STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: June 26, 2013)

TOWN OF JOHNSTON	:	
	:	
V.	:	**C.A. No. PM-2012-3370**
	:	
INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 1950, AFL-CIO, by and through its President, KEITH A. CALCI	:	

DECISION

CARNES, J. Before this Court are Plaintiff Town of Johnston's (Town) Motion to Vacate and Defendant International Association of Firefighters, Local 1950's (Union) Cross-Motion to Confirm an arbitration award issued on June 21, 2012. The Town has also moved to stay implementation of the award. Jurisdiction is pursuant to G.L. 1956 §§ 28-9-17 and 28-9-18.

I

Facts and Travel

The Town and the Union are parties to a collective bargaining agreement (CBA) that became effective July 1, 2009 and expired June 30, 2012. See CBA, Town's Compl., Ex. 1. The CBA was entered into pursuant to the Firefighter's Arbitration Act, §§ 28-9.1 et seq. (FFAA). Article XX of the CBA addresses the retirement benefits and pension rights of currently employed firefighters who were hired prior to July 1, 1999.[1] See Art. XX, § 1, CBA. Sections 1.1 through 1.12 of Article XX cover, inter alia, service requirements, maximum and minimum benefits, contribution rates, purchases of credit, and calculation of and eligibility for

[1] Firefighters hired after July 1, 1999 are enrolled in the Municipal Employees Retirement System (MERS). See Town's Mem. in Supp. at 2 n.2.

disability benefits. See Art. XX, CBA. The CBA also contains a procedure for resolution of any alleged grievances of either party that may arise "with respect to wages, rates of pay or other terms and conditions of employment arising under [the CBA] or in connection with the interpretation thereof[.]" Art. XIV, CBA. Disputes that are not resolved through the grievance procedure are referred for final and binding arbitration. See Art. XIV, § 1(D), CBA.

On February 17, 2011, the Johnston Town Council adopted Ordinance 2011-1 (Ordinance), amending Article VII, Chapter 47 of the Town of Johnston Code of Ordinances, and establishing the "Town of Johnston Fire Fighter and Police Officer Pension Fund" (Fund). See Ord. §§ 47-38 – 47-61.[2] The Fund was created "for the purpose of providing retirement pension benefits, survivors' benefits and other benefits for firefighters and police officers of the Town, pursuant to the provisions of the applicable state law and the Town Charter." Ord. § 47-38. Membership in the Fund includes all active employees and members of the Town retirement system for the police and fire departments.[3] The Ordinance also establishes a retirement board which is entrusted with the management of the Fund. See Ord. § 47-39. The other various provisions of the Ordinance address, inter alia, financing of the Fund, purchases of credit, and administration of, and eligibility for, retirement benefits. See Ord. §§ 47-43 – 47-55.

The Union filed a grievance on March 10, 2011, alleging that the Town had violated Article XX of the CBA and established past practices of the parties by enacting the Ordinance. (Grievance, Town's Compl., Ex. 2.) The Union requested that the Town immediately rescind the Ordinance and make whole any Union member affected by the Ordinance. Id. After the parties

[2] Unless otherwise indicated, all citations to the Ordinance are to the version appended to the Town's Memorandum in Support of its Motion to Vacate as Exhibit One.

[3] The Ordinance expressly excludes those employees who are members of MERS. See Ord. § 47-38. Thus, the Ordinance does not apply to firefighters hired after July 1, 1999.

failed to resolve the grievance, the Union filed a Demand for Arbitration on April 6, 2011. See Demand for Arbitration, Town's Compl., Ex. 3.

On September 19, 2011, arbitrator Marcia L. Greenbaum (Arbitrator) held a hearing on the grievance.[4] See Decision, Town's Compl., Ex. 5. The issues submitted for her consideration were:

> "1. . . . did the Town of Johnston violate Article XX and/or any other applicable articles of the [CBA] and/or duly established past practices of the parties, when it enacted Town Ordinance 2011-1, dated February 17, 2011?
>
> 2. If so, what shall be the remedy?" Id. at 2.

Both parties submitted post-hearing memoranda, reply memoranda, and thirty-five joint exhibits. See id. at 1. As of the time of the hearing, no Union member had been deprived of his or her bargained-for benefits by enforcement of the Ordinance.[5] See id. at 146.

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[4] Neither party filed a copy of the transcript from the arbitration hearing with this Court. All references to events or testimony taking place at that hearing are based upon the post-hearing memoranda and reply memoranda that the parties submitted to the Arbitrator, copies of which are attached to the Town's Complaint as Exhibit Four.

[5] There is some ambiguity as to whether the Town raised the issue of arbitrability at the hearing. The Town's objection to arbitrability was related to the Union's requested remedies: rescission of the Ordinance and monetary compensation for any firefighter harmed by the Ordinance. See Town's Post-Hearing Mem. at 1 n.1. At the arbitration hearing, the Union admitted that as of that time, none of its members had been deprived of his or her bargained-for retirement or disability benefits as a result of the Ordinance. See id. at 2-3. According to the Town, the Union's other requested remedy, rescission of the Ordinance, was beyond the Arbitrator's authority. See id. at 16. At the hearing, the Town "argued that [it] will raise the issue of arbitrability, if the [Union] does in fact argue that the appropriate remedy by the Arbitrator is rescission of any portions of the Ordinance." See id. at 1 n.1.

The Arbitrator stated in her written decision that the parties had left it to her to decide whether to frame a question concerning arbitrability. See Decision at 1. The Arbitrator framed the question, "Is the grievance arbitrable?" Id. at 2. She concluded that the grievance was arbitrable because it concerned subject matter explicitly covered in the CBA, namely pension rights and benefits. See id. at 129-30. She also concluded that "the fact that there may not be a grievant who has as yet suffered monetary loss, does not make the matter not arbitrable." Id. at 130. It appears that the Town is no longer pressing its objection to arbitrability in support of its Motion to Vacate.

The Arbitrator issued a written decision on June 21, 2012.[6] See id. at 148. In her decision, she interpreted the first issue submitted by the parties as "not whether the Town has legislative or corporate authority to pass an ordinance, but rather whether the text of the statute enacted is contrary to the terms of the [CBA]." Id. at 130. In answer to this question, the Arbitrator concluded that the Town had "violated Article XX, other applicable articles of the [CBA] and duly established past practices of the parties, when it enacted Town Ordinance 2011-1[.]" Id. at 148.

The Court agrees that this matter is arbitrable. In Rhode Island there is a presumption in favor of arbitrability. See, e.g., R.I. Court Reporters Alliance v. State, 591 A.2d 376, 378 (R.I. 1991); Providence Teachers Union Local 958 v. Providence Sch. Comm., 433 A.2d 202, 205 (R.I. 1981); Sch. Comm. of City of Pawtucket v. Pawtucket Teachers Alliance, 120 R.I. 810, 814, 390, A.2d 386, 389 (1978). The "court shall rule in favor of submitting the dispute to arbitration unless the arbitration clause of the collective-bargaining agreement cannot be interpreted to include the asserted dispute and [] all doubts should be resolved in favor of arbitration." See Providence Teachers Local, 433 A.2d at 205. The Court decides questions of arbitrability de novo, without deference to the arbitrator. See id. Here, the parties agreed that "[a]lleged grievances . . . with respect to . . . terms and conditions of employment arising under this Agreement or in connection with the interpretation thereof shall be handled in accordance with the [] grievance procedure" set forth in Article XIV, Section 1 of the CBA. Art. XIV, § 1, CBA. The dispute in this case implicates the pension rights and retirement benefits of current members of the Town of Johnston Fire Department. Article XX, § 1 of the CBA explicitly addresses pension requirements and benefits for current Town of Johnston firefighters. See R.I. Court Reporters Alliance, 591 A.2d at 378 (some specific provision within the agreement detailing the matter should exist to permit submission of the matter to arbitration). Resolving all doubts in favor of arbitrability, the Court finds that the arbitration clause in Article XIV of the CBA can be interpreted to encompass the substance of the dispute in this case. See Providence Teachers Union Local, 433 A.2d at 205. Moreover, the possibility that an arbitrator will issue a remedy that exceeds his or her contractual powers does not render an otherwise arbitrable matter not arbitrable. See Babylon Union Free Sch. Dist. v. Babylon Teachers Ass'n, 587 NE.2d 267, 268 (N.Y. 1991) (refusing to declare a dispute not arbitrable where it was possible for arbitrator to use his powers to craft a remedy narrow enough to stay within the bounds of the contract); Bd. of Educ. of Twp. of Bloomfield v. Bloomfield Educ. Ass'n, 598 A.2d 518, 522 (N.J. Super. 1990) (court will not determine the lawfulness of the remedy sought by the union when deciding arbitrability but rather will make the determination if the arbitrator rules in union's favor).

