefits. Gutzke, Ignatowski and Pipp all terminated their employment under Sec. 40.65 due to duty related injuries and received post employment health insurance and severance benefits. Before Robertson, they were the only firefighters to leave their employment due to disability.

The Union points out that the City applied Article XIV to award post employment health insurance to employees who retired under Sec. 40.65 consistently over the course of nearly nine years, beginning in 1998 with Gutzke. The City applied Article XIV in the manner advocated by the Union over the course of three contract terms. During a fourth contract term, it confirmed Pipp's eligibility for insurance when it amended the plan to cover Pipp's wife and dependents. There is a longstanding and consistent application of the disputed language, and there can be no defense or mistake where the City consistently and knowingly awarded severance and insurance benefits to duty disabled employees every time it was confronted with a claim. Also, the City cannot effectively argue that there are only two instances of a past practice when it has paid insurance benefits every month for Gutzke, Ignatowski and Pipp. Even if only two instances constitute the past practice, relatively few past instances may establish a binding practice when incidents giving rise to the issue rarely occur.

The Union is not asserting a right that runs contrary to the contract language. Nor is the Union asserting a right to a benefit arising solely on the foundation of past practice. This is a case where the Union points to past practice to give meaning to ambiguous contract language under Article XIV, specifically, the meaning of "disability pension." The meaning of that term has been clarified and demonstrated by the Employer's uninterrupted and undisputed partial payment of past employment insurance premiums for duty disabled retirees over the past nine years.

The Union contends that the bargaining history also supports its claim. Multiple Union witnesses described the conversations at the bargaining tables. The Union frequently explained to new members of the City's bargaining team that the contract was designed to provide post employment health insurance benefits to employees disabled in the line of duty. The City knew or should have known that it had to change the language of the contract before denying Robertson the severance and insurance benefits granted to other duty disabled employees. Moreover, after Luberda's arrival in the City, the City never bothered to repudiate the disputed "practice."

The City's reading of the contract leads to the absurd result of denying medical benefits to firefighters injured in the line of duty, the Union states. The City would argue that the term "disability pension" extends a right to insurance benefits to employees terminated due to an off-the job injury or illness but deny those benefits to employees injured on the job. The term "disability pension" was specifically intended to include duty disability retirement under Sec. 40.65, and a contrary conclusion would lead to a very strained result.

Finally, the Union asserts that the city is asking the arbitrator to reform the contract. The City contends that there has been a mistake, that Ignatowski and Pipp should never have been paid the benefits at issue. The invitation to reform the contract should be rejected. There was no mistake at the signing of the labor agreement. The Union knew exactly what it signed and how it was to be implemented. The City implemented the bargaining agreement as contemplated by the Union. There was a meeting of the minds between the parties. There may not be a meeting of the minds between the City's current Director of Administration and those who preceded him, but that lack of an internal meeting of the minds does not provide a basis for denying Robertson the benefits at issue.

The City

The City points out that the contract calls for limited arbitral power in Article V, Section 4(C), which states that no right of management shall be taken away or limited or modified ". . . excepting only to the extent that this Agreement clearly and explicitly expresses an intent and agreement to divest the City of such right." Any effort to use parol evidence to change the literal meaning of the collective bargaining agreement is decidedly contrary to the clearly expressed mutual intent of the parties when they negotiated this provision of the grievance procedure.

The City also states that there is a case containing an excellent reminder of the dangers of assuming the existence of a contractual guarantee, especially where a benefit of such a large financial cost is debated – CITY OF BERLIN, CASE 38, NO. 46309, MA-6944, (ARB. GRECO, 1992). In that case, the contract provided for half paid health insurance through age 65 if the employee "chooses an early retirement." The employee got a disability annuity under Sec. 40.63, and the City argued that the receipt of a

disability under Sec. 40.63 was not an early retirement, but was instead a disability annuity. The Arbitrator rejected the Union's argument that Sec. 40.2(49) defined a retired employee as one who is either retired or on a disability annuity, and found that early retirement was a unique status defined by one set of circumstances under the WRS. Arbitrator Greco stated that since there was no bargaining history or past practice showing that the City agreed to such a large liability, the City was not required to pay the benefits after the employee received his disability annuity, since it would involve granting a separate benefit never obtained in contract negotiations.

