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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

JOHN MLLER, RANDY OLSON, HERBERT GOSS, DOUGLAS BABCOCK, HENRY JACKSON, AND MICHAEL PALIN, Petitioners on Review, v. CITY OF PORTLAND, an Oregon municipal corporation, Respondent on Review.	Supreme Court Case No.: S061421 Court of Appeals Case No.: A145318 Multnomah County Circuit Court Case No.: 0810-14715

PETITIONERS' BRIEF ON THE MERITS

Petition for review of the decision of the Court of Appeals on appeal from a judgment of the Circuit Court for Multnomah County, Honorable Richards Maizels, Judge *pro tem*.

Opinion Filed March 27, 2013
Author of Opinion: Sercombe, J.
Concurring Judges: Ortega, P.J., Hadlock, J.

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PETITIONERS' BRIEF ON THE MERITS

I. Questions Presented and Proposed Rules of Law

A. Does the term "required duties," as used in § 5-306(a) of the Portland City Charter[1] mean, as a matter of law, "any tasks that the member could have been commanded to do at the time the member was actively employed," as the Court of Appeals held, or does it mean the duties required to qualify as a fire fighter? Alternatively, is there a question of material fact precluding summary judgment on this question?

Proposed rule of law: The term "required duties," as used in § 5-306(a) of the Portland City Charter means the duties required of the position the member held at the time the member became disabled from performing those duties.

Alternative proposed rule of law: There is a question of material fact precluding summary judgment as to the meaning of the ambiguous term "required duties."

B. Does § 8-104 of the Charter, requiring authorization of contracts by ordinance, apply to specific terms of employment of civil

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[1]Chapter 5 of the Charter as amended through 1997 is excerpted at App. 1-16 to the opening brief in the Court of Appeals.

service employees, such as firefighters, where all aspects of the terms of employment have been delegated by the City Council to the Human Resources Director?

Proposed rule of law: Charter § 8-104, requiring authorization of contracts by ordinance, does not apply to specific terms of employment, in jobs authorized by the City Council, city policy, the Charter and the City Code.

C. Does § 8-104 of the Charter, requiring authorization of contracts by ordinance, bar the imposition by estoppel of terms of employment where the City is acting in its capacity as an employer?

Proposed rule of law: Because Charter§ 8-104, does not apply to terms of employment, issued or changed in the regular course of business by authorized managerial or supervisory personnel, such as instructions, orders, promises, and terms implied by a long standing course of conduct, it does not preclude the application of estoppel. A municipality may be bound by estoppel in the circumstances presented by this case where: (a) the city is not acting in its sovereign capacity, but is acting as an employer, (b) the actions or representations relied upon by the employee are cloaked with authority and treated as a term of employment by the city, (c) the promise or action is within the apparent

or actual authority of the person or persons taking the action or making the promise, (d) the actions, practice or representations are of long standing duration, and (e) the affected employees reasonably relied on the action or promise.

D. Did Plaintiff Olson fail to exhaust administrative remedies where the City, a government employer, gave only a conditional notice of termination of benefits, specified a procedure to be followed, and then failed to follow the administrative procedure set forth in the notice after Olson followed the specified procedure?

Proposed Rule of Law: A municipality is bound by the notices it issues to employees regarding administrative procedures to be followed. When the City failed to respond to Plaintiff Olson's request for reconsideration, it abandoned its specified procedure and waived its right to require Olson to exhaust further remedies. Olson's compliance with the notice by filing a request for reconsideration satisfied his duty to exhaust administrative remedies. The City's failure to then follow the procedure announced in its notice to Olson precludes the City from asserting the defense of failure to exhaust those same administrative remedies.

E. Is there a genuine issue of material fact precluding the finding

that the return-to-work jobs assigned to Plaintiffs were in the same classification as the jobs Plaintiffs held at the time they were injured or became disabled?

Proposed rule of law: The absence of evidence in the record regarding how the City classified the return-to-work jobs, Plaintiffs' declarations showing that the duties they were assigned under the return-to-work program differed from the Plaintiffs' jobs at disability, and the apparent conflict between Plaintiffs' declaration testimony and the facts asserted in the declaration of Chief Klum, cast doubt on the City's claim that the return-to-work program jobs were properly given the same classification as Plaintiffs' jobs at disability. The City has failed to establish the jobs proper classification as an uncontroverted fact. Summary judgment was improperly granted.

II. Nature of the Action and Judgment

This is a claim by disabled Portland firefighters for breach of contract, including breach of the duty of good faith and fair dealing. Plaintiffs alleged that the City's imposition of its return-to-work program violated the terms of their employment delineated in the employee Disability Plan ("the Plan") contained in the City of Portland Charter, valid city regulations issued under the Plan, and other terms of the

employment contract. The trial court granted summary judgment for the City on the merits and on the procedural ground that the firefighters had failed to exhaust their administrative remedies. The Circuit Court then entered a general judgment dismissing the action.[2]

The Court of Appeals affirmed the summary judgment in part, but reversed the failure to exhaust holding as to all the firefighters except Plaintiff Olson, and remanded for trial on the claims of the other plaintiffs for breach of the duty of good faith and fair dealing. Plaintiffs seek reversal of the order granting summary judgment and the Judgment entered, and seek remand for further proceedings and trial.

III. Facts

A. Overview

The following facts, taken from the Court of Appeals' opinion give an overview of the case.

> This case arises out of the City of Portland's adoption and implementation of a return-to-work program for disabled firefighters.
>
> *****
>
> Chapter 5 of the charter for the City of Portland establishes the Fire and Police Disability, Retirement and Death Benefit

[2]The Circuit Court also issued a supplemental judgment for costs, which has been satisfied and is not part of this appeal pursuant to an agreement among the parties.

> Plan. The charter provides for creation of a Fire and Police Disability and Retirement Fund (FPDR) and a board of trustees to supervise and control the fund. As permitted by the charter, administration of the fund is delegated to a 'Fund Administrator.' Section 5-306 of the plan provides for service-connected and occupational disability benefits for members. Plaintiffs were employees of Portland Fire & Rescue. As plan members who suffered disabling injuries in the course of their duties, plaintiffs each received disability benefits pursuant to the plan. Plaintiffs each received those benefits over a number of years. In 2006, plaintiffs received written notice that, as part of the city's return-to-work program, they were required to attend mandatory EMT training. Furthermore, plaintiffs were notified that FPDR would continue their disability benefits during training but that, in the event that they failed to attend the training, 'the Fund w[ould] begin the process of suspension or termination of [their] benefits.' Thereafter, as part of the return-to-work program, plaintiffs were required to return to work in light-duty positions (such as 'low hazard fire inspector') that had not existed when they became disabled.
>
> ****** [Disputed finding omitted.]
>
> In addition, FPDR subsidized the wages paid to plaintiffs once they returned to work.

