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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

JOHN MILLER, RANDY OLSON, HERBERT GOSS, DOUGLAS BABCOCK, HENRY JACKSON, and MICHAEL PALIN,

Plaintiffs-Appellants,
Petitioners on Review,

v.

CITY OF PORTLAND, an Oregon municipal corporation,

Defendant-Respondent,
Respondent on Review.

Multnomah County Circuit Court
Case No.: 0810-14715

Court of Appeal Case No. A145318

Supreme Court Case No.: S061421

RESPONDENT CITY OF PORTLAND'S BRIEF ON THE MERITS

Review of the decision of the Court of Appeals
on Appeal from a Judgment of the Multnomah County Circuit Court
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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PROPOSED RULE OF LAW: The City cannot be bound to terms of employment in the form of written and oral representations by City employees when not authorized by an ordinance, made in writing, and signed by some person or persons duly authorized by the City Council.

B. Can the City of Portland be bound by estoppel to additional employment terms based on promises by City employees that are not authorized by ordinance, made in writing, and signed by some person or persons duly authorized by the City Council?

PROPOSED RULE OF LAW: The City cannot be bond by estoppel to additional employment terms based on promises by City employees that are not authorized by ordinance, made in writing, and signed by some person or person or persons duly authorized by the City Council.

C. What is the proper construction of the phrase "required duties" in § 5-306(a) of the Portland City Charter?

PROPOSED RULE OF LAW: "Required duties" in the context of § 5-306(a) means the range of tasks that the Fire Bureau could assign to a Member while the Member is actively employed by the Fire Bureau.

D. Is there a genuine issue of material fact as to whether the Fire Bureau could have required Plaintiffs to perform the range of tasks required by their return-to-work assignments while they were actively employed?

PROPOSED RULE OF LAW: There is no genuine issue of material fact concerning whether the Fire Bureau could have required Plaintiffs to perform the range of tasks required by their return-to-work assignments while they were actively employed.

E. Did Plaintiff Olson fail to exhaust his administrative remedies by not requesting a hearing before a hearings officer and following the administrative process before suing in circuit court?

PROPOSED RULE OF LAW: An FPDR Member fails to exhaust administrative remedies when the Member does not request a hearing within 60 days of the Fund Administrator's decision.

F. Did all Plaintiffs fail to exhaust their administrative remedies by not following the administrative procedure in the Charter and administrative rules?

PROPOSED RULE OF LAW: All Plaintiffs failed to exhaust their administrative remedies by not following the administrative procedure in the Charter and administrative rules.

2. SUMMARY OF THE ARGUMENT

This case essentially boils down to a disagreement between Plaintiffs and Defendant (the City) about whether a sworn Fire Bureau employee who is injured and begins receiving disability benefits under the City of Portland Fire and Police Disability, Retirement, and Death Benefit Plan (FPDR Plan) may refuse to return to work for the Fire Bureau in a position in which the employee is medically cleared to work, and continue to be paid the disability benefit, if he is unable to perform a single one of the duties that he could perform before the disabling injury or illness occurred. Plaintiffs argue they have established this entitlement through various written and oral promises made to them over the years by City employees. Defendants counter that such promises are not contractual and that the legislative intent of the citizens of Portland is to preclude them from being contractual, under any breach of contract theory including estoppel, by § 8-104 of the Charter, which requires all contracts to be 1) approved by ordinance, 2) in writing, and 3) signed by someone with authority.

To the same end, Plaintiffs interpret the FPDR Plan as meaning that only

a full-duty return to work may be required and, absent that, FPDR disability benefits must be paid until retirement or death. They arrive at this conclusion through a misinterpretation of the Portland City Charter's use of the term "required duties" in § 5-306(a). However, the Court of Appeals was correct in essentially adopting the City's definition of "required duties," which is "the duties that could have been required of that member at the time he or she was actively employed." *Miller v. City of Portland*, 255 Or App 771, 787, 298 P3d 640 (2013). Although the text of § 5-306(a) is not ambiguous, the context provided by the Plan is that the disability benefit is one that, except in most extreme cases for which there are no duties at all that an injured FPDR Member would be able to perform, reveals a disability plan designed to replace wages initially and then help return an injured Member to a productive, self-sufficient status within four years or so. *See, e.g,,* Charter, § 5-306(d). That the Plan was not administered in this fashion throughout all its history does not amount to a breach against these Plaintiffs.

There in no genuine issue of material fact that the duties assigned to Plaintiffs were among those that the Fire Bureau could have required of them while they were actively employed, even though, as Plaintiffs seem to argue, the Fire Bureau was requiring them to do less for their full salary. Plaintiffs' position contradicts that of their own union in *Portland Firefighters' Assoc v.*

City of Portland, 245 Or App 255, 257, 263 P3d 1040 (2011).