[6] The Arbitrator's written decision spans 148 pages. Most of the decision, however, repeats the parties' arguments and reproduces the provisions of the CBA and the Ordinance.

On the issue of remedy, the Arbitrator acknowledged that an award of damages would be inappropriate since no Union member had yet to suffer financial or monetary harm. See id. at 147-48. She also disavowed any authority to order the Town to amend or rescind the Ordinance. Id. Instead, the Arbitrator fashioned the following remedy:

> "3. Until the Town Council voluntarily amends Ordinance 2011-1 to be in conformance with the [CBA] or until the parties renegotiate the [CBA], the remedy shall be an order for the Town to cease and desist from enforcing any portion of [Ordinance 2011-1] that conflicts with the terms of the Agreement, as determined in the above Opinion[.]
>
> 4. The Arbitrator shall retain jurisdiction over any matter that arises under the [CBA] that was not brought forth in this case, that involves Article XX-Pensions, and calls for a remedy other than those set forth herein. Such retention shall be in effect until a successor contract takes effect." Id.

The Town filed a Petition with this Court to vacate the Arbitrator's award on July 2, 2012, followed by a Motion to Vacate on August 9, 2012. The Union filed a Cross-Petition to Confirm the award on July 19, 2012, followed by a Motion to Confirm on October 2, 2012. The Court held oral arguments on this matter on April 17, 2013. At oral arguments, the parties indicated that the Union and the Town had yet to reach agreement on a successor contract to the CBA. See Tr. 6, Apr. 17, 2013.

II

Standard of Review

Rhode Island has a strong public policy in favor of the finality of arbitration awards. See N. Providence Sch. Comm. v. N. Providence Fed. of Teachers, Local 920, 945 A.2d 339, 344 (R.I. 2008) (citing Pierce v. R.I. Hosp., 875 A.2d 424, 426 (R.I. 2005)). To preserve the integrity and efficacy of arbitration proceedings, this Court performs an extremely limited review of

arbitration awards. Aponik v. Lauricella, 844 A.2d 698, 704 (R.I. 2004). Section 28-9-18 expressly circumscribes the grounds upon which this Court can vacate an arbitration award. See Sec. 28-9-18. That section provides, in pertinent part:

> "In any of the following cases the court must make an order vacating the award, upon the application of any party to the controversy which was arbitrated:
>
> (1) When the award was procured by fraud.
>
> (2) Where the arbitrator exceeded their powers, or so imperfectly executed them, that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (3) If there was no valid submission or contract, and the objection has been raised under the conditions set forth in § 28-9-13." Sec. 28-9-18.

A party claiming that an arbitrator exceeded his or her authority bears the burden of proving that contention. See Coventry Teachers' Alliance v. Coventry Sch. Comm., 417 A.2d 886, 888 (R.I. 1980) (citations omitted). "[E]very reasonable presumption in favor of the award will be made[.]" Id. If the award is not vacated, modified, corrected or unenforceable, the Court must confirm the award upon application of any party to the arbitration. See Sec. 28-9-17.

III

Analysis

In support of its Motion to Vacate, the Town argues that the Arbitrator exceeded her authority by: (1) rendering a decision on the merits of the grievance that is irrational, not passably plausible, and fails to draw its essence form the CBA; and (2) crafting remedies that are irrational and fail to draw their essence from the CBA.

In response, the Union asserts that there is no basis for vacating the award. In support of its Motion to Confirm, the Union argues that the Arbitrator gave a passably plausible

interpretation of the CBA and acted within her contractual authority by issuing an injunction and retaining jurisdiction.

A

Merits

This Court "typically refrains from reviewing the merits of a previously arbitrated dispute." Woonsocket Teachers' Guild, Local 951 v. Woonsocket Sch. Comm., 770 A.2d 834, 836-37 (R.I. 2001) (citing State v. R.I. Alliance of Soc. Serv. Employees, 747 A.2d 465, 468 (R.I. 2000)). A motion to vacate does not permit "judicial re-examination of the relevant contractual provisions." Jacinto v. Egan, 120 R.I. 907, 912, 391 A.2d 1173, 1175 (1978) (citations omitted). It is the arbitrator's judgment for which the parties have bargained and by which they have agreed to abide. Id. at 911, 391 A.2d at 1175. Accordingly, an arbitrator's misconstruction of the contract is not grounds for vacating an award. Id. Pursuant to § 28-9-18, however, this Court must overturn an arbitrator's decision on the merits when the arbitrator has exceeded his or her authority by giving an interpretation that fails to draw its essence from the agreement, is not passably plausible, reaches an irrational result, or manifestly disregards a provision of the agreement. See, e.g., City of Newport v. Lama, 797 A.2d 470, 472 (R.I. 2002); Woonsocket Teachers' Guild, 770 A.2d at 837; Dep't of Children, Youth and Families v. R.I. Council 94, 713 A.2d 1250, 1253 (R.I. 1988).

An arbitrator may interpret external sources of law that are necessary to the resolution of a grievance brought pursuant to a collective bargaining agreement. See R.I. Bhd. of Corr. Officers v. State, 643 A.2d 817, 821 (R.I. 1994); see also Vose v. R.I. Bhd. of Corr. Officers, 587 A.2d 913, 914 (R.I. 1991) (arbitrator may decide questions of law). A mere error of law is not, however, grounds for vacating an arbitrator's award. See N. Providence Sch. Comm., 945 A.2d

at 344; Warwick Teachers' Union Local 915 v. Sch. Comm. of City of Warwick, 121 R.I. 806, 807, 402 A.2d 1190, 1191 (1979); see also Jacinto, 120 R.I. at 911, 391 A.2d at 1175 (arbitrator's misconstruction of the law is not grounds for vacating the award.) Nonetheless, the Court cannot uphold an award where the arbitrator manifestly disregards the law. N. Providence Sch. Comm., 945 A.2d at 344. An arbitrator manifestly disregards the law if he or she "understands and correctly articulates the law, but then proceeds to disregard it." City of Cranston v. R.I. Laborers' Dist. Council, 960 A.2d 529, 533 (R.I. 2008).

In her decision, the Arbitrator examined each provision of the Ordinance which the Union alleged was in conflict with the CBA and/or the past practices of the parties. The Arbitrator compared the relevant language from the CBA with the language of the Ordinance to determine if the latter might deprive a Union member of the rights or benefits to which he or she is contractually entitled. She ultimately concluded that "a number of the sections of the Ordinance are not in keeping with and are contrary to the [CBA]." (Decision 146.)