The City also argues this arbitrator to make no assumptions about the language beyond its plain meaning as expressed within the four corners of the contract, and be reticent to assume that any City would voluntarily agree to a huge costly benefit without clear language supporting such a conclusion. There is a danger in making any presumptions. Mootz assumed that "duty disability" was synonymous with "duty disability pension." Muth concluded that a disability pension and a duty disability annuity are the same thing because he was told that by Mootz. Bublitz signed off on Gutzke's change of status form and assumed that Sec. 40.65 and disability pension benefits were the same thing. Alderman Solomon assumed that if a firefighter were receiving a full disability, they would be on social security and Medicare. One of the biggest assumptions Union witnesses seem to make is that the parties would not logically enter into an agreement that provides benefits for employees who become totally disabled under Sec. 40.63 when that disability resulted from a non-work related injury, while denying benefits to employees who are partially disabled due to a work-related injured under Sec. 40.65. While the Union thinks such a result is irrational, the City contends that such a result is rational. Total disabilities occur very rarely and would preclude the employee from being able to provide health insurance benefits for his family through other employment. Because it would be rare, it would be a relatively low cost item. However, because of the higher risk that firefighters must be injured but be able to work in other capacities where they might get insurance benefits, insurance from the date of injury through age 65 is both expensive and likely unnecessary.

The City contends that a literal application of the contract language is all that is required. The Union suggests that it is unclear as to exactly what a "disability pension" is. Is a Sec. 40.63 disability annuity a disability pension? The critical point is that – even if we cannot define the precise parameters of what a "disability pension" is, we know what it is not – it is not a disability annuity under Sec. 40.65. Joint exhibits 32 and 33 clearly state that the duty disability program is a life time disability benefit and it is not a pension.

A similar analysis applies to the severance pay language under Article XI. The benefits are available only upon retirement. The Grievant was not eligible for retirement. The literal language of the contract does not require the payment of

severance benefits. The City admits there may be some level of ambiguity about the word "retirement' under Article XI, but counters that the strong language in the grievance procedure is more important – the language that requires that limitations on management rights can only occur if the agreement clearly and explicitly expresses an intent and agreement to divest the City of such right.

While there is no reason to refer to external aids to interpret the contract, the City argues that the Union's reliance on bargaining history is misplaced. The disputed phrase "disability pension" was put into the labor contract in 1989, but the Union did not present evidence of any conversation held between the parties when that language was first put into the contract. The Union knew that Hutler negotiated the language and was available to testify, but it did not call him as a witness. This failure is fatal to the party with the burden of proof on the issue of bargaining history. Mootz acknowledged that whatever meaning those words had in the old contract was retained in the new one. No testimony was offered by the Union to show what the language originally was intended to mean, so the obvious literal interpretation must stand.

The Union suggests that at subsequent negotiations, it described to the City's negotiating committee how benefits available under Chapter 40 worked. The City asserts that there was no specific statement made by the Union about whether Sec. 40.65 benefits would meet the definition of a "disability pension" within the meaning of the contract language. There are many reasons to question the reliability of the recall of the Union negotiators. They could not accurately remember who was at the table, who typed the contracts, or what conversations they had with individuals. They were certain that Claus was on the bargaining team and made every bargaining session for the 1991-1993 negotiations, but she was not. They had specific recollection that Taylor was at the bargaining table in 1997, but he was not. The Union failed to provide any documentary evidence prior to the 2004-2006 negotiations. During the negotiations for the 2004-2006 contract, the City sought to put a 13-year cap on the benefit to reflect the present 13-year difference between age 52 and 65. Union members allegedly asked the City if the cap would apply to a firefighter who entered a burning building, fell through or off the roof and was unable to provide for his family. According to the Union, the City said something like "that would be fine." Alderman Solomon, however, testified that he indicated the matter would not be an issue for the City because the employee would be on total disability, and therefore eligible for health insurance through Medicare and Medicaid. Solomon was certain that the parties never discussed a situation involving a partial disability. There was no meeting of the minds at the bargaining table, and both parties were making different assumptions about what they meant to say. This bargaining history cannot be used to modify the clear and plain language of the contract – that a "disability pension" gets you the insurance benefits, and that a Sec. 40.65 disability annuity is not a pension.