Finally, the Court of Appeals was correct in affirming the circuit court on the issue of whether Plaintiff Olson failed to exhaust his administrative remedies. Whether any notice was required under the Charter is debatable, but the notice provided to Olson was sufficient under FPDR's administrative rules, and his misreading of it, *arguendo*, does not excuse him of consulting the Charter and administrative rules and requesting a hearing if he wished to contest the termination of his disability benefits. The Court should revisit the question of whether the other Plaintiffs, albeit who did not receive notice, also should be barred from litigating issues on which they also did not follow the administrative procedure to contest their eligibility for continued disability benefits. The City's position is the circuit court was correct in finding that all of them, who admit they are contesting provisions of the FPDR Plan, should have requested administrative hearings in order to do so.

ARGUMENT

I. There Is No Legislative Intent for the City of Portland to Be Bound by Written and Oral Representations and Assurances Made by City Employees.

Plaintiffs claim there are promises that alter or define the FPDR Plan that were made by City personnel and which created contractual employment terms that bind the City. Apparently, Plaintiffs assert such promises could alter the

delegation to the Fund Administrator to "determine the existence of a disability," which requires the determination of 1) what a Member's required duties are, 2) whether the Member is able to perform them, 3) if so, whether the disability arises out of and in the course of the Member's employment, and 4) how long the disability exists. *Id.*; § 5-306(d). Plaintiffs also frame the case as testing whether a return-to-work program adopted by the City "breaches the terms of disabled firefighters' employment." (Pet Br at 21). Another way to say this might be whether written and oral representations and assurances may alter the terms of the City Charter, passed by the citizens of Portland, such that the term "required duties" in § 5-306(a) of the Charter prevents the City from ordering an FPDR Member back to work to a light duty job within the Member's restrictions. It is apparently the Plaintiffs contention that the Charter should be construed in favor of them being paid not to work when there is one single pre-injury task they cannot perform. The City's position is that performing available light-duty assignments, even if Plaintiffs do not find socially or vocationally valuable, is what the Charter requires.

Although written and oral representations and assurances can become part of an employment-related contract with a government entity, whether such

representations are contractually binding, for a statutory contract[1] depends on legislative intent. *Watkins v. Josephine County*, 243 Or App 52, 61, 259 P3d 79 (2011). The City Council legislates through ordinances. Therefore, the Court of Appeals is correct in concluding legislative intent was not present for the City to be bound by such representations, because there is no ordinance supporting the proposition that the types of assurances and conduct of City employees alleged by Plaintiffs would become part of the "express legislative contract" between Plaintiffs and the City. *Miller v. City of Portland*, 255 Or App 771, 788, 298 P3d 640 (2013). Contrary to Plaintiffs' position, the issue here is not whether the City as the employer may command its employees to do something but whether it may be *bound* by new contract terms without complying with § 8-104's requirements. Plaintiffs' distinction between "internal employment contracts" and external contracts entered into by the City has no basis. § 8-104 says "any contract," which can only reasonably be read to mean "all contracts." The Court of Appeals' analysis here is consistent with its decision in *Simons v. City of Portland*, 132 Or App 74, 887 P2d 824 (1994). In *Simons*, the court rejected the City's contention that § 8-104 of the Charter prohibited an argument based on estoppel, because the plaintiffs there did not

[1] The City assumes *arguendo* that the FPDR Plan is a contract, without conceding it.

allege a contract existed between the City and themselves. *Id.* at 83. Because Plaintiffs are alleging a contract, the opposite conclusion should be true here. In addition, § 8-104 of the City Charter expresses a "clear intent" that the City not be bound unless its requirements are met; as discussed below, they are not met in this case. *Id.* at 788-89. If the citizens of Portland had wanted to exclude some categories of contracts from this Charter provision, they could easily have done so. But the words enacted to law are "any contract," without respect to subject matter or whether they are, to borrow Plaintiffs' description, "internal" or "external" contracts. The necessary conclusion is the City's legislative intent is not to be bound to written and oral representations and assurances as terms of employment.

II. Promissory Estoppel Does Not Apply to the Circumstances Alleged by Plaintiffs.

Although promissory estoppel can be applied to a governmental entity based on a promise of its agent, it is only appropriate in limited circumstances. *Wiggins v. Barrett & Associates, Inc.*, 295 Or 679, 683, 669 P2d 1132 (1983); *Neiss v. Ehlers*, 135 Or App 218, 227-28, 899 Pd 700 (1995) (recognizing promissory estoppel as a subset of and a theory of recovery in breach of contract actions). A municipality may be bound if

> (a) the municipality clothes the agent with apparent authority, (b) the promise is one which the municipality could lawfully make

> and perform, (c) there is no statute, charter, ordinance, administrative rule, or public record that puts the agent's act beyond his authority, (d) the person asserting the authority has no reason to know of the want of actual authority, and (e) the municipality has accepted and retained the benefits received by the municipality in return of the promise.