The Town argues that the Arbitrator's conclusion that the Ordinance eliminates or impairs firefighters' bargained-for retirement benefits is irrational and fails to draw its essence from the CBA. According to the Town, the Ordinance addresses issues not covered by Article XX of the CBA and as such, does not eliminate any of the benefits provided for therein.[7] The

[7] The Town asserts that the Arbitrator concluded that the enactment of the Ordinance, in its entirety, violated the CBA. A careful review of the Arbitrator's opinion, however, belies this assertion. As mentioned previously, the Arbitrator interpreted the issue submitted as asking her to determine "whether the text of the statute enacted is contrary to the terms of the Collective Bargaining Agreement[.]" (Decision 130.) An arbitrator's interpretation of the issues submitted is entitled to great deference. See Matteson v. Ryder System Inc., 99 F.3d 108, 113 (3rd Cir. 1996) (citing Mobil Oil Corp. v. Indep. Oil Workers Union, 679 F.2d 299, 302 (3rd Cir. 1982)). In addition, the Arbitrator expressly stated that the enactment of the Ordinance was a valid exercise of the Town Council's legislative authority under the Town Charter. See Decision at 133. She also emphasized that whether enactment of the Ordinance violated the Town's duty to bargain under the FFAA was a matter for the State Labor Relations Board to decide. See id. at

Town generally asserts that the Ordinance establishes a fund that previously did not exist, creates a retirement board which is entrusted with the management of the fund, and governs the administration of benefits. The Town has not, however, offered an interpretation of the specific provisions of the Ordinance at issue in this dispute.

In response, the Union asserts that multiple provisions of the Ordinance contain language that conflicts with Article XX in such a way as to impair or eliminate the retirement benefits to which its members are contractually entitled. The Union therefore concludes that the Arbitrator's award is passably plausible and draws its essence from the CBA.

1

Establishment of the Retirement Board

Section 47-39 of the Ordinance establishes a retirement board that "shall have exclusive original jurisdiction over all matters relating to or affecting the Fund[,] including all claims for benefits and refunds, and its actions, decisions or determinations in any matter shall be reviewable according to law."[8] Ord. § 47-39(g). In addition, § 47-50(b) of the Ordinance specifically assigns to the retirement board the responsibility of determining whether an employee who is out on disability is fit to return to work.[9] See Ord. § 47-50(b). The Arbitrator

131, 134, 146. The Arbitrator then proceeded to examine each provision of the Ordinance that the Town alleged was in conflict with the CBA.

[8] On December 12, 2011—after the arbitration hearing but before the Arbitrator issued her written decision—the Town Council adopted Ordinance § 47-61, which provides that "[a]ppeals of decisions of the [Retirement] Board shall be taken in accordance with the Administrative Procedures Act of the Rhode Island General Laws[.]" See Town of Johnston Code of Ordinances, available at http://www.ecode360.com/JO1987.

[9] Pursuant to § 45-21-8(d) of the General Laws, the State Retirement Board shall determine the eligibility for ordinary disability benefits for firefighters employed by the Town of Johnston from the date of that section's enactment. See Sec. 45-21-8(d). Neither party has addressed the Ordinance's impact, if any, on § 45-21-8(d).

concluded that Ordinance § 47-39(g)[10] could possibly prevent a firefighter from utilizing the agreed-upon grievance procedure contained in Article XIV of the CBA. (Decision 135.) She reasoned that "if the firefighter disagrees with the determination of the . . . Board, he or she has a contractual right to grieve the matter[.]" Id. at 141.

Not every decision of the retirement board will necessarily involve a matter covered by the terms of the CBA. If, however, a firefighter were not allowed to grieve a decision of the retirement board impacting his or her contractual rights, that firefighter would be denied his or her right to dispute resolution as provided for in Article XIV of the CBA. Thus, the Court finds that the Arbitrator's determination is passably plausible, not irrational, and draws its essence from the CBA.[11]

2

Firefighter and Police Officer Fund

The Arbitrator concluded that the Ordinance violated the CBA by combining the pension funds for the Town's police and fire departments. See Decision at 135. She reasoned that "[t]here is no evidence that the parties ever negotiated and agreed to combine the pension funds of the two distinct bargaining units." Id.

Although Article XX of the CBA spells out the pension benefits to which Union members are entitled, there is no language in the CBA that limits the Town's authority to

[10] In her decision, the Arbitrator refers to Ordinance § 47-38. This appears to be a mistake.

[11] At oral argument, the Town suggested that the retirement board's authority to determine eligibility for disability benefits only applies to retirees, and not to current members of the collective bargaining unit. See Tr. 8, Apr. 17, 2013. It is unclear if the Town ever presented this interpretation to the Arbitrator. On a motion to vacate, however, this Court does "not sit to hear claims of . . . legal error by an arbitrator[.]" See R.I. Council 94 v. State, 714 A.2d 584, 588 (R.I. 1998) (quoting United Paperworks Int'l Union v. Misco, Inc., 484 U.S. 29, 37-38 (1987)). Thus, to the extent that the Town is arguing that the Arbitrator misconstrued the Ordinance, this is not a basis upon which the Court may vacate the award.

manage and invest pension monies. Pursuant to the Town Charter, the Town Council has the authority to enact and amend ordinances "which have to do with the preservation of the public peace . . . welfare, and comfort of the inhabitants and the protection of . . . property, and other municipal functions." Town Charter, Art. III, § 3-8. Such language authorizes the Town Council to enact and amend ordinances concerning the investment of pension funds. See Ret. Bd. of Employees' Ret. Sys. of City of Providence v. City Council of City of Providence, 660 A.2d 721, 729 (R.I. 1995) (similar language in city charter gave city council authority to enact ordinance granting and transferring authority to invest pension funds).[12] Since there is nothing in the CBA that limits the Town's authority to make investment decisions, the Town's choice to combine the funds for the police and fire departments cannot violate that agreement.[13] See City of Newport, 797 A.2d at 473 (where city did not agree otherwise in agreement, it retained its inherent authority to amend disability ordinance).

Furthermore, several sections of the Ordinance clearly provide for the pension benefits of firefighters and police officers to be determined according to the terms of their respective bargaining agreements. See Ord. §§ 47-43(a), 47-44(b), 47-45(a)(1)(a), 47-48(a), 47-54, 47-55, 47-56 (incorporating the terms of the "recognized collective bargaining agreement negotiated between the Town and the . . . the fire department, or the police department depending on the member's respective employment with the Town"). Thus, the Ordinance in no way attempts to enroll police officers in Union firefighters' Pension Plan A. Accordingly, the Arbitrator's conclusion that the CBA prohibits the Town from combining the pension funds of police officers

[12] The relevant language from the city charter at issue in Retirement Board of Providence gave the city council the power to enact such ordinances as the council considered necessary to ensure the welfare and good order of the city. See 660 A.2d at 729.

[13] The Court also notes that the CBA specifically provides that the Town "retains all rights and responsibilities granted by law to manage, control, and direct its Fire Department, except as specifically abridged herein by the provisions of this Agreement." Art. II, § 1, CBA.

and firefighters fails to draw its essence from the CBA. See Woonsocket Teachers' Guild, 770 A.2d at 839 (arbitrator's award cannot be upheld when she "based her decision on a limitation contained nowhere in the CBA") (emphasis in original).

3

Membership

Section 47-42 of the Ordinance governs membership in the Fund. Subsection (c) of that provision includes as members any interim employees who are temporarily employed as firefighters in a time of war. See Ord. § 47-42(c). In her written decision, the Arbitrator specifically referenced Ordinance § 47-42(c) as one of the provisions that conflicted with the terms of the CBA. She reasoned that "the contract . . . defines who is eligible to participate in the pension plan. To the extent that the definition of the plan participants in the Ordinance is different from what is in the contract, that language violates the Agreement." (Decision 137-38).