The City states that Bublitz was responsible for administering the bargaining agreement, but he did not negotiate it or know the details about the words "disability pension." Because he came up through the ranks as a fire union member, he was exposed to the language and one of the goals of fire unions generally – free health insurance forever. He was familiar with what his fellow fire union members elsewhere placed on the phrase "disability pension." The Union also cites one judge who used the phrase "disability pension" in the context of a Sec. 40.65 case. Bublitz never sought advice from the City Attorney or spoke with those who negotiated the language. He did not review Sec. 40.65 or the ETF documents interpreting and applying it when making his decision to authorize Gutzke's change of status form. He followed the same assumption when the Ignatowski and Pipp matters came before him. Then when Luberda discovered the language in Jt. Ex. #32, he correctly applied the contract in ways that Bublitz had not. The actions of Bublitz do not evidence a sufficiently intentional act by the City to rise to the level of a binding past practice overriding the otherwise clear language of the contract. The three instances cited by the Union are less compelling when the first one, Gutzke, was eligible for a Sec. 40.63(4) benefits based on his age. He was only two months short of the 25 years of service required, so Bublitz' decision added little cost to the City.

In Reply, the Union

The Union notes that the term "disability pension" is not as plain as the City would have one believe. Luberda did not know for certain all the types of benefits that would be considered a "disability pension," but it was clear to him what a "disability pension" was not – benefits under Sec. 40.65. If Luberda can only say that a "disability pension" is not, how can the contract be clear and explicit, the Union asks. The City is asking the arbitrator to rely on the term "disability pension" to deny Robertson a benefit while insisting that the arbitrator cannot look to parole evidence to define the term. In effect, the City would leave the term undefined and without meaning. This contract requires interpretation. The term "disability pension" must mean something. Past practice provides the most reliable evidence of what the parties intended the term to mean.

The Union points out that in Luberda's September 18, 2006 letter to the Personnel Committee, he concludes that "disability pension" must be presumed to apply to Sec. 40.63. However, that section of the law refers to the benefit as an annuity and does not define the benefit as a retirement or a "disability pension." Sec. 40.65 benefits run to employees whose duty disability causes them to retire. Similarly, eligibility for post employment health insurance under the contract runs to an employee who "retires under a disability pension."

The Union asserts that the evidence does not support a claim of mistake. The City paints Bublitz as a naïve, ill-informed, pro-union fire chief who unilaterally awarded expensive, extra-contractual benefits to three Union members. While the City

argued that Bublitz started the ball rolling in the wrong direction by mistakenly awarding benefits to Gutzke, the record suggests otherwise. Bublitz said the responsibility to initiate the process that awards severance and post employment health insurance benefits was not exclusively his. Someone else from the City may have authored the form granting benefits to Gutzke and others. He did not act alone in applying the disputed contract language. By the time Luberda arrived at the City in June of 2006, Bublitz and others in the City had a history of interpreting and applying the language to award severance and post employment benefits to employees who left the Department under Sec. 40.65 program. In 1998, Gutzke's change in status form was approved by Mayor Frederick Klimetz and the City's Personnel Coordinator/Business Administrator, James Payne. Klimetz and Payne approved a resolution that recognized the Gutzke retired because of a duty incurred injury. The City's assistant Business Administrator, Shannon Hansen, completed the Employer Certification of Duty Disability to which she attached a calculation of Gutzke's severance benefits. In 2000, Ignatowski's change in status form was approved by Bublitz and Klimetz. Schermer completed his Employer Certification of Duty Disability. In 2002, Pipp's change of status form was approved by Klimetz and Bublitz and they noted on the form that all vacation and holidays were paid out. Schermer again completed the Employer Certification of Duty Disability to which she attached a calculation of his severance benefits. In 2004, the City issued an addendum to its health insurance plan to allow Pipp and his dependents to remain on the insurance plan to allow his spouse to join the plan due to marriage. The Mayor, the Human Resources Coordinator, the Assistant Business Administrator, the Personnel Coordinator/Business Administrator and the entire Common Council all had a hand in interpreting and applying the language in exactly the same way as Bublitz.