295 Or at 683. Not every one of these factors needs to be satisfied for estoppel to apply, but it debatable whether *even a single one* can be satisfied in this case. *Arken v. City of Portland*, 351 Or 113, 139, 263 P3d 975, *adh'd to on recons*, 351 Or 404, 268 P3d 567 (2011). There was no one with apparent authority making the promises that Plaintiffs allege, and these promises could not lawfully be made or performed, because they violate the Charter and FPDR's administrative rules. *See* Charter, § 5-306(d) (requiring Fund Administrator to determine whether a "Member continues to be eligible" for FPDR disability benefits). Under FPDR administrative rule III.A,

> Disability benefits will be paid to a Member only during such time as the Member is unable to perform his or her required duties in the Bureau of Fire, Rescue and Emergency Services or Bureau of Police. Thus, the disability benefits being paid to a Member shall cease when the Member is capable of performing the duties required of him or her. *A Member who is unable to perform his or her usual job but is able to do other work to which the Member may be assigned in his or her respective Bureau, is ineligible for disability benefits if such a job is available to the Member.* For example, a police officer whose injury prevents him or her from performing police duties in the field will be ineligible for disability benefits if the officer is capable of

> performing more sedentary duties and such sedentary position is available to the officer.

(Emphasis added.) Therefore, a promise never to have to return to work and to have disability benefits continue until retirement or death would be contrary to the mandatory language of this rule and put any promise beyond the agent's authority. *See also Arken*, 351 Or at 140, *citing Committee in Opposition v. Oregon Emergency Correc*, 309 Or 678, 686, 792 P2d 1203 (1990) (stating that the existence of a law in the public domain makes reliance on a contrary representation patently unreasonable, precluding estoppel). Also, the Charter and rules would provide a reason for the person asserting the authority to know of the want of actual authority. Finally, there is no evidence of any benefit that the City could possibly receive by paying people to stay home rather than come back to work in a light-duty job.

If even relevant, Plaintiffs mistake § 3.22.030 of the City Code as creating a Portland Fire and Rescue "Council" – one that somehow would have "power to delegate authority to the Commissioner in Charge of Portland Fire and Rescue. . . ." Pet Br at 37. What this section of the Code is describing is Portland's elected *City Council*, comprised of five commissioners, including the Mayor, one of which would be the Commissioner in Charge of the Fire Bureau. How could the City Code even create a body that has authority over

one of the City Commissioners? There is no Fire Bureau Council. Nor is there any reasonable or sensible way to interpret § 8-104 of the Charter as permitting oral or written promises *in addition to* the terms and conditions of a collective bargaining agreement (or any contract for that matter) as being binding on the City by virtue of a delegation of collective bargaining responsibilities to the Human Resources Director through the City Code. It is not unlikely that precisely the type of claims that Plaintiffs make is what § 8-104 was designed to avoid.

Plaintiffs' contention that the Charter may not "meddle in the terms of employment" because of the City Code is not well taken. The Charter trumps the City Code if what Plaintiffs are alleging is there are conflicting terms between the two. *See, e.g., Harder v. City of Springfield*, 192 Or 676, 683, 236 P2d 432 (1951) ("A city charter constitutes the organic law of a municipality. . . . The municipality's action must find its support therein and everything to the contrary must give way to the mandate of that body of the city's organic law...."). Even though the Human Resources Director may "enter into agreements with labor organizations, recognizing their exclusive representation of specified classifications within City service" (City Code, § 3.15.050(C)), § 8-104 requires the terms that Plaintiffs claim to have relied on be in a written contract authorized by an ordinance of the City Council in order to bind the

City. The promises and course of conduct alleged by Plaintiffs are not to be found in any written contract satisfying § 8-104. Summary judgment was appropriate as to all Plaintiffs' breach of contract claims arising out of estoppel.

III. "Required Duties" Means Any Conduct or Tasks that the Fire Bureau Could Have Required Plaintiffs to Do at the Time They Were Still Actively Employed.

A. The text of § 5-306(a) supports the City's interpretation.

Plaintiffs appear to assert that § 5-306(a) of the FPDR Plan has been breached by offering to pay them their full salaries to return to available light duty assignments within their medical restrictions. Somewhat confusingly, during oral argument on the City's motion for summary judgment, Plaintiffs argued that "the guts of the case are violations of . . . [Charter §] 5-306, eliminating benefits when [Plaintiffs] were entitled to at least a minimum benefit." Tr at 46-47. During oral argument before the Court of Appeals, on Plaintiffs' rebuttal, they were asked which term of the employment contract had been breached in this case. Plaintiffs identified this term as § 5-306(a) of the Charter, which is the eligibility section of the FPDR Plan concerning service-connected disability benefits:

> 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. The Fund Administrator shall determine the existence of a disability and whether it arises out of and in the course of such employment. . . .

A Member is a person who is "permanently appointed as [a] sworn employee[] in the Bureau of Police or Fire" (with some very limited exceptions for PERS members and the bureau chiefs). Charter, § 5-301(a). An Active Member is defined as "a person who is actively employed as a Member in the Bureau of Fire or Police and does not include a Member receiving disability or retirement benefits under this Chapter." Charter, § 5-306(b).

This case raises the question of whether these duties are limited to those that each Plaintiff was actually performing at the time he became disabled under this provision. Said another way, this case asks whether an FPDR Member eligible for disability benefits is guaranteed to continue receiving these benefits until retirement or death if he is unable to perform every single duty he was required to do at the moment when he became eligible for disability benefits. Plaintiffs' allegations of breach of the express terms of a contract depend on an interpretation of § 5-306(a) of the Charter that is at odds with the ordinary and plain meaning of the phrase "required duties" and not supported by the context of the FPDR Plan. The ordinary and unambiguous meaning of "required duties" is the range of tasks that the employer could assign its sworn Fire Bureau employees to perform, and this is supported by

context.