Miller v. City of Portland, 255 Or. App. 771, 773-74, 298 P.3d 640, 642-43, review allowed, 354 Or. 61 (2013).

B. Facts Relevant to Interpretation of the Disability Plan

The City's disability plan is not like workers compensation disability benefits, although it is in lieu of workers compensation. ORS 656.023; ORS 656.027(6). It has more in common with a disability insurance policy, at least the aspects at issue here do (see Open. Br.

pp. 25-26; Reply Br. p. 8-9). The Plan does not contemplate ever terminating benefits so long as the member remains disabled from required duties and is cooperative. Charter § 5-306. There is no provision for light duty terminating the monthly benefit as long as a firefighter is even partially disabled. *Id*. There is no temporary total disability provision as there is in workers compensation. *Id.* There is no lump sum permanent partial disability award and claim closure as in workers compensation. *Id*. Instead, the plan provides a floor of 25% of base pay and specifically contemplates the continuation of that floor regardless of other employment or vocational rehabilitation. Charter § 5-306(c)(4) and (5).

C. Facts Relevant to Implied Terms and Estoppel

At the time the City adopted the return-to-work program, Plaintiffs had for years been treated by the City as permanently disabled and "medically separated" from employment, their deferred compensation had been paid out and they had been told by the Fire Chief and others that they were not going to be returned to work (Palin Decl. ¶¶ 2, 5; Palin Decl. Ex 10, p12; Goss Decl. ¶¶ 5, 6; Babcock Decl. ¶¶ 2, 6; Jackson ¶¶ 2, 5, 6; Miller Decl. ¶ 6; Olson Decl. ¶¶ 2; 5; 6). The city had never attempted to return the disabled firefighters to work (*Id*.).

Plaintiffs knew that the City had treated other disabled firefighters and police officers as permanently separated from employment by disbursing deferred compensation, ceasing to monitor vocational and medical status, acknowledging their inability to work, ceasing the requirement of bi-weekly medical authorizations, making no effort to find employment for disabled firefighters in other positions, retraining other disabled firefighters and police officers and placing them in other careers, allowing disabled firefighters to restructure their lives, vocations and living arrangements to adapt to their disabled status, all without any suggestion that the City would someday attempt to force them to work in non-Firefighter positions under threat of termination of disability benefits (Decl Miller, ¶¶ 3, 6; Decl Olson, ¶¶ 3, 6; Decl Goss, ¶ 6, Decl Babcock, ¶ 6; Decl Jackson, ¶¶ 3, 6; Decl Palin, ¶¶ 3, 5, 6; Olson Supp. Decl.).

The disabled firefighters trusted that information and the years of consistent treatment as permanently disabled to mean that they should develop other aspects of their lives. Plaintiffs changed their life styles, moved (in some cases long distances from Portland), ceased maintaining certifications and training as firefighters, or started small businesses (*Id*.).

Plaintiffs' disabling injuries occurred between 1988 and 1999

(Decls Plaintiffs). Plaintiffs began receiving disability benefits for their injuries between 1996 and 2000 (Decls Plaintiffs). Each Plaintiff was eventually placed on "long term disability."

After being placed on long term disability, Plaintiffs received payouts of their deferred compensation, were notified of medical separation from employment, were no longer required to submit biweekly disability request (WSR) forms, and were promised that they would not be required to return to work for the City (Decls Plaintiffs).

In 2002, the City began medically separating from employment disability benefit recipients who were permanently restricted from working by issuing notices of medical separation to disabled Firefighters (MSJ Resp App 2 at 7; MSJ Resp App 3 at 6). Plaintiffs, except Miller, received such notices (Decls Plaintiffs). These notices, combined with other communications from FPD&R and the Fire Bureau told Plaintiffs that they were not subject to recall to work for Defendant and were permanently disabled (Decls Plaintiffs).

In March 2006, the Fund Trustees authorized creation of long-term light-duty ("LTLD") positions for permanently disabled employees which would subsidize their wages for up to 24 months (MSJ Resp, App 2 at 7; MSJ Resp, App 3 at 6). These changes were to be part of a

Return-to-Work Pilot Project (*id*).The City implemented the "Return to Work Program" (RTW) on March 7, 2007. The RTW required Plaintiffs to return to work in jobs which were created by the City to require Plaintiffs and similarly situated disabled Firefighters to work for Defendant after having been off work and receiving disability payments for many years.

The City implemented the RTW through the Fund and through its Fire Bureau. The Bureau provided the light duty positions and supervision, while the Fund dealt with the termination of disability benefits and paid part of the wages under the RTW program. None of the Plaintiffs were given any notice of termination of disability benefits when they returned to work in the RTW program.

All plaintiffs except Olson complied with the City's orders (MSJ Resp., declarations of Plaintiffs). Subsequently, some plaintiffs were unable to work and went out on disability again (*id*). Some plaintiffs have now retired (*id*). Those retirements were "early," meaning that they retired before they had reached 30 years of accredited service. The early retirements were due to the increased symptoms and other problems caused by the return to work (*id*). Early retirement reduces the amount of the pension each plaintiff receives (*id*).

D. Facts Relevant to Job Classification and "Required Duties"

Firefighters are subject to the City's civil service rules. City Code, § 3.22.020; Charter § 4-402. City Code § 3.15.050 grants personnel management power, including compensation, employee behavior, training, and discipline to the Human Resources Director. The Fire Bureau is governed by its own council, established by Code § 3.22.030 which describes its powers:

> The Council shall have the power and it is hereby made its duty to organize, govern, and conduct a Portland Fire & Rescue for effective service within the City, and to that end may authorize the appointment of a Chief Engineer (Fire Chief) and as many other officers and employees as in its opinion are necessary. It shall have the power to make, or power to delegate authority to the Commissioner In Charge of Portland Fire & Rescue to make, all necessary or convenient rules and regulations for the organization and conduct of the Bureau, for receiving and hearing complaints against any members, and for the removal or suspension of any member of the Bureau. The Civil Service rules prescribed in the Charter shall apply to every officer and member of the Bureau and shall govern the actions of the Council in its organization and government of the Bureau.