Bublitz was not ill informed on the WRS. Through his advocacy with the Professional Fire Fighters of Wisconsin, he knew and used the term "disability pension" to refer to Sec. 40.65 duty disability retirement benefits. The term has also been used by a state Court of Appeals to refer to Sec. 40.65 duty disability benefits.

The Union takes issue with the City of Berlin case cited by the City, because Arbitrator Greco in that case was troubled by the lack of past practice and bargaining history. This case has bargaining history, confirmed by the granting of benefits to three employees over multiple contracts, reinforced by monthly premium payments. Mootz, Muth, Manke, Langowski and Robertson testified as to the history of the disputed language. When Mootz explained that post employment benefits were available to those forced to retire due to a duty disability, the City's bargaining team, including its labor lawyer, never objected. The City drafted language, and any ambiguity should be construed against it. The Union repeatedly established its position regarding the language at issue in each set of negotiations. Contrary to the City's claim, there is specific bargaining history, notes and action.

In Reply, the City

The City responds by stating that the fundamental flaw in the Union's argument is to misunderstand the difference between an ambiguity and a dispute. The Union claims that past practice has been widely accepted to give substance to "disputed" language, as if the existence of a dispute automatically translates to an ambiguity. The fact that one party does not like the application of unambiguous language and creates a dispute by filing a grievance does not convert unambiguous language into ambiguity. If the language cannot literally have the meaning the Union would like to give to it, the fact that an alleged past practice may be consistent with that desired meaning is irrelevant. Following that practice would ignore the clear and unambiguous language of the contract.

The City notes that the term "retirement" is a prerequisite to receive severance benefits, and the word "pension" is a prerequisite to receive post employment insurance benefits. The City acknowledges that the word "retirement" is ambiguous and subject to varying interpretations, but the word "pension" is not susceptible to the interpretation the Union would give it, which includes receipt of benefits which are not a pension. The Union argues that the statutory provisions of Chapter 40 should be relied upon in finding a proper definition of the word "retirement" and goes on to rely upon documents produced by ETF. Then the Union completely ignores the impact of Chapter 40 on interpreting the word "pension" and fails to mention the critical quote in Jt. Ex. #32 that a disability annuity under Sec. 40.65 is "not a pension." The Union uses Chapter 40 when it suits them and ignores it when it does not.

Regarding the term "retirement," the City contends that the Union's claims about bargaining history must fall on deaf ears. The Union knew who negotiated the language but chose not to call him. The Union argues that the language of Article IX, Severance Benefits, remained intact and unchanged since it was bargained. Whatever the language meant when it was first negotiated is critical to understanding what it means today. Thus, the failure to call the Union's negotiator at the time the language was first placed in the contract as a witness is fatal. Moreover, the limited past practice evidence and the testimony of Bublitz that his decision to grant those benefits was based on his misunderstanding of the contract language minimizes the weight of the past practice evidence. The City also notes that the case in West Bend cited by the Union has been appealed and that decision cannot be relied upon. In West Bend, there was testimony of individuals actually at the bargaining table when the ambiguous language was first put into the contract, and that evidence is not available to this Arbitrator.

Contrary to the Union's argument, the City is not asking the Arbitrator to reform the contract but to enforce it. When the Union signed the agreement providing post employment health insurance to those receiving a disability pension, the Union may not have realized that benefits under Sec. 40.65 are not a pension. Nonetheless, the fact that they failed to realize the full ramifications of the contract they signed is not a reason to accept their claim that past practice has changed the clear and unambiguous meaning of the language.