The FPDR Plan allows a permanently appointed, sworn employee of the Fire Bureau to receive a disability benefit payment when unable to perform the duties required by the employer because of a work-related injury or illness. When the benefit payment may begin does not appear to ever have been at issue in this case, but the parties do disagree as to when eligibility for the benefit may end. The Court of Appeals correctly concluded that the answer to this question hinges on the meaning of the term "required duties" as it is used in § 5-306(a) and that this term refers not only to the tasks each of these Plaintiffs was performing before each one's disabling, work-related injury or illness but also to "any conduct or tasks that the [Plaintiffs] *could have been* required to do by the employer at the time they were still actively employed." 255 Or App at 787 (emphasis in original).

In analyzing the text of § 5-306(a), Plaintiffs interpret the Charter at odds with the words actually enacted into law. First, they seek an interpretation of § 5-306(a) that requires adding words. Under § 5-306(a):

> 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.

For Plaintiffs' interpretation of this provision as referring to "job at injury" or an equivalent concept to be plausible, § 5-306(a) would need additional words. Here are some examples:

> An Active Member shall be eligible for the service-connected disability benefit when unable to perform **all** the **Active** 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.
>
> An Active Member shall be eligible for the service-connected disability benefit when unable to perform **all** the Member's required duties **at injury** 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.
>
> An Active Member shall be eligible for the service-connected disability benefit when unable to perform **all** the Member's required duties **of the Fire Fighter job**[2] 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) (added words in boldface).

There are probably additional ways to modify § 5-306(a) to arrive at Plaintiffs' desired meaning, but adding to (or subtracting from) a statute is obviously an impermissible method of statutory construction. ORS 174.010 ("In the construction of a statute, the office of a judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what

has been omitted or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."); *see also Crooked River Ranch Water Company v. PUC*, 224 Or App 485, 490, 198 P3d 967 (2008) ("Of course, we cannot supply language that the legislature has omitted.)

The Court of Appeals did not err in concluding that "under its plain meaning, the term 'required duties' refers to conduct or tasks the employer could compel or command an employee to perform." 255 Or App at 787. With no support, Plaintiffs claim that "required duties" is a term of art. (Pet Br at 32.) However, their justification for this is simply that "job at injury" and "own occupation" are terms of art. Even if true, it is irrelevant. For a phrase to be a term of art, it – not other phrases made up of entirely different words – must necessarily refer only to or be coextensive with a particular meaning. *See, e.g.*, *Engweiler v. Cook*, 340 Or 373, 379, 133 P3d 904 (2006) (holding "term of incarceration" is not a term of art).

Appropriately in this case, the Court of Appeals determined the ordinary meaning of "required duties," which is not a term of art, by examining the dictionary definitions of "required" and "duties." *Id.* at 786-87; *see also Department of Rev v. Faris*, 345 Or 97, 101, 190 P3d 364 (2008) (holding that

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[2] *See Petitioner's Brief* at 18.

ordinary meaning is presumed to be what is reflected in a dictionary); *State v. Murray*, 340 Or 599, 604, 136 P3d 10 (2006) ("Absent a special definition, we ordinarily would resort to dictionary definitions, assuming that the legislature meant to use a word of common usage in its ordinary sense."). In addition, the phrase in question is "required duties," not just duties, and therefore it must have been intended that "required" have some meaning. *State v. Stamper*, 197 Or App 413, 417, 106 P3d 172, *rev den*, 39 Or 230 (2005) ("As a general rule, we assume that the legislature did not intend any portion of its enactments to be meaningless surplasage."). It can only be the employer who is requiring the employee to perform the duties.

B. Context Supports the City's Interpretation of "Required Duties."

In addition, the Court of Appeals analyzed "required duties" with reference to the appropriate context.[3] Chapter Five of the Charter allows benefits to be paid only when a work-induced inability to perform a "Member's required duties" exists. Charter, § 5-306(a). Of course, immediately upon sustaining a disabling service-connected injury or illness, these duties are those that the Member had been required to do by the employer; there is nothing else this could mean. This concept is not as static as Plaintiffs portray it.

[3]The City does not contend that the Court of Appeals' reliance on *Watkins v. Josephine County*, 243 Or App 52, 57-59, 259 P3d 79 (2011) is incorrect, but

§ 5-306(a) allows disability benefits to be paid "when" a Member is unable to perform the "Member's required duties" because of a work-induced injury or illness. The only one of these words defined in the Charter is "Member," which means someone "permanently appointed as [a] sworn employee[] in the Bureau of Police or Fire" with very limited exceptions. Charter, § 5-301(a). It is also helpful to consider what "Active Member" means: "An Active Member is a person who is actively employed as a Member in the Bureau of Fire or Police and *does not include* a Member receiving disability or retirement benefits under [the FPDR Plan]." Charter, § 5-301(b) (emphasis added). Because "Active Member" and "Member" mean different things the phrase "Member's required duties" in § 5-306(a) cannot mean "Active Member's required duties."