Job classification actions by the Human Resources Department are subject to review by the civil Service Board. Charter §§ 4-301, 4-402; City Code, § 3.22.020.

The City offered the affidavit of Chief Klum and a description of

the “Fire Fighter” class (MSJ Ex. 74) to show that Plaintiffs work in the return-to-work program was in the same classification as their jobs at disability. The affidavit of Chief Klum states that the low hazard fire inspector position “had job duties in the firefighter classification,” but does not state that the low hazard firefighter job itself was in the same class. (Klum Aff. ¶¶ 4, 5). The Fire Fighter class document provides, “All employees of this class perform almost all fire fighting tasks associated with an engine, truck, rescue squad, or fire boat company, since personnel are rotated for administrative and personal reasons” (MSJ, Ex. 74, p. 1). The exhibit lists fire fighting tasks such as: holds nozzles and directs fog or water streams, uses a variety of equipment and tools in extinguishing fires and responding to emergencies, drives and operates a fire apparatus and aerial ladder, raises ladders, rescues occupants of buildings, operates power tools and equipment, removes excess water and debris, uses advanced techniques and apparatus to restore cardiopulmonary function, administers first aid to injured persons, and removes trapped accident victims. Other duties ranging from participation in inspections to receiving calls are in the list.

“Fire inspector,” however, is a separate classification from “fire fighter” (See, e.g., Fairchild Aff. ¶ 5). We have not found the fire

inspector classification description in the record.

The low hazard fire inspector job description is Exhibit 29 to the motion for summary judgment. The duties are described as routine low hazard safety inspections of limited kinds of structures. It does not include any firefighting or rescue duties.

The City also proffered the affidavit of the Operations Manager of the fund. It states that her duties include ascertaining the classification of Portland Fire and Rescue employees, but does not state what classification the low hazard fire inspector position held, nor does she state the classification of any of the jobs Plaintiffs held in the return-to-work program (Bates Aff. ¶ 2).

The disabled firefighters were required to return to work despite the absence of any change in their medical conditions or impairments (Palin Decl. ¶¶ 2, 5, 6, 10; Goss Decl. ¶ 10; Babcock Decl. ¶ 10; Jackson Decl. ¶ 10; Miller Decl. ¶ 10; Olson ¶ 10). The summary judgment record is replete with evidence that the positions to which Plaintiffs were required to return to work were "make-work" "meaningless" positions having characteristics different from the class of their jobs at disability (Palin Decl. ¶¶ 12, 15; Goss Decl ¶ 12; Babcock Decl. ¶ 15; Jackson Decl. ¶ 15; Miller Decl. ¶ 12). The make work jobs

did not require the same certifications (EMT, CPR, Fire Inspector), training or skills (id). The make-work jobs included "low hazard fire inspector" and "lockbox specialist" (Jackson Decl. ¶ 15; Miller Decl. ¶ 15; Palin Decl. ¶ 15; Goss Decl. ¶ 15; Babcock Decl. ¶ 15). The jobs "wasted the majority of my time on the job doing nothing" or work was found to fill the time, and unlike real jobs the return-to-work-program jobs had no production quotas, consisted of data entry, were not supervised like real jobs, and did not require examining building plans (id).

However, the Court of Appeals found that when Plaintiffs returned to work under Defendant's return-to-work program, "... plaintiffs' positions were in the same job classifications as the positions that they had held when they became disabled." 255 Or. App. at 774. On that finding, Plaintiffs seek reversal because there is a genuine issue of material fact precluding summary judgment.

E. Facts Relevant to Exhaustion of Remedies by Olson

The following facts are taken from the Court of Appeals' opinion:

> [Olson] received written notice dated April 12, 2007, that his disability benefits were terminated effective April 5, 2007, because he was "no longer disabled or eligible." The notice advised Olson:
>
> > "You have 14 days from the date of this letter to provide a written response for the Director's

> consideration.
>
> "If the Director does not hear from you within the 14-day time frame, this denial is affirmed and you then have 60 days from April 26, 2007 to appeal to a hearings officer. * * * An untimely request for hearing may be accepted by the Director, upon a finding of good cause."
>
> (Boldface omitted) In a letter dated April 26, 2007, Olson provided the written response seeking reconsideration of the termination of his benefits. However, he received no response to that request for reconsideration.

Miller, 255 Or App at 774. Olson never received any response to his timely request for reconsideration or any further notice of denial.

On October 13, 2004, Olson entered into a settlement agreement with the City, under which he was to receive continuing disability benefits at 50% reduced by 25% of wages earned (*id*). That settlement was to resolve his dispute with the City as to whether or not he was capable of substantial gainful activity, which would have entitled him to continuing benefits at a higher rate than if he was not (*id*). Pursuant to the terms of the settlement, Olson has reported annually, including financial reports (*id*). The City retained the right to continue medical management of Olson's claim, but gave up the right to determine whether he was capable of gainful employment (*id*).

F. Return to Work Program Determined to Be Illegal in Other Proceedings

Defendant's implementation of its Return to Work Program (RTW) has been determined to be unlawful in two proceedings other than this action. The Employee Relations Board (ERB) determined that the RTW was unlawfully implemented without the required collective bargaining in violation of ORS 243.672(2)(e) and (f) (ERB Order at 34). *Portland Fire Fighters' Association, Local 43, IAFF v City of Portland*, 23 PECBR 43 (2009), on recon 23 PECBR 165 (2009), remanded for reconsideration on procedural grounds, 245 Or. App. 255, 263 P.3d 1040 (2011). The ERB ordered Defendant to post a notice of wrongdoing stating that its implementation of the RTW was unlawful and ordered Defendant to engage in good faith bargaining.

In a grievance proceeding by another disabled firefighter, Hurley, who is not a plaintiff in this action but is a Plaintiff in a similar Circuit Court action, the arbitrator determined that Defendant's orders furthering the implementation of the RTW were "unlawful at the time they were made" and found that Defendant's orders requiring an employee to return to work were "unlawful and unreasonable." The arbitrator ordered Defendant to reinstate Hurley and compensate him for lost disability benefits. *Portland Fire Fighters' Association, Local 43,*

IAFF, Complainant V. City of Portland, Respondent, ERB Case No. UP-013-10, 24 PECBR 472 (2011), adhered to on reconsideration, 2012 WL 390027, 24 PECBR 583 (2012), petition for judicial review pending CA No. A150768.[3] (The arbitrator's opinion is at Open. Br., App. 24, 26, 27.)