The City states that if a disability annuity under Sec. 40.65 is not a pension under the contract, the relevant contract language has not been rendered a nullity. Under Sec. 40.63(4), a protective safety occupation participant who suffers a career-ending injury on or off the job, while between the ages of 50 and 55, will receive their full normal pension under the WRS as if they had retired after age 55. This employee would receive a "disability pension," unlike the employee receiving a "disability annuity" under Sec. 40.65. This is not an absurd interpretation of the contract. The idea that the contract provides 30 or more years of insurance for a firefighter injured on his first day of work while denying insurance to a career firefighter that suffers a career-ending injury while at home one week before eligible for his retirement is equally absurd. The City may have deemed it more reasonable to agree to a benefit in conjunction with Sec. 40.63 rather than Sec. 40.65, because it would be a capped benefit.

DISCUSSION

The parties agreed to waive the 30-day requirement in Article V for the arbitrator to issue a written decision.

The Arbitrator has reviewed Article V, Section 4(C), which states that no right of management shall be taken away or limited or modified ". . . excepting only to the extent that this Agreement clearly and explicitly expresses an intent and agreement to divest the City of such right." The City objects to the use of parol evidence to interpret the contract. However, if language is ambiguous, it is customary to look at bargaining history and past practices, if available, to determine the intent that is not so clearly and explicitly expressed. The City admits that the word "retirement" in Article XI is ambiguous but disputes that the term "disability pension" in Article XIV is ambiguous. Both sections are being disputed in this case. The City even admits that some past practice evidence would be useful in interpreting the ambiguous term "retirement" in Article XI. Therefore, the City is not suggesting that Article V prevents the Arbitrator from looking at past practice or bargaining history if the language is ambiguous. The City was the drafter of the language at issue, and it cannot use Article V to get rid of its contractual obligations by claiming at a later date that the language it wrote was ambiguous.

Therefore, the starting point is whether the term "disability pension" as used in Article XIV is ambiguous. I find that it is. The language states:

> Any employee who retires from employment with the City under a regular pension at statutory normal retirement age and who has attained twenty five (25) or more years of full time service (twenty (20) years effective January 1, 2006) with the City or retires under a disability pension shall be eligible for enrollment in the City's conventional

> hospital and surgical insurance program. The City shall pay seventy-five percent (75%) of the premium amount in effect on the date the employee retires, whatever that figure may be, and will continue to pay that amount toward the employee's health insurance coverage so long as the employee is retired and until the retired employee qualifies for Medicare. Coverage shall not be extended to the retiree while he is covered by another health plan of equal or better benefit at no additional cost to the employee. Coverage shall terminate in the event of the retiree's death.

The term "disability pension" is an imprecise term, not tracking any statute or publication of the State. The City claims it is sure it knows what a disability pension is not – that it is not a pension, and the publication of ETF clearly states that the duty disability benefit is not a pension. That might be interesting if the parties had ever known about the ETF publication while bargaining, but there is no evidence that they ever knew anything about the ETF publication and what ETF calls the duty disability benefit. Certainly the City's own witness, Bublitz, had no knowledge of the ETF publication that the City relies on so heavily. There is no evidence that the negotiators looked at copies of the statutes for Sec. 40.63 or Sec. 40.65. ETF calls Sec. 40.65 payment a "disability benefit." The parties, however, called it a "disability pension." Those terms are very similar and were synonymous in the minds of the parties, until this grievance.

If the parties used the term "disability benefit," it still does not clear up the meaning, because there are a couple of possibilities under the "disability" term itself – either a Sec. 40.63 benefit or a Sec. 40.65 benefit. The term "disability pension" is certainly ambiguous. The City admits that the word "retirement" is somewhat ambiguous. Therefore, since the language in Article XI and XIV is ambiguous, it is certainly proper to review the bargaining history and past practices.