The other thing that "Member's required duties" cannot mean is what the Member was required to do while remaining on disability benefits. There is no reasonable or sensible way to arrive at this interpretation. It cannot be what the Member is required to do with respect to turning in disability claim forms to FPDR, *e.g.*, under FPDR's administrative rules, because such an inability would preclude the Member from receiving benefits in the first place. And the FPDR Plan does not contemplate a Member receiving the benefit available

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does not concede that the FPDR Plan is a contract.

under § 5-306(a) while performing duties for the Fire Bureau.[4]

Appreciating what "Member's required duties" does not mean, the next question is what it does mean. The only reasonable answer is not only those duties that the Member had at the time he was hurt or became ill, but also those that the employer assigns to the Member. This is consistent with the Court of Appeals' opinion. *See, e.g.,* 255 Or App 786 ("Along with the reference to an active member, the use of the term 'the Member's required duties' references the member's required duties prior to that person receiving disability benefits."). The references to both "Active Member" and "Member" in § 5-306(a) can be read harmoniously as envisioning a bridge from dependency on disability benefits to self-sufficiency, regardless of the qualitative judgment a Member might make about the duties being assigned. Plaintiffs' argument that "required duties" means only First Class Fire Fighter duties particular to each Plaintiff is not supported by the context of § 5-306(a) itself.

As a practical matter, the Court of Appeals' interpretation does allow the employer to choose what Plaintiffs' required duties are, and if Plaintiffs disagree, any or all of them could have invoked their civil service rights or grieved under the collective bargaining agreement, or quit. Plaintiffs'

[4] This is not to say that some other form of financial incentive that would reduce disability costs could not be made to a disabled Member. *See, e.g.,* § 5-202(d).

representation at oral argument before the Court of Appeals to the effect that the return-to-work orders were not grievable *because they were not grieved* by the Portland Firefighters Association is clearly not accurate.

The context identified by Plaintiffs is similarly unavailing. They contend that "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." (Pet Br at 27) (emphasis in original). But § 5-306(g) allows reimbursement for reasonable medical and hospital expenses "arising from" a service-connected or occupational injury or illness, with no requirement that "eligibility" continue for the benefit to remain payable. (Ex 2, p 5, MSJ). That is, the Charter does not prohibit a Fire Bureau employee who returns to work after having been receiving disability benefits from continuing to have qualifying medical and hospital expenses reimbursed from the FPDR Fund. Further, contrary to Plaintiffs' argument, the Charter allows some discretion to "pay other financial incentives that demonstrate a reduction in disability benefits."[5] (§ 5-202(d)). That is to say a disabled Member could still receive vocational rehabilitation and subsidized salary in instances where eligibility for disability benefits ends. A simple example would be a Fire

[5] Whether and when the expenses of a vocational rehabilitation plan are payable (under § 5-202(d)) has no bearing on this case.

Bureau employee being cleared for a range of duties, *e.g.,* full duty, by his attending physician, but with a strong warning that it is medically probable that he would reinjure himself after a short period of time performing these duties. Under such circumstances, even though discontinuation of the benefit would be appropriate in the short term, it is plausible that some form of "other financial incentives" could sufficiently demonstrate a reduction in disability benefits in the long run to be payable under the Plan.

Along the same lines, the Substantial Gainful Activity provision in § 5-306(d)(2) indeed might be helpful context, but it supports a different conclusion than the one Plaintiffs rely on it for:

> The Member shall continue to be paid the benefit . . . 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.

Charter, § 5-306(d)(2).

This provision reveals an intent to reduce benefits after a relatively short time period. It is essentially a way to reduce the expense to the Fund when a

Member is capable of pursuing other employment and either is not doing so or is not successful getting hired elsewhere. It is context showing the Plan's goals include returning Members to self-sufficiency:

> Restoring injured workers physically and economically to a self-sufficient status in an expeditious manner and to the greatest extent practicable is an important aspect of any disability system.

Charter, § 5-202(h). Consistent with this, § 5-306(d) as a whole suggests that context for "required duties" is a disability plan that aims to get injured workers back to being productive members of society as quickly as is reasonable, rather than incentivizing them to not work and collect a disability payment until retirement or death.

As Plaintiffs appear to construe the Charter, if there is one "required duty" of their chosen occupation that they can no longer physically perform, these benefits would be payable. This is an inconsistent interpretation in light of the context of the FPDR Plan limiting the amount and duration of benefits paid. It is also difficult to reconcile the purpose that this interpretation serves, if as Plaintiffs claim, the FPDR Plan strives to award the heroism that no one disputes firefighting demands. That is, how is heroism rewarded by enabling dependency, keeping in mind that the light-duty assignments do not pay any

less than do the full-duty assignments and, in fact, pay more than the disability rate (50%) for Members who have been determined capable of Substantial Gainful *Activity*.

Along the same lines, the 25% minimum benefit under 5-306(d)(4) for "other employment" is an *incentive* to go find other employment – with a different employer – if the Fire Bureau does not require the Member to do anything. This minimum really has nothing to do with the meaning of "required duties" at least until the Fire Bureau calls the Member back to work. At that point, like many other employment relationships, the Member could make a choice whether to keep working the "other employment" and forego the 25% benefit or forego the other employment and return to the Fire Bureau.