The Arbitrator appears to have concluded that Ordinance § 47-42(c) seeks to enroll temporary firefighters in Union members' Pension Plan A, as set forth in § 1.1 of Article XX of the CBA. In this Court's view, the plain language of Ordinance § 47-42(c) clearly concerns who may become a member of the Town's newly established Fund, and not who is a participant in the Union's Pension Plan A. Nonetheless, this Court's disagreement with the Arbitrator's application or construction of the law is not grounds for vacating an award. See Jacinto, 120 R.I. at 911, 391 A.2d at 1175. The Arbitrator is correct that the CBA defines who may participate in the Union's pension plan. See Art. XX, § 1.1, CBA ("All employees presently in the service of the Johnston Fire Department hired prior to July 1, 1999 shall be in Pension Plan (A).") Thus, the Arbitrator's conclusion draws its essence from the CBA.

4

Contributions and Funding

The Ordinance provides that "each member [of the Fund] shall contribute, as his/her share of the cost of the pension benefits and benefits prescribed in this article, the amount provided for in the recognized collective bargaining agreement negotiated between the Town and the exclusive bargaining agent for the fire department[.]" Ord. § 47-43(a). The Ordinance further states that the Town will make contributions concurrently with the members' contributions "in the amount set forth in the recognized collective bargaining agreement[.]" Ord. § 47-43(b).

Notwithstanding the language of the Ordinance specifically incorporating the terms of the CBA, the Arbitrator concluded that the cost arrangement set forth in the Ordinance is inconsistent with the CBA. See Decision at 138. She specifically pointed to § 47-44(a) and (d) of the Ordinance. See id. Section 47-44(a) declares that "[t]he Town plans and intends to maintain this Fund on a sound actuarial basis . . . so that, insofar as practicable, two-thirds of the cost of this Fund will be paid by the Town and one-third of such cost will be paid by the contributions from members[.]" Ord. § 47-44(a). To that end, § 47-44(d) calls for an actuarial study of the Fund at least once every two years "to determine what revision, if any, is required in the contribution rates established hereunder to maintain the Fund on a sound actuarial basis with the Town contributing two-thirds and the members one-third[.]" Ord. § 47-44(d). The Arbitrator concluded that section 47-44(a) "does not conform with [sic] how the cost is divided in the [CBA], and thus violates the contract." (Decision 138.) According to the Arbitrator, the Ordinance "is not in keeping with the contract language in a number of sections, which call for a contribution of 8%[.]" Id.

The CBA sets the contribution rate for firefighters in Pension Plan A at eight percent of weekly salary, longevity pay and holiday pay. See Art. XX, § 1.10, CBA. Firefighters are also required to contribute eight percent of their overtime pay. See id. If the Town, acting pursuant to Ordinance § 47-44(d), were to require Union members to contribute at a rate other than the eight percent specified in the CBA, such an action would be a deviation from the terms of § 1.10 of Article XX of the CBA. Thus, the Arbitrator's conclusion that § 47-44 of the Ordinance conflicts with the CBA is passably plausible and draws its essence from the CBA.

5

Purchases of Credit for Service in the Armed Forces

The CBA allows firefighters who have completed more than six months of active duty in the armed forces to purchase up to four years of retirement credits. See Art. XX § 1.9, CBA. For every period of more than six months that a firefighter spent on active duty, he or she may purchase one year of retirement credit. See id. The cost for such purchases is ten percent of the firefighter's first year of weekly salary. See id. Firefighters may make the purchase at any time prior to retirement. Id.

Section 47-49 of the Ordinance, entitled "Buyback of military service," also allows members of the fire and police departments to purchase retirement credits for time served in the armed forces. See Ord. § 47-49. That section provides that "[a]t the time of his/her retirement, any member of the fire department . . . who is eligible to retire . . . will be eligible to buy back up to the number of years additional service as provided for in the recognized collective bargaining agreement." Ord. § 47-49(a). A firefighter must pay "an additional percentage of his/her highest year's pay, equal to the annual contribution rate prevailing at the time of the member's retirement plus interest, for each year of service purchased." Ord. § 47-49(a). The last sentence

of Ordinance § 47-49(a) declares that "[i]n no event will a member who has completed fewer than twenty (20) years of service be eligible to buy back service." Ord. § 47-49(a).

The Arbitrator concluded that Ordinance § 47-49(a) deprives firefighters of their right to purchase credit for military service on the terms set forth in the CBA. (Decision 139-40.) She reasoned that the cost specified in the Ordinance could potentially be greater than the cost prescribed in the CBA. See id. The Arbitrator also concluded that the Ordinance would effectively deprive firefighters with fewer than twenty years of credited service of their contractual right to purchase credits for military service. See id. Such an interpretation is rational, passably plausible, and draws its essence from the CBA.

6

Disability Benefits

The Arbitrator determined that certain provisions of the Ordinance could deprive firefighters of their contractual entitlement to disability benefits. (Decision 140.) According to the Arbitrator, the Ordinance places multiple restrictions on the receipt of disability benefits that are inconsistent with the CBA.

i

Calculation of Benefits

The Arbitrator concluded that the Ordinance deprives firefighters of bargained-for benefits by calculating disability benefits according to a formula that differs from the one provided in the CBA. See Decision at 137. Sections 1.2 and 1.3 of Article XX of the CBA state that disability benefits shall be calculated as a percentage of "the final average of the . . . three (3) highest consecutive years of compensation based on weekly salary, longevity pay, holiday pay, severance pay[,] . . . unused personal days, pro-rated holiday pay and unused sick leave"

and "seventy-five (75%) percent of the three (3) highest consecutive years of overtime pay."[14] Art. XX, §§ 1.2 and 1.3, CBA. Sections 47-52 and 47-53 of the Ordinance govern service-related and non-service related disabilities, respectively. Those provisions call for an employee's disability benefit to be calculated as a percentage of the employee's "rate of salary in effect at the date of disability." Ord. §§ 47-52, 47-53(a). Sections 47-52 and 47-53 of the Ordinance define "salary" as the employee's "base pay as of the date of his/her disability." Ord. §§ 47-52, 47-53(a). The Arbitrator determined that "the Ordinance . . . calls for disability benefit[s] to be based on salary alone. . . . This is not the same as the contractual definition, and therefore a violation of the contract, which does not make any reference to 'base pay.'" (Decision 137.)

If "base pay," as used in §§ 47-52 and 47-53 of the Ordinance, does not include the various kinds of compensation that are included in the formula set out in §§ 1.2 and 1.3 of Article XX of the CBA, then the terms of the Ordinance contravene the terms of the CBA. Thus, the Court finds passably plausible the Arbitrator's conclusion that the Ordinance may deprive a firefighter of the disability compensation guaranteed to him or her in the CBA.[15]

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[14] The CBA applies this formula to both service and non-service related disability pensions, with the insignificant difference that the provision pertaining to non-service related disabilities refers to "personal time" rather than "personal days." See Art. XX, §§ 1.2 and 1.3, CBA.

[15] In her discussion of the calculation of retirement benefits, the Arbitrator also specifically referenced "Article XX, Section 1, Plan A, Subsection 1" of the CBA, which calculates a firefighter's service retirement benefit as a percentage of the average of "the employee's three (3) highest consecutive years of compensation based on weekly salary, longevity pay, holiday pay, severance pay . . . pro-rated holiday pay and unused sick leave . . . and seventy-five (75%) percent of the three (3) highest consecutive years of overtime pay.'" Art. XX, § 1.1, CBA. The Arbitrator concluded that "there are a number of components, which have been negotiated to be a part of the pension benefit." (Decision 136.) She pointed out that the Ordinance contains "a number of sections" that use "base pay" to calculate benefits. Id.