G. The Parallel *Hurley* Case

Hurley v. City of Portland, Multnomah County Circuit Court Case No. 0905-07888. Hurley is a disabled Portland firefighter who is not a plaintiff in this case, but filed a similar case. A different judge of the Multnomah County Circuit Court in *Hurley* reached the opposite result from this case, denying a very similar motion for summary judgment. Copies of the Order denying summary judgment and excerpts from the motion for summary judgment and its briefing in Hurley are contained in Open. Br., App. 17-22. *Hurley* is abated pending the outcome of this case.

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[3]The Award and ERB Order, MSJ Resp, App 2 and 3 contain detailed findings of fact which are binding on Defendant by virtue of the arbitration award and, if affirmed, the ERB decision, many of which apply to the facts of this action. MSJ Resp, App 3 at 3-24 contains useful information on the organizational structure of Defendant as it affects the facts of this case and details of the adoption and implementation of the RTW.

IV. Summary of Argument

A. Meaning of Required Duties

"Required duties" is used in the Charter to indicate the required duties of a disabled firefighter or police officer at the time of disability. This is evident from the context provided by the provisions proscribing eligibility for disability benefits, the amount of benefits and defining who is a member of the Plan. The Court of Appeals conflated the Plan's concepts of eligibility and reduction of benefits. Charter § 5-306 provides that a firefighter is eligible for disability benefits when the firefighter can no longer perform the required duties of the Fire Fighter job. A disabled firefighter remains eligible so long as the firefighter cannot perform those duties. When the firefighter becomes capable of "substantial gainful employment," a year passes from the date of disability and the firefighter begins working at "other employment," then benefits may be reduced to a floor of 25%. § 5-306(c)(2)-(4). But the firefighter remains eligible. No where does the Plan contemplate cutting off benefits if a firefighter works in employment other than as a Fire Fighter. It necessarily follows that the Plan intends "required duties" to mean the duties necessary to qualify as a Fire Fighter.

This meaning is supported by the use of this and similar terms in

other contexts, such as discrimination law, workers compensation and disability insurance policies. It is further illustrated by the self-contradictory position taken by the City by which it contends that the disabled firefighters are not eligible for benefit payments, but continues to provide other benefits such as medical, rehabilitation and subsidized wages. The Plan contains no such policy. If these disabled firefighters are indeed working at their "required duties," under the express terms of the plan they are not eligible for any benefits.

Alternatively, if the term does not have the more obvious meaning, "required duties" of the job at disability, then it is ambiguous and evidence of its meaning must be provided to the finder of fact, precluding summary judgment.

B. Charter § 8-104 Does not Apply to Terms of Employment

Charter § 8-104 requires that contracts be authorized by ordinance of the city council to be binding. While it is probable that § 8-104 applies only to external contracts, and not to employment contracts, the requirements of the section are met here. The jobs, terms and conditions of employment in Portland Fire and Rescue are authorized by the City Council and by the Charter. City Code, §§ 3.22.020; 3.22.030 and 3.15.050; Charter § 4-402.

C. Charter § 8-104 Does not Bar the Application of Estoppel

For the same reasons discussed immediately above, § 8-104 does not provide notice to city employees that oral and implied terms of their employment are not binding. This section of the Charter is simply irrelevant.

D. Olson - Exhaustion of Remedies

The notice sent to Olson was a conditional notice. It did not contain a final decision of the director, and thus did not trigger the running of the 60 days to request a hearing. The city should be bound by the procedural terms of its April 12, 2007 notice. It told Olson he had 14 days to "provide a written response." Olson submitted a timely response. The notice told Olson, "If the Director does not hear from you within the 14-day time frame", the denial would be affirmed, and he would "then" have 60 days to request a hearing. The City did nothing. Olson had no way of determining when the 60 days began to run. By the terms of the letter the 60 days was tolled by Olson's response. The denial was never "affirmed" and never became a final decision. Mr. Olson waited 18 months to file his complaint in Circuit Court. By its failure to follow its own announced procedures, the City has waived its right to argue Olson's action is barred by any failure to exhaust his

administrative remedies.

V. Argument

This case tests whether the "return-to-work program" adopted by the City of Portland breaches the terms of disabled firefighters' employment.

This case was decided on summary judgment. The Court of Appeals opinion does not appear to have consistently borne the standards of review of a summary judgment in mind as it viewed the terms of the Plan and the evidence. For example, the Court of Appeals said, "We cannot conclude that the city breached the express terms of the charter by reducing plaintiffs' benefits as alleged in this case." 255 Or. App. at 788. But that is not the question. The question is whether there is no genuine issue of material fact that the City did not breach the contract.

This Court reviews *de novo* a grant of summary judgment. *Jones v. General Motors Corp.*, 325 Or 404, 411, 939 P2d 608 (1997). Summary judgment is appropriate only if the agreed upon facts would compel a jury to return a verdict for the moving party. 325 Or at 414. The adverse party has the burden of producing evidence on any issue raised in the motion on which the adverse party would have the burden

of persuasion at trial. ORCP 47C. This Court reviews the record in the light most favorable to party opposing the motion. 325 Or at 413. The foregoing principles lead to these methodological points (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party; and (3) the court must assume the truth of direct evidence set forth by the nonmoving party if it conflicts with direct evidence produced by the moving party. *T.W. Elec. Serv. v Pac. Elec. Contractors*, 809 F2d 626, 630 (9 Cir 1987). "The evidence of the non-movant is to be believed." *Anderson v Liberty Lobby, Inc*., 477 US 242, 249 (1986). On a motion for summary judgment, the court does not weigh the evidence or determine the truth of the matter asserted, but decides only whether there is a genuine issue for trial. *Abdul-Jabbar v Gen. Motors Corp*., 85 F3d 407, 410 (9 Cir 1996). When different ultimate inferences can be reached, summary judgment is not appropriate. *Sankovich v Life Ins. Co. of N. Am*., 638 F2d 136, 140 (9 Cir 1981).

A. Meaning of "Required Duties"[4]

The City argues and the Court of Appeals held that "required duties" means any duties the City required the disabled firefighters to perform. The problem with that argument is that it conflates the Plan criterion for eligibility with the criteria for benefit reduction. To understand that distinction it is necessary to analyze § 5-306 of the Plan.