Also, FPDR's administrative rules, promulgated about fifteen years prior to the Portland voter's passage of § 5-306(a), could be considered context supporting the City's interpretation of the words in dispute. *Fisher Broadcasting, Inc v. Dept of Rev*, 321 Or 341, 351, 898 P2d 1333 (1995). These rules, explicitly allow the light-duty job offers at issue in this case:

> Disability benefits will be paid to a Member only during such time as the Member is unable to perform his or her required duties in the Bureau of Fire, Rescue and Emergency Services or Bureau of Police. Thus, the disability benefits being paid to a Member shall cease when the Member is capable of performing the duties required of him or her. *A*

> *Member who is unable to perform his or her usual job but is able to do other work to which the Member may be assigned in his or her respective Bureau, is ineligible for disability benefits if such a job is available to the Member.* For example, a police officer whose injury prevents him or her from performing police duties in the field will be ineligible for disability benefits if the officer is capable of performing more sedentary duties and such sedentary position is available to the officer.

(MSJ Ex 5 at page 9) (emphasis added). In addition, these rules shed additional light on what "Member" means:

> The term "Member" means those sworn permanent employees of the bureau of Fire, Rescue and Emergency Services having the job classifications of Fire Fighter, Fire Fighter Specialist, Fire Fighter Communications, Fire Lieutenant, Fire Training Officer, Staff Fire Lieutenant, Fire Captain, Fire Training Captain, Fire Battalion, Chief, Deputy Fire Chief, Division Fire Chief, City Fire Chief, Fire Inspector I, Fire Inspector II, Fire Inspector I Specialist, Staff Fire Captain, Fire Lieutenant Communications, Harbor Pilot, Assistant Fire Marshal, Assistant Public Education Officer and EMS Coordinator . . . .

(MSJ Ex 5 at page 29). This rule provides context for the range of duties that the Fire Bureau may require its sworn employees to do. And the uncontested evidence is all Plaintiffs were assigned a range of duties within the same classification as the classification they were in when they became unable to perform their required duties. (Pet Br at 41-42, *quoting* Klum Aff). Plaintiffs create a distinction that does not exist in the context of the FPDR Plan

regarding "jobs" versus "classifications." But what this rule says is "job classification[]," suggesting there is no real distinction between these terms for the purpose of analyzing this Plan.

Plaintiffs are correct in noting their civil service protection, which would have been precisely how they could have contested whether the low hazard fire inspector assignments were *properly* within the firefighter classification. However, there is no evidence that they did contest this. *See* Charter, § 4-402(1) (empowering Civil Service Board to "[r]eview classification actions alleged by employees in the classified service to have been made without rational basis, contrary to law or rule or taken for political reason(s)"). Plaintiffs' lawsuit reads much like a misdirected civil service complaint.

It is not clear why Plaintiffs both argue that the FPDR Plan is not a workers' compensation plan and then analogize the Plan to the workers' compensation system. *See, e.g.,* Pet Br at 32. But the claim that the FPDR Plan is more similar to a insurance disability plan than to the state's workers' compensation system is not evidenced by the words of Chapter Five itself and appears to be specious. As it pertains to disability benefits, there is no mention of disability insurance in the FPDR Plan. By contrast, the FPDR Plan acknowledges that the City could be required by law to extend all or substantially all, of its police officers and fighters "[t]he workers'

compensation benefits required by statutes of the State of Oregon." § 5-403(b)(3). As discussed in Respondent's Brief below, if the comparison truly matters, this Plan is a workers' compensation plan. Resp Br at 12-14. Perhaps Plaintiffs seek to avoid the equitable conclusion that like the rest of the nonvolunteer firefighters in the State of Oregon, Plaintiffs should be subject to a light-duty requirement.

The context of the FPDR Plan as a whole weighs heavily in favor of the City's interpretation of "required duties," which the Court of Appeals appropriately adopted. There was no breach of contract in providing work assignments that Plaintiffs could do.

IV. There is No Genuine Issue of Material Fact Regarding Whether Plaintiffs' Required Duties in the Return to Work Program Fall Within the Fire Fighter Classification.

It is well established that the low-hazard fire inspector duties fall within the range of duties performed by Fire Bureau employees in the fire fighter classification. In *Portland Firefighters' Assoc v. City of Portland,* the Court of Appeals addressed the City's appeal of an Employment Relations Board (ERB) order concerning the return-to-work program at issue in this case. *Portland Firefighters Assoc v. City of Portland*, 245 Or App 255, 263 P3d 1040 (2011). The court repeats ERB's finding regarding the low hazard fire inspection duties at issue in the present case, which was "undisputed" by the PFFA: "The other

positions were new positions, although, in some cases, the duties assigned to the positions had been performed previously by fire fighters (low-hazard inspection duties). . . ." 245 Or App at 257. Also undisputed by the union: "The Fire Bureau eventually assigned the rank of fire fighter to the low-hazard fire inspector position . . . ." *Id.* at 259-60. Plaintiffs, in privity with the PFFA, should be precluded by collateral estoppel from relitigating the same issue that their union conceded and which the Court of Appeals adopted. *See, e.g., Shuler v. Distribution Trucking Co.,* 164 Or App 615, 627, 994 P2d 167 (1999) (applying issue preclusion against union member whose union had grieved his termination).