Although there are several instances in the Ordinance that provide for a benefit to be calculated as a percentage of an employee's "base pay," the calculation of a service retirement benefit is not one of those instances. Section 47-48(a) of the Ordinance provides that upon eligibility for a service retirement, a "retiree shall be entitled to an annual pension equal to the amount provided for in the recognized collective bargaining agreement negotiated between the

In addition to listing the components of salary to be included in the calculation of disability benefits, the CBA also sets the rate of those benefits. The rate of compensation for firefighters who qualify for a non-service related disability pension is specifically determined by reference to a table in § 1.3 of Article XX of the CBA. See Art. XX, § 1.3, CBA. According to that table, the rate of compensation for non-service related disabilities ranges from twenty-five percent to seventy-five percent, depending on how many years of credited service a firefighter has accrued. See Art. XX, § 1.3, CBA. Section 47-53 of the Ordinance states that employees who qualify for a non-service related disability pension "shall receive an annual sum of 50% of his/her highest salary[.]" Ord. § 47-53(a). The Arbitrator concluded that even if Ordinance § 47-53 may result in a greater benefit rate for some firefighters, it deviates from the agreed-upon terms for disability benefits embodied in the CBA.[16] (Decision 143.) Such a conclusion draws its essence from the CBA and is passably plausible.

ii

Amounts Offset Against Disability Payments

The Arbitrator concluded that the Ordinance deprives firefighters of bargained-for benefits by requiring disability benefits to be reduced by the amount of any payments received

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Town and the exclusive bargaining agent for the fire department[.]" Ord. § 47-48(a). Thus, the Ordinance explicitly defers to the terms of the CBA to determine the amount of a firefighter's service retirement benefit. Accordingly, to the extent that the Arbitrator suggests that the Ordinance deprives firefighters of the service retirement benefit guaranteed in § 1.1 of Article XX of the CBA, the Arbitrator's determination is irrational and not passably plausible.

[16] For firefighters with fewer than twenty years of credited service, the contractual rate of compensation for non-service related disabilities ranges from twenty-five percent to forty seven and one-half percent. See Art. XX, § 1.3, CBA. Under the terms of the Ordinance, all non-service related disability pensions are compensated at a rate of fifty percent, irrespective of years of service. See Ord. § 47-53(a). Thus, firefighters with fewer than twenty years of credited service would be compensated at a higher rate under the Ordinance than under the CBA.

from insurance or any earned income. (Decision 140-42.) Section 47-51[17] of the Ordinance states that any amount received from worker's compensation or any amount received as damages from an action for personal injuries will be offset against an employee's disability benefit. See Ord. § 47-51. That section provides, in its entirety:

> "Any amounts paid or payable under the provisions of any workers' compensation law, or as the result of any action for damages for personal injuries against a third party on account of death or disability of a Town employee occurring while in the performance of duty, shall be offset against and payable in lieu of any benefits payable out of funds provided by the Town for death or disability payments to the employee." Ord. § 47-51.

There is no mention of insurance in Ordinance § 47-51. Nor does this Court's review of the Town's Code of Ordinances reveal any reference to insurance within the whole of Chapter 47. Thus, the Arbitrator's conclusion that the Ordinance conflicts with the CBA by requiring "deductions or offsets for . . . supplemental disability insurance" is not passably plausible. (Decision 141.)

The Ordinance does, however, mention an offset for earned income. Section 47-50(d) of the Ordinance provides that if "a member is engaged . . . in any gainful occupation, payment of the disability pension shall be discontinued or reduced to an amount which, when added to the member's income from such gainful occupation, shall not exceed 50% of the rate of his/her salary[.]" Ord. § 47-50(d). The Arbitrator concluded that "this deduction called for in the Ordinance imposes a limitation on an employee's contractual pension entitlement" because the parties "did not include any offset for outside employment" in the CBA. (Decision 140-41.)

[17] In her decision, the Arbitrator states that "[s]ections 41-51 and 41-51a deal with deductions or offsets for worker's compensation and supplemental disability insurance, including T[emporary] D[isability] I[nsurance]." (Decision 141.) There is no § 41-51 in the Town of Johnston's Code of Ordinances. The Court assumes the Arbitrator is referring to Ordinance § 47-51. There is, however, no subsection (a) in Ordinance § 47-51.

The Arbitrator overlooked or ignored relevant language in the CBA. Section 1.3 of Article XX of the CBA addresses non-service related disabilities and states that firefighters in Pension Plan A "who become disabled because of a non-occupational injury or illness . . . shall be placed on a[] non-occupational disability pension subject to the requirements of R.I.G.L. §45-21.2-7." Art. XX, § 1.3, CBA. Section 45-21.2-7 of the General Laws states that an employee "who has five (5) years or more of total service and who is not otherwise eligible for retirement may, upon the member's application . . . be retired on an ordinary disability retirement allowance, subject to the restrictions set forth in §§ 45-21-19, 45-21-20, 45-21-23, and 45-21-24." Sec. 45-21.2-7. In turn, § 45-21-24 mandates that if the recipient of a disability pension is "engaged in a gainful occupation . . . the [state] retirement board shall adjust, and from time to time readjust, the amount of his or her disability allowance[.]" Sec. 45-21-24. Thus, the CBA appears to incorporate § 45-21-24's offset for any compensation received from earned income. Nonetheless, it is not this Court's prerogative to interpret what statutory requirements the CBA incorporates. See Coventry Teachers' Alliance, 417 A.2d at 889 ("Statutory authority to vacate an award . . . does not permit a judicial resolution of the relevant contractual provisions."). Rather, this Court is constrained to find that the Arbitrator exceeded her authority by giving an interpretation that disregards a provision of the CBA. See State v. Nat'l Ass'n of Gov't Employees Local 79, 544 A.2d 117, 120 (R.I. 1988) (vacating award where arbitrator manifestly disregarded collective bargaining agreement); accord Nat'l Gypsum Co. v. Oil, Chem. and Atomic Workers Int'l Union, 147 F.3d 399, 403 (5th Cir. 1998) (arbitrator exceeds his or her authority by ignoring a contractual provision permitting the employer's action) (citation omitted).

The section of the CBA addressing service-related disabilities also contains a statutory reference. See Art. XX, § 1.2, CBA. Specifically, § 1.2 of Article XX of the CBA states that any firefighter who is disabled due to a service-related injury or illness is entitled to a disability pension "subject to the requirements of R.I.G.L. § 45-21.2-10." See id. Neither § 45-21.2-10 nor any of the sections cross-referenced therein mention an off-set for earned income. See Secs. 45-21.2-10, 45-21-22, 45-21-31. There is also no mention of a deduction for earned income within the four corners of the CBA. Thus, with regards to service-related disabilities, the Arbitrator's conclusion that Ordinance § 47-50(d) impairs firefighters' bargained-for disability benefits is passably plausible.

iii

Maximum Age for Non-Service Related Disability Pensions

Pursuant to § 47-53(c) of the Ordinance, a firefighter who had twenty years of credited service at the time he or she began receiving non-service related disability benefits, will receive a service-retirement pension, in lieu of a disability pension, when he or she reaches the age of fifty-five.[18] Ord. § 47-53(a). The Arbitrator noted that the relevant language in the CBA specifies that the payment of non-service related disability benefits is not subject to any age

[18] Section 47-53(c) of the Ordinance, in its entirety, reads:

> "The disability pension shall be payable during continuing disability of the member, provided that if the credited service of the member at the commencement of the disability was twenty (20) years or more, the member shall receive upon attainment of age 55, in lieu of the nonservice-connected disability pension, a service retirement pension as prescribed in this article." Ord. § 47-53(c).

requirements.[19] (Decision 144.) She therefore concluded that § 47-53(a) of the Ordinance "imposes an age requirement of 55 years, which is contrary to the contract." Id. at 143. The Arbitrator's interpretation draws its essence from the CBA and is passably plausible.

iv

Annual Requirements

The Arbitrator found that § 47-50 of the Ordinance contravenes the CBA by requiring employees who are receiving disability benefits to submit to an annual medical examination and to return to active service if deemed fit. (Decision 140.) As discussed previously, with regard to non-service disabilities, the CBA appears to incorporate the statutory requirements set-forth in § 45-21.2-7 of the General Laws. See Art. XX, § 1.3, CBA. Section 45-21.2-7 cross-references § 45-21-23, which requires any disability annuitant under the minimum age for a service retirement to undergo a medical examination at least once each year. See Sec. 45-21-23(a). That section further provides for a return to work, "[i]f the examination indicates that the annuitant is able to engage in a gainful occupation." Sec. 45-21-23(b). The Arbitrator again ignored the CBA's reference to the requirements contained in § 45-21.2-7. On a motion to vacate, it is not for this Court to determine the extent to which the CBA incorporates § 45-21-23's annual requirements for recipients of non-service related disability pensions. See Coventry Teachers' Alliance, 417 A.2d at 889. Rather, the Court finds that the Arbitrator exceeded her authority by disregarding a provision of the CBA. See Nat'l Ass'n of Gov't Employees, 544 A.2d at 120.

[19] The Arbitrator quoted § 1.3 of Article XX of the CBA as stating that "[t]here shall be no age or years of service requirements to receive this pension benefit." (Decision 144.) The relevant language from § 1.3 actually reads, "[t]he pension payment benefits listed in [this section] are not subject to any age requirement at the time of the employee's retirement." See Art. XX, § 1.3, CBA.

In contrast to recipients of non-service related disability pensions, recipients of service-related disability pensions do not appear to be under a contractual or statutory obligation to submit to an annual examination.[20] See Art. XX, § 1.2, CBA; § 45-21.2-10. Thus, the Arbitrator's conclusion that § 47-50(c) and (d) of the Ordinance impair a firefighter's contractual entitlement to service-related disability benefits is passably plausible and draws its essence from the CBA.

v

Total and Partial Disabilities

Section 47-52 of the Ordinance divides service-related disabilities into two categories: total disabilities and partial permanent disabilities. See Ord. § 47-52. Subsection (a) of that provision states that an employee who is determined to be "totally disabled" will receive a disability pension of sixty-six and two-thirds percent of his or her salary as of the date of the disability. Ord. § 47-52(a). Subsection (b), in contrast, provides that an employee who is "partially permanently disabled" will receive a benefit not to exceed fifty percent of his or her salary as of the date of the disability. Ord. § 47-52(b). The Ordinance defines a "partially permanently disabled" employee as "an individual who is disabled to perform his/her duties as a fire fighter . . . based upon his/her employment with the Town, but who has not been determined to be totally disabled." Ord. § 47-52(b).

The Arbitrator concluded that § 47-52(b) of the Ordinance conflicts with the CBA by creating a new category of "partial" disabilities which are compensated at a reduced benefit rate. (Decision 142.) Section 1.2 of Article XX of the CBA governs service-related disabilities.

[20] As mentioned previously, the CBA appears to incorporate § 45-21.2-10's requirements for service-related disabilities. See Art. XX, § 1.2, CBA. Neither § 45-21.2-10 nor the provisions cross-referenced therein require the recipient of a service-related disability pension to submit to an annual exam. See Secs. 45-21.2-10, 45-21-22, 45-21-31.

Under § 1.2, all employees who are "unable to perform all of the duties of a Johnston Firefighter" are entitled to a disability pension. See Art. XX, § 1.2, CBA. Thus, the CBA classifies firefighters as either able or not able to fulfill their duties. A firefighter who is unable to fulfill his or her duties is entitled to disability compensation at a rate of sixty-six and two-thirds percent, irrespective of the degree or severity of the firefighter's incapacity. Accordingly, the Arbitrator's conclusion draws its essence from the CBA and is passably plausible.

vi

Commencement of Benefits for Non-Service Related Disabilities

Section 47-53 of the Ordinance provides that "[a] non-service-connected disability shall begin to accrue upon the expiration of 90 days following commencement of disability." Ord. § 47-53(f). The Arbitrator concluded that § 47-53 of the Ordinance conflicts with the CBA because the latter "has no such commencement period, and under it firefighters collect their pension the first day of the following month after disability. This has been the past practice as well, and the Ordinance is contrary to the contract and the practice, and therefore in violation of both." (Decision 144.) The Arbitrator did not cite to any specific section of the CBA that states that non-service pension benefits accrue the first day of the month following disability. This Court's review of the CBA has likewise failed to locate any such provision. Thus, the Arbitrator's assumption about the accrual of disability benefits appears to be based entirely on the past practice of the parties.

The Town argues that the Arbitrator's consideration of past practices was in violation of § 28-9-27 of the General Laws. Under § 28-9-27(a), an arbitrator may only consider the past practices of the parties if (1) the agreement does not contain an express provision that is the subject of the grievance; (2) the agreement contains a provision that is unclear and ambiguous; or

(3) the agreement contains a provision that preserves existing past practices for the duration of the agreement.[21] See Sec. 28-9-27(a). Section 28-9-27(b) further requires a party claiming the existence of a past practice to prove by clear and convincing evidence that the alleged practice (1) is unequivocal; (2) has been clearly enunciated and acted upon; (3) is readily ascertainable; (4) has been in existence for a substantial period of time; (5) has been accepted by representative of the parties who possess the actual authority to accept the practice. See Sec. 28-9-7(b).

Although the Arbitrator reproduced the relevant text from § 28-9-27 earlier in her decision, she made no attempt to fulfill § 28-9-27's requirements when she concluded that Ordinance § 47-53(f) conflicts with the past practices of the parties.[22] (Decision 117, 144.) Indeed, the Arbitrator gives no indication of what evidence clearly and convincingly establishes that disability benefits accrue on the first day of the month following disability.[23] Cf. N. Providence Sch. Comm., 945 A.2d at 345 (upholding award where "arbitrator appropriately looked at each of the five factors set forth in § 28-9-27(b)" and "concluded that the union had established, by clear and convincing evidence, the existence of a long-standing practice, which had been accepted . . . for more than thirty years"). Accordingly, the Arbitrator exceeded her authority by improperly relying on the past practices of the parties in violation of § 28-9-27. See Town of Smithfield v. Local 2050, 707 A.2d 260, 264 (R.I. 1998) (arbitrator exceeded his

[21] The CBA does not contain a past practices clause.

[22] The Town explicitly called the Arbitrator's attention to § 28-9-27's requirements in its Post-Hearing Memorandum. See Town's Post-Hearing Mem. at 11-15.