Eligibility is determined under § 5-306(a) which provides in relevant part:

> (a) Eligibility for Service-Connected Disability Benefit. An Active Member shall be eligible for the service-connected disability benefit when unable to perform the Member's required duties because of an injury or illness arising out of and In the course of the Member's employment in the Bureau of Police or Fire. (Remainder of Section at Open. Brief, App. 14)

The Plan provides for benefit reduction in § 5-306(c) which provides:

> (c) Amount of Benefits. During the period the Member continues to be eligible under Subsection (a) or (b) benefits shall be paid as follows:
>
> 1. During the first year from the date of disability, the Member shall be paid 75 percent of the Member's rata of Base Pay in effect at disability, reduced by 50 percent of any wages eamed in other employment during the period the

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[4]Discussed at Opening Br., pp. 34-40 and Reply Br., p. 12

benefit is payable.

2. The Member shall continue to be paid the benefit described in Paragraph 1 after one year from the date of disability until the earliest date on which the Member is both medically stationary and capable of Substantial Gainful Activity. If not medically stationary sooner, the Member shall be treated as medically stationary for purposes of this Section on the fourth anniversary of the date of disability, regardless of the Member's condition. The Member is capable of Substantial Gainful Activity If qualified, physically and by education and experience, to pursue employment with earnings equal to or exceeding one-third of the Member's rate of Base Pay at disability.

3. After the date described in Paragraph 2, the Member shall be paid 50 percent of the Member's rate of Base Pay at disability, reduced by 25 percent of any wages earned in other employment during the same period.

4. The minimum benefit shall be 25 percent of the Member's rate of Base Pay, regardless of the amount of wages earned in other employment.

5. The Board may suspend or reduce the benefit if the Member does not cooperate in treatment of the disability or in vocational rehabilitation or does not pursue other employment.

Note that this section applies as long as the Member is eligible. § 5-306(c), first sentence. Said another way, even if a member's benefits are suspended or reduced, the member is still eligible for benefits under the plan because the member is still not able to perform the required duties of the member's job.

Other employment does not render the member ineligible. Other employment reduces the member's benefits. The disabled member may well be able to perform *some* of the duties of a Fire Fighter, as that

position is described, but if the member cannot perform the *required* duties necessary to be a Fire Fighter, the member still receives a benefit, albeit a reduced benefit, because the member is still eligible - that is qualified to receive benefits.

To illustrate, consider a firefighter who is shot by a kidnapper as the firefighter is rescuing a victim from a burning home that the kidnapper has set on fire in an attempt to kill the victim. As a result of the gunshot, the firefighter is paralyzed from the waste down. The firefighter is highly motivated to recover and dedicated to the Bureau. The firefighter works hard at recovery and achieves the ability to perform a number of tasks from a wheelchair. The firefighter wants to return to work but cannot meet the strenuous requirements of the Fire Fighter position. To reward the firefighter's heroism, the Bureau accommodates the firefighter and provides a job with duties within the firefighters limitations.

The firefighter is still eligible for disability benefits under § 5-306(a) because the firefighter cannot perform the required duties necessary to be a Fire Fighter. The firefighter's benefits, however, are reduced according to the formula in § 5-306(c)(2)-(4) once the first year has passed because the firefighter is capable of "substantial gainful

employment" and is earning wages.

The plan not only allows, it requires continuing benefits after a return to work. This is not a workers compensation system with claim closure and a lump sum permanant partial disability award, nor is there "temporary total disability" which is cut off upon a return to light duty. Instead, the plan recognizes the special occupational risks associated with police work and firefighting. It reward these two unique job classes with continuing benefits until retirement, so long as a police officer or firefighter cannot perform the required duties of those two hazardous jobs and remains cooperative with treatment and rehabilitation. The City does not contend that these Plaintiffs can perform the required duties necessary to qualify as a Fire Fighter as that class is described. The City does not contend that these Plaintiff's (other than Olson) failed to cooperate.

We turn now to deeper study of "required duties" in the context of the Charter's disability plan.

1. Special Standard Applicable to Interpretation of Portland's Disability Plan

The City of Portland retirement and disability plan is to be liberally construed in favor of benefits. *Blalock v City of Portland*, 206 Or 74, 78, 291 P2d 218, 220 (1955). The Court of Appeals did not construe

"required duties" liberally in favor of benefits.

2. The Meaning of "Required Duties" must Be Determined under the Summary Judgment Standard

On review of a summary judgment, this court views the evidence in the light most favorable to the nonmoving party, including all reasonable inferences of fact. *Hampton Tree Farms, Inc. v. Jewett*, 320 Or. 599, 613, 892 P.2d 683, 692 (1995). If "required duties" does not, as a matter of law, mean the required duties of the job Plaintiffs held at the time they became disabled, there is at the least a genuine issue of material fact as to whether the meaning of the term. It cannot be said that "required duties" as a matter of law means any duties the City required of Plaintiffs.

3. "Required Duties" in Context

The context provided by the text of the Plan also suggests that "Required duties" are the duties of the job at disability.

If the Court of Appeals were correct, then a firefighter capable of "other employment" and working in other employment by definition would not be disabled and would not qualify to receive any benefit because the firefighter would not be *eligible*. That is not what the plan says. In fact, that is exactly the opposite of the express language of

Charter § 5-306(c), especially subsection (4)("The minimum benefit shall be 25 percent of the Member's rate of Base Pay, regardless of the amount of wages earned in other employment"). Indeed, if an injured firefighter was not *eligible* the firefighter would not receive *any* benefits under the plan - no medical benefits, no vocational rehabilitation, no subsidized salary. The City does not see the inconsistency in its position. It continued to provide benefits to participants in the return-to-work plan - but not the disability payments. Under the terms of the plan, if a firefighter is eligible for disability benefits, the firefighter is eligible for all the benefits. Conversely, if a firefighter is not entitled to benefits because the firefighter is performing the "required duties," there should be no benefits. The City's position itself violates the Plan. A disabled firefighter is one who cannot perform the regular duties of the Fire Fighter job, not *any* duties of *any* job.

Throughout § 5-306(c), the "date of disability" is used as a marker. This tends to suggest that "Required duties" are the duties of the job at disability, not some later assignment.

Under the Charter, an "Active Member is eligible for service-connected disability benefit when unable to perform the Member's required duties because of an injury or illness arising out of

and in the course of the Member's employment in the Bureau of Police or Fire." § 5-306(a). "Members shall consist of those persons who are permanently appointed as sworn employees in the Bureau of Police or Fire [except FPDR Three employees participating in Oregon PERS]. The chief of the Bureau of Police or Fire shall be a member unless the terms of employment of such chief provide otherwise." § 5-301(a). Thus, under the Plan, determination of disability is circumscribed by the Member's duties at the time of disability.