If the inquiry must go further, there is no evidence in the record contradicting Chief Klum's affidavit, which states that the low hazard fire inspector position "had job duties in the firefighter classification." Klum Aff ¶¶ 4, 5. That Plaintiffs' light-duty "low hazard fire inspector" assignments were within the fire fighter classification is another way of saying these are tasks that the Fire Bureau could have ordered Plaintiffs to perform at the time they became disabled. And Klum's affidavit should be interpreted in the context of the PFFA and City's agreement concerning this range of duties in *Portland Firefighters' Assoc v. City of Portland, supra.* There is no genuine issue of material fact as to whether the Fire Bureau could have ordered the

Plaintiffs to perform the low hazard fire inspector tasks before they became disabled. Accordingly, none of the "specifications" of breach in the Second Amended Complaint, or other things Plaintiffs have identified as breaches of contract along the way, as discussed at pages 14 to 20 of Respondent's Brief before the Court of Appeals, could constitute a breach of any contract between the City and Plaintiffs. Summary judgment is appropriate.

V. Petitioner Olson Failed to Exhaust His Administrative Remedies.

Petitioner Olson failed to exhaust his administrative remedies by not requesting a hearing within 74 days of the date of the notice that his disability benefits were being terminated. The parties do not dispute that Olson provided a written response "for the Director's consideration," but that is not the same thing as requesting a hearing, which the Charter, administrative rules, and the notice in question all told Olson he could do.[6] Namely, the FPDR Administrator would have the ability under FPDR's administrative rules to "reconsider" her decision, but the request for hearing would be referred to a hearings officer with

> the power to administer oaths, subpoena and examine witnesses, and require the production and examination of papers and documents. The decision of the hearings officer shall be in writing and shall be

[6] The notice to Olson also cited the appropriate administrative rule to him, which, had he referred to it, provides a reference to the applicable Charter provision.

> issued within 30 days after the close of the evidentiary record. . . .
>
> The decision of the hearings officer shall be final unless an appeal to the independent panel is filed by the Member, Surviving Spouse, Dependant Minor Child or the Fund Administrator with the Fund within 30 days of the hearings officer's decision. The decision of the independent panel shall be de novo on the record and shall be the final decision of the Fund and may be appealed to the circuit court as provided by state law.

Charter, § 5-202(h)(3), (4).

As noted by the Court of Appeals, "neither the notice nor the charter or administrative rule at issue here suggested that Olson *could not* seek a hearing in the absence of a response from the director to Olson's written response to the decision." 255 Or App at 785 (emphasis in original). Had Olson asked for a hearing, *e.g.,* in the alternative to requesting "reconsideration," it could not be said that he failed to exhaust his administrative remedies (assuming he subsequently timely appealed the hearings officer's decision to the independent panel as set forth in § 5-202(h)(4), above). The inclusion in the notice to Olson of a hypothetical scenario does not change what the Charter or the administrative rules require nor does it permit Olson to ignore the Charter or the administrative rules.

The administrative rule under which the notice was sent requires all

appeal rights being set forth in the same termination notice:

> [I]f the Director obtains evidence that . . . the Member is no longer disabled or eligible. . . the Director shall notify the Member of the Director's decision to suspend, reduce, or terminate benefits. A summary of the evidence and the decision shall be provided to the Member. . . . The Member will have 14 days to provide a written response for the Director's consideration. The Member shall also be notified of the rights under Charter § s 5-202(h) and the right to appeal for a Hearing as provided for in § IV.[B.(1) of the administrative rules]. Any such written request must be filed with the Director within 60 days after the date of the decision being appealed.

FPDR Admin Rule III(G)(7)(2007). The requirement of providing contemporaneous notice of the right to correspond with the Director and to request a hearing before a hearings officer (not the Director) can only reasonably read in context to say that another notice should not be expected, even given Olson's request for "reconsideration." That is, why would the rules require including the hearing rights in the termination notice if it were "conditional," as is being alleged? Tellingly, there is no Charter provision or rule that provides for another termination notice to issue in response to information being provided by the Member within 14 days. That the notice uses the word "then" and provides a hypothetical scenario is a flimsy reason for overlooking the fact that neither the Charter or administrative rules describe an

"interim" step before a hearing may be requested. It is logical in a vacuum, as the *amicus* brief points out, that the inverse of a hypothetical situation might be assumed to have the correspondingly inverse result, but it is not reasonable to leap to this conclusion when it has no support in the administrative rule under which the notice was issued or under the Charter under which this administrative rule was adopted.