[23] The Arbitrator appears to have drawn her conclusion about the accrual of disability benefits based on the Union's Post-Hearing Memorandum. The Union states therein, "[s]ection 47-53, sub (f) . . . introduces a ninety (90) day period for the commencement of a nonservice-connected disability. The contract has no such commencement period when fire fighters are pensioned off. Members begin to collect their pension the first day of the following month." (Union's Post-Hearing Mem. 57.) The Arbitrator similarly writes, "[s]ection 47-53(f) introduces a ninety (90) day waiting period for the commencement of a non-service-connected disability. The contract has no such commencement period, and under it firefighters collect their pension the first day of the following month after disability." (Decision 144.)

authority by improperly considering past practice); see also Cumberland Teachers Assoc., 45 A.3d at 1192 (arbitrator manifestly disregards the law when he or she correctly articulates the law, but then proceeds to disregard it).

vii

Examination by Three Physicians

Section 47-50(a) of the Ordinance calls for disability determinations to be made by majority decision of three physicians: one physician selected by the Town, one physician who also serves as an officer of the retirement board, and a third physician chosen by the first two.[24] See Ord. 2011-1, § 47-50(a). In her decision, the Arbitrator characterized § 47-50 as requiring a majority of three physicians, "all of whom are essentially appointed by the Town, without the employee having a voice in the selection process." (Decision 140.) She concluded that "[t]he Ordinance violates both the Agreement and the past practice of the parties, who have used a third neutral physician to resolve medical issues in the past."[25] Id. at 141. The Arbitrator did not, however, point to any particular provision in the CBA that addresses who shall make disability determinations. Thus, the Arbitrator's conclusion fails to draw its essence from the CBA. See Woonsocket Teachers' Guild, 770 A.2d at 839 (award invalid when based on a limitation contained nowhere in the contract). Any reliance on past practices was again in violation of,

[24] As mentioned previously, § 45-21-8(d) of the General Laws provides for certain disability determinations to be made by the State Retirement Board. See supra, n.10.

[25] The Arbitrator appears to have relied, almost verbatim, on the Union's argument that Ordinance § 47-50 unfairly skews disability decisions in the Town's favor because "[a]ll three (3) physicians are essentially Town physicians. The member seems to have no medical voice in this process." (Union's Post-Hearing Mem. 53.) According to the Union, the CBA "and the practices between the parties provide a process of one (1) Town physician and one (1) member physician. If the aforesaid physicians disagree, the two (2) physicians shall agree on a third physician[.]" Id. The Union also fails to identify a specific provision in the CBA that allows employees to select one of the three physicians.

and with manifest disregard for, the requirements in § 28-9-27.[26] See Town of Smithfield, 707 A.2d at 264.

viii

One Year Limitation on Disability Benefits

The Arbitrator concluded that the Ordinance contravenes the CBA by imposing a one year limit on receipt of disability benefits. (Decision 137.) She reasoned that section "47-42(b) [of] the Ordinance talks about one year of long-term disability. The Agreement, on the other hand, imposes no limitation. For the town to impose a limitation where none was negotiated violates the Agreement as it diminishes a firefighters' [sic] contractual entitlement to a benefit[.]" Id.

Section 47-42 of the Ordinance, entitled "Membership," governs membership in the Fund. Subsection (b) of that provision excludes from membership those employees who have been on a leave of absence for more than one year, as of the effective date of the Ordinance. Section 47-42(b), in its entirety, reads:

> "Any person who is temporarily absent on the effective date due to sickness or disability and any person on approved leave of absence on such date for any cause shall be considered as being an employee on the effective date, provided that such leave shall not have extended for more than one (1) year continuously, except in the case of military service." Ord. § 47-42(b).

[26] On March 12, 2012—subsequent to the arbitration hearing but prior to the Arbitrator's issuing her written decision—the Johnston Town Council amended Ordinance § 47-50(a). See Ord. 2012-3, § 47-50(a), available at http://www.ecode360.com/JO1987. Section 47-50(a) now calls for disability determinations to "be made upon the basis of reports on examinations made by three physicians consisting of a physician selected by the Town, a physician selected by the member, and a third physician to be selected by the other two physicians." Ord. § 47-50(a) (emphasis added). Thus, the amendment to Ordinance § 47-50(a) possibly renders this issue moot. Neither party has addressed the amendment.

The plain language of § 47-42(b) governs who will become a member of the Fund. It makes no mention of how long an employee may continue to receive disability benefits.

The Arbitrator was clearly aware that the Ordinance envisions disability benefits continuing for longer than one year. As discussed previously, she examined the provision of the Ordinance that requires recipients of disability benefits to submit to a medical examination on an annual basis. See Decision at 140. The Arbitrator also reproduced and discussed Ordinance § 47-53 which states that a disability pension will convert to a service pension when a retiree reaches fifty-five years of age. See id. at 143-44. That provision of the Ordinance specifically states that a non-service related disability pension "shall be payable during continuing disability of the member[.]" Ord. § 47-53(c). For the Arbitrator to be fully cognizant of these provisions but nonetheless conclude that disability benefits cannot continue for more than one year is irrational and manifestly disregards other relevant provisions of the Ordinance. See City of Cranston, 960 A.2d at 533 (award cannot be upheld where arbitrator understands and articulates law but then proceeds to disregard it).

7

Mandatory Retirement

The Arbitrator determined that § 47-48(a) of the Ordinance eliminates a firefighter's right to decide when he or she will retire. (Decision 139.) That section states that any firefighter may apply to be placed on the pension list "after serving twenty (20) continuous years, or as otherwise may be provided in the recognized collective bargaining agreement[.]" Ord. § 47-48(a). Section 47-48(a) further provides that "[i]n the event said member does not apply . . . within thirty (30) days of eligibility, the board may, at its discretion, place said member on the pension list." Ord. § 47-48(a). According to the Arbitrator, involuntary retirement "constitutes a

violation of the past practice, and imposes a condition, which does not exist in the plan itself or the contract, which clearly allows for the employee to choose when he or she seeks retirement[.]" (Decision 139.)

The Arbitrator does not identify which provision of the CBA "clearly allows" for a firefighter to choose when he or she will retire. This Court's review of the CBA has failed to disclose any provision that commits the decision of when a firefighter will retire to his or her sole discretion. Thus, the Arbitrator's determination that Ordinance § 47-48(a) conflicts with the CBA fails to draws its essence from that agreement. See Woonsocket Teachers' Guild, 770 A.2d at 839.

As for the Arbitrator's reliance on the parties' past practices, the Arbitrator again made no attempt to fulfill the requirements of § 28-9-27(a) or (b) before considering past-practices or concluding that a past-practice existed. See Decision 139. Thus, the Arbitrator's reliance on past practices is in violation of § 28-9-27.[27]

[27] In her written decision, the Arbitrator also discussed §§ 47-54, 47-55, and 47-56 of the Ordinance. (Decision 144-146.) Those provisions govern service-related death benefits, non-service-related death benefits, and refunds of contributions, respectively. See Ord. §§ 47-54, 47-55 and 47-56. By their own terms, §§ 47-54 through 47-56 do not take effect until after the current CBA expires. Each of the three provisions contains the following introductory language:

> "The terms provided in this section shall not be effective until the current recognized collective bargaining agreement negotiated by the Town and the exclusive bargaining agent for the Fire Department, or Police Department depending on the member's respective employment with the Town, has expired. Until said expiration, the terms provided in said recognized collective bargaining agreement shall apply. After expiration of said recognized collective bargaining agreement, the following terms shall apply:" Ord. §§ 47-54, 47-55, 47-56.

The Arbitrator noted that if the terms of §§ 47-54, 47-55, and 47-56 automatically take effect upon expiration of the CBA, the Town may violate its statutory duty to bargain under the

The Court reiterates that it is irrelevant whether it agrees or disagrees with the Arbitrator's interpretations on the merits of the grievance. Those of the Arbitrator's interpretations that the Court has found to be rational and passably plausible, and that draw their essence from the CBA must stand. Only those that the Court has found fail to draw their essence from the CBA, are irrational, or not passably plausible are invalid.