The context of the Charter definition of "Member," in conjunction with its definition of disability, is based on that Member's duties at the time of disability, strongly suggesting that required duties means duties of the job at the time of injury or disability. Those duties are the duties required to qualify for the Fire Fighter position.

The Charter, having defined disability as the inability to perform a Member's required duties, § 5-306(a), provides that during the period the Member continues to be so disabled, the Member shall receive a minimum benefit of 25 percent of the Member's Base pay, regardless of the amount of wages earned in *other* employment. § 5-306(c)(4). Thus a member is still disabled, that is unable to perform “required duties,” and yet capable of working in other employment. The Charter also

provides that a Member is "capable of Substantial Gainful Activity" if qualified, physically and by education and experience, to pursue employment with earnings equal to or exceeding one-third of the Member's rate of Base Pay at disability." § 5-306(c)(2). But neither being capable of gainful employment, nor working in other employment disqualifies the member from being disabled. Because a member can be simultaneously disabled and working, and because inability to perform required duties is the definition of disability, "required duties" necessarily means something other than any duties of any job. The scheme is to provide benefits when a firefighter cannot perform the job of firefighter. The Plan is not built to provide benefits only to firefighters not capable of any employment.

These three provisions, taken together, show that the overall scheme of the plan is only coherent if "required duties" means duties at disability or injury.

Required duties are those duties required to be a Fire Fighter. The City equates the term with "assigned duties," which are the duties that may be assigned to any employee. But this plan is not for any employee. It is only for Fire Fighters and sworn Police Officers. Only those two kinds of employees can be Plan members. "Required

Duties" duties required to be a plan member.

4. Other Contexts

We have found only two cases mentioning the term "required duties" in the Portland City Charter. Those cases do not interpret or construe the term, but in context the suggest that required duties are the duties of the job at injury or disability.

In *Blalock v City of Portland*, *supra*, the Supreme Court did not discuss the term "required duties," other than to recite that the inability to perform the required duties establishes disability. 206 Or at 77. The Court found, "[Blalock's] heart condition has progressed to such an extent that all parties agree plaintiff is now disabled from carrying on his duties as a police officer," 206 Or at 76, and held that it was now a disability, not merely a disease. 206 Or at 81. It appears that Blalock's duties as a police officer were the only duties at issue. There is no discussion of other work or limited duty.

In *Harrington v Board of Trustees*, 100 Or App 733, 788 P2d 1019 (1990), the Court of Appeals reviewed a determination by the Fund Board that a Portland Police Chief was no longer entitled to benefits based on a review of her condition by a medical panel and the Board. The Board had found that Harrington was capable of returning to duty

and terminated her benefits because she no longer was unable to perform her required duties. 100 Or App at 735. Although it appears the discussion was of returning to full duty, that is not stated.

The concept of job duties at date of injury, often referred to as "job at injury" runs through various aspects of employment law dealing with disability. It affects determination of entitlement to work disability in workers' compensation cases. *See, e.g. Matter of Taylor*, 61 Van Natta 1322 (2009). It is a factor in the "reasonable accommodation" requirements of anti-discrimination statutes such as ORS 659.425. *See, e.g. Ammann v Multnomah Athletic Club*, 141 Or App 546, 553, 919 P2d 504 (1996). And, of course, under the Charter, a Member becomes and remains disabled when unable to perform the Member's required duties. § 5-306(a).

5. A Term of Art

The phrase "required duties" in the Portland City Charter is a term of art such as “job at injury” or “own occupation” used in disability insurance policies and statutory disability provisions. “Required duties” as used in Charter § 5-306(a) must mean the required duties of the job, not any duties “the employer could compel or command the employee to perform,” as the Court of Appeals held. 255 Or. App. at 787-788. There

would be little or no need for a reduction of disability benefits to a minimum of 25% for wages earned in "other employment," Charter § 5-306(c)(4), if *any* duties "required" by the City could defeat the disabled firefighter's eligibility for benefits. If *any* duties would suffice, no firefighter would ever be disabled after the initial acute injury phase - the City could just assign "duties" within whatever capabilities the firefighter had left. The City could simply "require" the employee to do nothing but sit, stand or lie down. But in this plan, a firefighter capable of "other employment" is still considered disabled and receives benefits. *Id.*

The term "other employment" expressly means some job other than the job at disability. If "other employment" means something other than the job at disability, it follows that the term "required duties" means the duties required of the job at disability. The context of having not required the disabled firefighters to work light duty jobs for decades also suggests that "required duties" means the duties of the job at disability. If that were not true, the City would have offered permanent light duty jobs for all those years. The City must not have thought it could do that - until the politics changed.

6. Ambiguity Requires Remand

But, if the term "required duties" does not have the common sense

and obvious meaning, then the term is capable of more than one meaning and is therefore ambiguous. *State ex rel. Dep't of Educ. v. Vantage Technologies Knowledge Assessment*, *LLC*, 243 Or. App. 557, 569-70, 261 P.3d 17, 24 (2011)(where both parties offered plausible interpretations of the contract, it was ambiguous and the meaning was correctly submitted to the jury as factfinder). In that event, the trier of fact must resolve the ambiguity. *Id*.; *Sisters of St. Joseph v. Russell*, 318 Or. 370, 377, 867 P.2d 1377, 1381 (1994)("If a contract is ambiguous, the trier of fact will ascertain the intent of the parties and construe the contract consistent with the intent of the parties").

The City has the burden of proving its proposed meaning of the Charter. The Charter is to be liberally construed in favor of benefits. *Blalock*, 206 Or. at 78. All inferences in favor of Plaintiffs must be drawn from the evidence. *Jones*, 325 Or at 413. Summary judgment was improperly granted.