Regarding the bargaining history, the City objects to the fact that the Union never called Hutler to testify, as he was the person who first negotiated the language into the contract. And it further suggests that an adverse inference should be made because of the Union's failure to call him. However, the City never called Petre, Hynes, Payne or Taylor to the stand either, and all of them probably had some knowledge about this. The Arbitrator is making no adverse inferences from either party's failure to call certain witness. The fact that Hutler was not called is not fatal to the Union's case, because the Union brought forward five other witnesses who were at the negotiating table at various times after Hutler's tenure, and who testified about their involvement in the disputed language. A party is not required to bring the very first person who was involved in the language to testify. The five Union witnesses all agreed on the meaning of the language, as did one of the City's witnesses from the management team. The language was further implemented in accordance with that understanding (that disability pension was the same as duty disability). Therefore, what would Hutler's testimony add?

The Union negotiators were very clear about the fact that during negotiations for every contract, they explained their benefits to the aldermen and citizens on the City's negotiation team. The citizens and aldermen frequently changed and were unfamiliar with the benefits in the contract, so the Union negotiators explained those benefits, including the disability benefit at issue here. Mootz was the first Union negotiator following the 1989-1990 contract when the benefit first went into the contract. As he noted, the citizens were concerned that anybody could get a disability pension, but the Union explained that this provision applied only if someone was hurt on the job and could not perform the duties of a firefighter and would have to retire under a duty disability. There was no objection to that interpretation, and the City drafted changes in the contract language which the Union reviewed. When the Union found that Article XIV did not include the disability pension wording, the City put it back into the contract. The mistake appeared to be unintentional. This shows that the City was the drafter of the contract language, as the Union claimed, and at times, ambiguities will be resolved against the drafter of the contract.

The City points out that Mootz's memory may be faulty because he identified Sandy Claus Wesolowski as a member of the City's negotiating team back in the early 1990's, and she was not on the team until 2005. Mootz also identified Taylor as being on the City's team in the 1997-1999 bargain, but Taylor was not an alderman until April of 1999. The City does not dispute that Hynes, Petre or Payne were at the table on behalf of the City at various times. Mootz may have been mistaken about who was at the table at a particular point in time, but his memory on the meaning on the term "disability pension" is completely in line with everyone else who was at the negotiating table and testified about it. Alderman Solomon's memory was probably faulty in some respects also - he did not think he was involved in the negotiations for the 2004-2006 contract, but he must have been there, because that's the contract where the City proposed a cap on the benefit. While he did not recall a discussion about duty disability, he recalled a question about disability and a discussion about full disability. Faulty memories aside, there is nothing in the record to contradict the Union's interpretation of the language at the bargaining table and the fact that the City failed to dispute it. There is no evidence that the City ever raised the issue of a disability under Sec. 40.63 as opposed to the Sec. 40.65 duty disability section.

In fact, the testimony of the Union negotiators is very consistent. In the bargaining for the 2001-2003, Muth explained to the City what the benefits were for insurance if someone were injured on the job. Chief Bublitz was probably involved in that contract for the City (or the contract for 2000), and he certainly understood that a disability pension applied to someone injured on the job.

Then in the bargain for the 2004-2006 contract, Muth, Manke, Langowski and Robertson all told the same account of the bargaining. As the City proposed a cap on the benefit, Muth raised the issue of being younger and disabled. He gave the aldermen the example about a firefighter going into a burning building and falling through a floor or a roof and being injured and unable to return to work. The aldermen agreed that the 13-year cap would exclude duty disability. Manke recalled Muth's example, and he

took notes during that bargain. His notes referred to disability, meaning the same thing as duty disability. Langowski also remembered Muth's example, and he agreed that the City did not want to hurt that person, and that injured person would not be included in the 13-year cap. He also took notes that showed that people getting a disability would not be capped at 13 years, and he understood disability to mean duty disability. Robertson's notes again show the same thing – that the City agreed to exclude disability in the 13-year cap proposal. Robertson explained that the big concern of the citizens on the City's bargaining team was that firefighters often have side jobs, such as roofing or building decks, and they did not want to pay insurance for a firefighter falling off a roof on his day off. The Union negotiators always said it was never with intent to cover someone working on a side job, but to cover employees injured in the line of duty for the City. Once the citizens understood the Union's intent, they had no objections. Robertson also used the term disability to mean duty disability.