Notably absent from the rule quoted above is language indicating that the appeal rights under the Charter or § IV.B.(1) are conditioned on or affected by the 14-day opportunity to provide a written response for the Director to consider. Implicit in both Olson's and the *amicus's* arguments is the assumption that every Member who is willing to provide a written response to the FPDR Director under this rule would also be willing to go through an evidentiary hearing.[7] The "object" of the rule that the *amicus* seeks 14-day regarding the reconsideration opportunity is the ability to provide additional information that might affect the Director's decision-making without going through an evidentiary hearing before a hearings officer under § 5-202(h)(3). *See Amicus Br* at 8.

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[7] This is the same principle guiding Olson's agreement with FPDR to agree to the substantial gainful activity reduction, without contesting whether he qualified under § 5-306(d)(2) and (3). He did not negotiate anything that the Charter did not allow FPDR to do, nor does this have any bearing whatsoever on his inclusion in the return to work program. Its irrelevancy is probably why

The question posed by the *amicus* brief concerning what the process was that Olson began with his "request for reconsideration" is answered simply by referring to the Charter and administrative rules. The amicus brief is also framed in terms of a scenario where an exhaustion requirement is "not provided by statute." (Amicus Br p 4), which is inapposite. See Charter §§ 5-202(h), 5-306(h). The Charter has the right to request a hearing. § 5-202. Olson began what, under the administrative rules, could have been a parallel process of asking the Director to consider a written response and requesting a hearing, which would be referred to a hearings officer (administrative law judge). Because there is no penalty for FPDR rescinding a denial of benefits, it is conceivable that if a Member provided information for the Director's consideration that would change which way the evidence tipped with regard to the decision that the Director was making, then the Director could opt to change the benefits determination and avoid the expense of the evidentiary hearing. There is no genuine issue of material fact that Olson failed to exhaust his administrative remedies. *Miller v. Schrunk*, 232 Or 383, 375 P2d 823 (1962). Summary judgment is appropriate.

VI. <u>All Plaintiffs Failed to Exhaust Their Administrative Remedies, Which is Their Exclusive Remedy for the Damages They are Claiming</u>.

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the Court of Appeals did not review it.

In their Second Amended Complaint, as their damages, Plaintiffs describe lost or reduced FPDR benefits, which they first needed to contest through the administrative scheme fixed by the Charter. ER 9, 10. "Judicial review is only available after the procedure for relief within the administrative body has been followed without success." *Miller*, 232 Or at 388. The first step should have been each Petitioner requesting his own administrative hearing. Charter, § 5-202(h)(3). None of them did. Only the Fund Administrator may pay FPDR benefits, and a Member adversely affected by a benefit determination has to follow the administrative procedure spelled out in the Charter and administrative rules in order to challenge a loss or reduction in benefits. "By applying for and accepting service-connected or occupational disability benefits, a Member waives any right to recover any other compensation or damages from the City of Portland as a result of such disability." Charter, § 5-306(h). FPDR benefits are Plaintiffs' exclusive remedy.

Plaintiffs' right to request a hearing is published in the Charter and in FPDR's administrative rules. The Charter simply requires a Member to be adversely affected by a decision of the Fund Administrator for the right to request a hearing to arise. Charter, § 5-202(h)(3). No "final" or particular type of notice is required. The ability to request a hearing is not limited to

appealing the notices described in FPDR's administrative rules. Moreover, the rules build in a "good cause" safeguard[8] to request a hearing after 60 days of the Director's decision to account for situations where the "date of the Director's decision" might not be so apparent. FPDR Admin Rule IV. B.(1) (2007). When an administrative remedy is fixed by statute, individualized notice of the remedy is not necessary. *Compare City of West Covina v. Perkins*, 525 US 234, 241 (1999) (finding no requirement to provide "individualized notice of state-law remedies which . . . are established by published, generally available state statutes and case law") *and v. Parker*, 472 US 115, 141 (1985) (noting that "[t]he entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular policies that affect his destiny") *with Memphis Light, Gas & Water Div v. Craft*, 436 US 1, 14 (1978) (requiring notice of administrative procedures when the administrative procedures at issue were not described in any publicly available document). Although timing and circumstances vary among them, Plaintiffs had the ability to contest the Fund Administrator's decision concerning their benefits. To say there was never a decision to contest seems to ignore the contentions Plaintiffs have made in this

[8] "An untimely request for hearing may be accepted by the Director, upon a finding of good cause for the untimely request." FPDR Admin Rule IV.B.(1).

case.

CONCLUSION

This Court should hold that the City of Portland is not prevented by unauthorized written and oral representations from returning injured employees to light-duty assignments within the range of duties that they are medically cleared to perform. The FPDR Plan should be interpreted to allow this as well, and the Court of Appeals should be affirmed on these issues.

This Court should also hold that Plaintiffs did not exhaust their administrative remedies or at least affirm the Court of Appeals' decision concerning Olson's failure to exhaust.

Dated this 21st day of November, 2013.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 8,690 words. I further 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).

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing RESPONDENT CITY OF PORTLAND'S BRIEF ON THE MERITS with the Appellate Court Administrator, Appellate Records Section, 1163 State Street, Salem, OR 97301, on November 21, 2013.

I further certify that the foregoing RESPONDENT CITY OF PORTLAND'S BRIEF ON THE MERITS will be served electronically on November 21, 2013, on the following individuals:

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