B. Charter § 8-104 Does Not Apply to Terms of Ongoing Employment In Jobs Authorized by The City

Charter § 8-104 provides in full:

> The City of Portland shall not be bound by any contract nor in any way liable thereon, unless the same is authorized by an ordinance and made in writing and signed by some person or persons duly authorized by the Council. But an ordinance may authorize any board, body, officer or agent to

> bind the City without contract in writing for the payment of any sum not exceeding twenty thousand dollars ($20,000); such amount to be adjusted annually based on the average inflation rate for the Portland Metropolitan Area as determined from the U.S. Department of Labor statistics as certified by the City Auditor. In adopting any ordinance authorizing any board, body, officer or agent to so bind the City for any sum in excess of two thousand five hundred dollars ($2,500) the Council shall make specific findings as to what classes of items or services may be purchased without a contract in writing authorized by a specific ordinance and the Council shall establish rules and regulations to be followed in purchasing such items. Notwithstanding the provisions of this Section, however, the Council may waive the written contract requirement when work, materials or supplies are necessary for an emergency involving public safety or health.

The language strongly suggests that it applies to external contracts, not employment contract terms. The City Code proves that is true.

The short answer is that the City Council has delegated the management of city employee contracts, so that even if § 8-104 applied, it has been satisfied. City Code § 3.15.050 provides:

> A. The Bureau of Human Resources shall be supervised by a Director who shall report to the CAO. The responsibilities of the Bureau of Human Resources shall include coordination and control of the administrative and technical activities relating to maintenance of a comprehensive human resources system for the City, including employee relations, labor negotiations, training, employment services, classification, compensation, affirmative action and diversity development, workforce development and employee benefits. The Bureau of Human Resources shall be

> responsible for the health benefit plan administration including the Health Insurance Fund and the Portland Police Association Health Insurance Fund.
>
> B. The Human Resources Director shall formulate, administer and monitor administrative rules approved by the Council, or the CAO, including provisions for:
>
> 1. Recruitment, examination, certification and appointment on the basis of applicants' knowledge, skills and abilities.
>
> 2. Classification and compensation.
>
> 3. Employee behavior and expectations.
>
> 4. Disciplinary guidelines with notice to employees of prohibited practices.
>
> 5. Employee training and development.
>
> C. In accordance with Oregon law, the Human Resources Director or designee, on behalf of the Council, may enter into agreements with labor organizations, recognizing their exclusive representation of specified classifications within City service.

It is implausible that Charter § 8-104 was intended to, or ever did apply to the ongoing, ever changing terms of employment. It is more likely that it was intended to apply to external contracts, such as purchasing, construction, advertising, and outside services contracts. No matter what its original intent, it does not govern the terms of firefighters' employment in the Fire Bureau. Firefighters are subject to the City's civil service rules. City Code, § 3.22.020; Charter § 4-402.

City Code § 3.15.050 grants broad personnel management power, including compensation, employee behavior, training, and discipline to the Human Resources Director. The Fire Bureau is governed by its own council, established by Code § 3.22.030 which describes its powers:

> The [PF&R] Council shall have the power and it is hereby made its duty to organize, govern, and conduct a Portland Fire & Rescue for effective service within the City, and to that end *may authorize the appointment of a Chief Engineer (Fire Chief) and as many other officers and employees as in its opinion are necessary*. It shall have the power to make, or power to delegate authority to the Commissioner In Charge of Portland Fire & Rescue to make, all necessary or convenient rules and regulations for the organization and conduct of the Bureau, for receiving and hearing complaints against any members, and for the removal or suspension of any member of the Bureau. The Civil Service rules prescribed in the Charter shall apply to every officer and member of the Bureau and shall govern the actions of the Council in its organization and government of the Bureau.

(Emphasis added.) There is no place for § 8-104 of the Charter to meddle in the terms of employment.

The imposition of § 8-104 would invalidate the fire chief's general orders and supervisors' instructions. An ordinance could not have been required for every hire, every change in job duties, every change in job description, every command by a superior. This case is not about a new contract - it is about a term of the ongoing employment contract. The ruling of the Court of Appeals also allows the City to unilaterally decide

after the fact what terms of employment it will allow to be enforced and which it will not - an arbitrary and unreasonable result.

The jobs in Portland Fire and Rescue are authorized by the City Council and by the Charter. City Code, §§ 3.22.020 and 3.15.050; Charter § 4-402. Not only is § 8-104 inapplicable, if it were, it would be satisfied by those authorizations. The Court of Appeals opposite holding is error.

The defense that § 8-104 bars Plaintiffs' claims is an issue on which the City bears the burden of proof on summary judgment. All permissible inferences must be drawn from the evidence in favor of Plaintiffs. *Jones*, 325 Or at 413. The City did not offer evidence other than the language itself to show that it applies to internal employment contracts. Summary judgment was improperly granted.

C. Estoppel Claims are Not Barred by Charter § 8-104[5]

For the same reason, § 8-104 does not bar the application of estoppel to establish terms of an employment contract. When representations, commands, consistent treatment and a course of conduct are consistently followed for years, and disabled employees

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[5]Discussed at Open. Br., pp. 27-33. Not addressed in Answering Brief.

have heavily relied on them and changed major aspects of their lives as a result, the City should not be free to disregard them. In another context, the Court of Appeals has held that Charter § 8-104 did not preclude estoppel. *Simons v. City of Portland*, 132 Or. App. 74, 83, 887 P.2d 824, 830 (1994).

The City abandoned, or at least did not address in its brief below, its argument on summary judgment that it could not be estopped. But the Court of Appeals, relying on *Arken v City of Portland*, 351 Or 113, 263 P3d 975, adh'd to on recons, 351 Or 404, 268 P3d 567 (2011), held that § 8-104 gave notice that the City did not intend to be bound by the promises of City employees not authorized by ordinance, and therefore terms of the employment contract could not be imposed by estoppel. Arken's holding that, "....the existence of a law in the public domain makes reliance on a contrary representation patently unreasonable, precluding estoppel," is inapposite here, where the existence of § 8-104, a completely irrelevant law, put Plaintiffs on notice of nothing.

The firefighters' jobs and the management of all aspects of their conditions of employment are authorized by the City Council and by the Charter. City Code, §§ 3.22.020 and 3.15.050; Charter § 4-402. Charter

§ 8-104 does not apply to bar any terms of the employment contract, whether oral, implied, or by estoppel.

D. Olson Did Not Fail to Exhaust Administrative Remedies[6]

The City's administrative rules and the notice it sent Olson both require a final decision of the director. The letter sent to Olson was a provisional notice, by its terms not final: "You have 14 days from the date of this letter to provide a written response for the Director's consideration. If the Director does not hear from you with the 14-day time frame, this denial is affirmed and you *then* have 60 days from April 26, 2007 to appeal to a hearings officer" (Olson Decl., Ex. 5, p. 2, emphasis added). Olson sent the written response requested by the Director, but he is still waiting for the Director to respond. The denial was not "affirmed" and therefore could not be appealed.