This is a very significant bargaining history. Mootz, Muth, Manke, Langowski, Robertson and Bublitz all had the same understanding. Five from the Union and one from management. There was no one from management that disputed the Union's interpretation of "disability pension" to mean the same thing as "duty disability" or "duty disability benefit" until this grievance. The term "disability pension" may have been an imprecise term, but everyone at the negotiation table from both sides knew what it meant. The parties did not bargain with the statutes or ETF or WRS booklets and publications in front of them. Bublitz said he had never seen the ETF publication that the City now relies on to say that a Sec. 40.65 benefit is not a pension. This is the first time the City has raised this issue. If the City thought that the "disability pension" term in Article XIV did not cover a firefighter who was disabled while on duty, it was incumbent upon the City to raise that issue in past negotiations. It never did. The bargaining history alone is so strong that it is determinative in this case. The City cannot effectively dispute the bargaining history – it can only rely on its argument that the language is clear and unambiguous, which it is not. And added to the bargaining history is the fact that every time someone was injured on duty and unable to return to work from the time the language went into the contract until the instant grievance, the parties implemented the language in the same manner as the negotiators explained it. "Disability" meant "duty disability." In three cases, Gutzke, Pipp, and Ignatowski received severance benefits and health insurance benefits after being injured on the job and unable to work as firefighters. The conduct of the City reinforces the understanding that the parties always had up until the instant grievance.

The cases of Gutzke, Pipp, and Ignatowski show that the parties had a meeting of the minds, that an employee who left on duty disability would receive both the severance benefit and health insurance benefit. The City never denied anyone (until Robertson) these benefits. The three cases were the only employees who became disabled from firefighting while working for the City. In all three cases, the City treated the three as if they were retiring and gave them the severance pay benefits under the collective bargaining agreement. In all three cases, the City gave the three the health insurance benefits. This happened, as the Union points out, over three contract terms, and during a fourth contract term, the City confirmed Pipp's eligibility for post

employment health insurance by amending the plan to cover Pipp's wife and dependents. This was no mistake. This is a case where the City concurred with the Union's interpretation of Articles XI and XIV every time an incident arose in the past. Bublitz was not the only person in the City involved in granting these benefits to the three disabled firefighters. As the Union notes, there were several people from the City's administration that were involved in approving or signing forms, such as Mayor Klimetz, Schermer, and Hansen (per joint exhibits).

The cases noted by the City are not relevant to this case because of their factual differences. In CITY OF BERLIN, CASE 38 NO. 46309 MA-6944 (ARB. GRECO, 4/92), there was no past practice or bargaining history, unlike the instant case. In CITY OF PALO ALTO, 107 LA 484 (ARB. RIKER, 10/96), the arbitrator found the language to be clear and unambiguous, unlike the case here. This Arbitrator might have more to say about this case, but will observe the cautionary statement in Article V that the arbitrator is to not submit "observations or declarations of opinion which are not directly essential in reaching the determination."

If the City wants to change the meaning of the language in dispute, it should do it at the bargaining table. The bargaining history, which is supported by the conduct of the City in implementing the language for duty related injuries, convincingly shows that the ambiguous language favors the Union's interpretation that employees leaving the City on a duty-related injury are to receive the benefits of Articles XI and XIV. The Union had presented a very strong case, and the Grievant is entitled to the severance and health insurance benefits.

AWARD

The grievance is sustained.

> The City violated the collective bargaining agreement when it denied Burton Robertson post employment health insurance and severance benefits. The City is ordered to make the Grievant, Burton Robertson, whole by paying to him the amount owed for severance benefits under Article XI and the amount owed to him for the insurance benefits under Article XIV, and to continue such payments as required by the collective bargaining agreement. The Arbitrator will retain jurisdiction until September 28, 2007, solely for the purpose of resolving any disputes that may arise regarding the scope and application of the remedy.

Dated at Elkhorn, Wisconsin, this 12th day of July, 2007.

Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

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