The notice letter and the City's Administrative Rules are silent concerning what steps must be taken if the Member submits a timely written response. But the administrative rules do require a final notice and a notice of appeal rights. FPDR Administrative Rules, § III(G)(7) quoted at Open. Br. p. 15. By failing to follow its own rules, failing to

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[6]Discussed at Open. Br., pp. 17-21; Reply Br., pp. 6-8.

take steps to notify Olson that the denial had become final, and failing to notify Olson of what procedure to follow if he submitted a written response, the City has waived, and is precluded from asserting, its defense of failure to exhaust administrative remedies.

Olson also contends that the City's order requiring him to participate in the return-to-work program violated the settlement he had reached with the City in 2004 (See Open. Brief at p. 44). The Court of Appeals did not reach that issue.

E. There is a Genuine Issue of Material Fact on the Classification of the Return-to-Work Program Jobs[7]

If this Court agrees with our interpretation of the term "regular duties," this issue becomes moot, because a job's class is irrelevant to the determination whether a firefighter can perform the regular duties of a Fire Fighter.

The City offered no evidence to show that the classification process had been properly followed. See, Charter §§ 4-301, 4-402; City Code, § 3.22.020. The City offered the affidavit of Chief Klum and a description of the "Fire Fighter" class (MSJ Ex. 74). But Chief Klum carefully states that the low hazard fire inspector position "had job duties

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[7]Discussed at Open Br. 11, 22, 37, 40-41; Reply Br. 13-15.

in the firefighter classification," and avoids stating that the low hazard firefighter job itself was in the same class. (Klum Aff. ¶¶ 4, 5).

The "Fire Fighter" class description provides, "All employees of this class perform almost all fire fighting tasks associated with an engine, truck, rescue squad, or fire boat company, since personnel are rotated for administrative and personal reasons" (MSJ, Ex. 74, p. 1). The exhibit lists fire fighting tasks such as holds nozzles and directs fog or water streams, uses a variety of equipment and tools in extinguishing fires and responding to emergencies, drives and operates a fire apparatus and aerial ladder, raises ladders, rescues occupants of buildings, operates power tools and equipment, removes excess water and debris, uses advanced techniques and apparatus to restore cardiopulmonary function, administers first aid to injured persons, and removes trapped accident victims. Other duties ranging from participation in inspections to receiving calls are in the list.

But to be a Fire Fighter, one must be capable of performing all the required duties, not just some of them.

"Fire inspector" is a separate classification from "fire fighter" (See, e.g., Fairchild Aff. ¶ 5). We have not found the fire inspector classification description in the record.

The low hazard fire inspector job description describes the duties as “routine” low hazard safety inspections of limited kinds of structures. It does not include any firefighting or rescue duties (MSJ Ex. 29).

The affidavit of the Operations Manager of the fund states that her duties include ascertaining the classification of Portland Fire and Rescue employees, but does not state what classification the low hazard fire inspector held, nor does she say what classification any of the Plaintiffs held in the return-to-work program (Bates Aff. ¶ 2).

Plaintiffs were returned to work as “Low Hazard Fire Inspector” or “lock box specialist” (Klum Aff., ¶¶ 4-6; Declarations of Goss ¶ 15, Babcock ¶ 15, Jackson ¶ 15, Miller ¶ 15, Palin ¶ 15). Those positions did not exist prior to the return-to-work program and were created specifically for the return-to-work program (Id., except Klum Aff.). The return-to-work jobs were different and had different required qualifications than the jobs at injury (Id.). Defendant’s fire chief admitted that these assignments were different from the Plaintiffs’ assigned duties at the time of onset of disability (Klum Aff., ¶ 11). Most telling, these jobs did not require EMT, Fire Inspector or CPR certifications, nor the same training or skills as the Plaintiffs’ jobs at injury (Palin Decl. ¶¶ 12, 15; Goss Decl ¶ 12; Babcock Decl. ¶ 15; Jackson Decl. ¶ 15; Miller

Decl. ¶ 12).

Defendant, nevertheless, classified the return-to-work jobs as "sworn" Fire Fighter positions in a pretextual attempt to justify cessation of payment of disability benefits by arguing that these jobs were the equivalent of the disabled Firefighters duties at disability.

The City offered no direct evidence that the "low hazard fire inspector" position to which disabled firefighters were assigned in the return-to-work program was classified in the "Fire Figher" class The City is burdened to present enough evidence on summary judgment to establish that there is no genuine issue as to the material fact that the return-to-work jobs were properly classified. Not only did the City fail to present that evidence, Plaintiffs presented evidence tending to show that the alleged classification of the return-to-work jobs as "Fire Fighter" was pretextual.

There is a genuine issue of material fact on this question, precluding summary judgment.

VI. Conclusion

This Court should reverse the following portions of the Court of Appeals' decision:

1. The holding that the City did not breach the Plan's express

terms because the term "required duties" means any duties "the employer could compel or command" Plaintiffs to perform;

2. The holding that the return-to-work jobs were in the same classification as the Plaintiffs' jobs at disability;

3. The holding that City Charter § 8-104 barred Plaintiffs' claims based on oral, implied and estoppel by conduct terms of the contract; and that Plaintiff Olson failed to exhaust his administrative remedies.

This Court should affirm the Court of Appeals' rulings that Plaintiffs were not required to exhaust administrative remedies, and that Plaintiffs were entitled to pursue their claims for breach of the duty of good faith and fair dealing.

The general judgment of the Circuit Court should be reversed and the case remanded for further proceedings and trial.

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CERTIFICATE OF COMPLIANCE
WITH ORAP 5.05(2)(d) & ORAP 8.15(3)

Word Count

I certify that this PETITIONERS' BRIEF ON THE MERITS complies with the word-count limitation in ORAP 5.05(2)(b)(I) & ORAP 8.15(3) and that the word-count of this brief as described in ORAP 5.05(2)(a) is **10,921** words.

Font size:

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

Dated October 3, 2013.

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CERTIFICATE OF FILING

I certify that on October 3, 2013, I filed the original of the foregoing **PETITIONERS' BRIEF ON THE MERITS** with the State Court Administrator by eFiling.

CERTIFICATE OF SERVICE

I also certify that on October 3, 2013, participants in this case who are registered eFilers will be served via the electronic mail function of the eFiling system as follows:

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