B

Remedy

In crafting a remedy, the Arbitrator noted that at the time of the hearing, none of the Union's members had suffered harm from enforcement of the Ordinance. (Decision 147.) She therefore concluded that "no compensatory damages are yet due to anyone." Id. She declared, however, that "should the Town implement the Ordinance as written employees may well be harmed, and lose what is otherwise their contractual entitlement." Id. According to the Arbitrator, "the best remedy is for the Town to amend the Ordinance voluntarily so that it is in conformity with the [CBA] and so as to avoid any future conflicts." Id. Nonetheless, she expressly disavowed the authority to order the Town to rescind or amend the Ordinance. Id. Instead, the Arbitrator asserted that she possessed the requisite authority to order the Town to

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FFAA. (Decision 146.) The Arbitrator ultimately stated, however, that "whether the expiration of the [CBA] on June 30, 2012, absent a written extension thereof and absent a successor agreement, gives the Town the right to implement the Ordinance as written or gives rise to a valid alleged unfair labor practice, is a matter for the State Labor Relations Board and/or the courts to decide." Id. Thus, the Court understands the Arbitrator to have taken no position on the contractual propriety of §§ 47-54, 47-55, and 47-56. The Arbitrator's restraint is in keeping with the pronouncement of our Supreme Court that when "a union contends that an expired agreement's terms should apply until a new agreement is reached, the appropriate remedy is to file an unfair labor practice complaint with the [State Labor Relations Board]." Arena v. City of Providence, 919 A.2d 379, 391 (R.I. 2007) (discussing Warwick Sch. Comm. v. Warwick Teachers' Union, Local No. 915, 613 A.2d 1273, 1274 (R.I. 1992)).

cease and desist from enforcing the Ordinance. Id. Accordingly, the Arbitrator fashioned the following remedy:

> "3. Until the Town Council voluntarily amends Ordinance 2011-1 to be in conformance with the 2009-2012 Collective Bargaining Agreement or until the parties renegotiate the Agreement, the remedy shall be an order for the Town to cease and desist from enforcing any portion of the Ordinance that conflicts with the terms of the Agreement, as determined in the above Opinion[.]
>
> 4. The Arbitrator shall retain jurisdiction over any matter that arises under the 2009-2012 Agreement that was not brought forth in this case, that involves Article XX – Pensions, and calls for a remedy other than those set forth herein. Such retention shall be in effect until a successor contract takes effect." Id. at 148.

The Arbitrator did not indicate the source of her alleged authority for either the cease and desist order or the exercise of jurisdiction.

The Town argues that the Arbitrator lacked the authority to address the issue of remedies. According to the Town, the issue of remedy is not "justiciable" because the Union has failed to show that any of its members are entitled to relief. (Town's Mem. in Supp. 19; Tr. 15, Apr. 17, 2013.) The Town further asserts that the remedies actually fashioned by the Arbitrator are irrational and fail to effectuate the intentions of the parties. The Town emphasizes that the enactment of the Ordinance was a valid exercise of its legislative authority under the Town's Charter.

1

Arbitrator's Authority to Fashion a Remedy

As an initial matter, the Town's reference to "justiciability" is inapposite. Justiciability concerns a court's ability to render a decision. See Black's Law Dictionary (9th ed. 2009) (defining "justiciable" as "properly brought before a court" or "capable of being disposed of

judicially") (emphasis added). In absence of an injury in fact, adjudication is not an appropriate avenue for relief. See Vose, 587 A.2d at 915 n.2 ("Litigation will be confined to those appropriate situations where the litigant's concern with the subject matter evidences a real . . . injury in fact.") (internal quotation omitted). This matter, however, is before the Court on motions to vacate and confirm an arbitration award. Thus, the Court concerns itself with the arbitrator's, not a court's, power to grant relief. See id. (where plaintiff requested declaratory judgment as to his statutory authority and union requested suit be stayed pending arbitration, court held suit for declaratory judgment was "justiciable" but denied stay because matter was not an "arbitrable" grievance).

An arbitrator has "inherent power to fashion an appropriate remedy." City of Pawtucket v. Pawtucket Lodge No. 4, 545 A.2d 499, 504 (R.I. 1988). In the absence of any limiting language in the agreement, an arbitrator possesses broad remedial discretion. See Elkouri & Elkouri, How Arbitration Works, § 18.1.B (7th ed. 2012). Our Supreme Court has cautioned, however, that "an arbitrator's broad authority to . . . fashion an appropriate remedy is not unbridled." R.I. Council 94, 714 A.2d at 588. While an arbitrator must be allowed some flexibility "to bring his [or her] informed judgment to bear in order to reach a fair solution of a problem," the arbitrator "does not sit to dispense his [or her] own brand of industrial justice." United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960). Rather, "[t]he arbitrator is confined to interpret the terms of the agreement so as to effectuate the intentions of the parties to the contract." R.I. Council 94, 714 A.2d at 588. Thus, an arbitrator

is prohibited from "reach[ing] beyond the terms of the parties' CBA for the purpose of rendering what he or she believes is a more desirable result."[28] Id. at 594 (citations omitted).

i

Cease and Desist Order

In general, arbitrators may issue cease and desist orders even in the absence of any express authorization in the agreement. See Elkouri & Elkouri, supra, at § 18.2. A court will not, however, enforce a cease and desist order that fails to draw its essence from the agreement. See Int'l Paper Co. v. Paperworkers, 215 F.3d 815, 817-18 (8th Cir. 2000)). In the typical case, an arbitrator orders "a party to 'cease and desist' from continuing to do some specified act that the arbitrator has ruled violative of the collective bargaining agreement." Elkouri & Elkouri, supra, at § 18.2.

[28] The Union suggests that the parties gave the Arbitrator essentially unfettered discretion to fashion a remedy by stipulating that the Arbitrator should determine "what shall the remedy be?" While this ubiquitous language in arbitration agreements recognizes the arbitrator's power to fashion a remedy, it does not authorize the arbitrator "to fashion a remedy that transcends the underlying grievance or that imposes the arbitrator's own brand of workplace justice." Elkouri & Elkouri, supra, at § 18.1.A.

The Union also relies on Prudential Prop. and Cas. Ins. Co. v. Flynn, 687 A.2d 440 (R.I. 1996). Prudential was an uninsured-motorist case wherein the insurance company argued that an arbitration panel's calculation of damages exceeded its authority. Id. at 441. The panel had calculated prejudgment interest based on total damages, without first deducting payments that the injured party had received from a settlement reached prior to arbitration. Id. The insurance company asserted that the panel's calculation violated state law and the insurance policy. See id. at 442. In upholding the panel's award, our Supreme Court reasoned that the "[t]he insurance policy . . . offered no guidance on how to compute prejudgment interest, and none of our prior decisions on prejudgment interest addressed the uninsured-motorist context. The arbitrators thus were free to fashion the remedy they deemed most appropriate in the circumstances." Id. at 443. This Court does not read our Supreme Court's pronouncement in Prudential as saying any more or any less than the previously discussed case law, i.e., that an arbitrator has the power to fashion an appropriate remedy, subject to legal and contractual limits. See, e.g., R.I. Council 94, 714 A.2d at 588, Enterprise Wheel, 363 U.S. at 597. Thus, Prudential does not suggest that an arbitrator's remedial powers are unlimited.

In this case, the Arbitrator found that "should the Town implement the Ordinance as written[,] employees may well be harmed, and lose what is otherwise their contractual entitlement." (Decision 147.) (emphasis added). To preemptively enjoin the Town from enforcing its laws before the Town has rendered an interpretation, or even threatened to render an interpretation thereof that is inconsistent with the CBA, goes well beyond what the parties intended in executing that agreement. See Chicago Typographical Union v. Chicago Sun-Times, Inc., 860 F.2d 1420, 1425-26 (7th Cir. 1988) (refusing to compel arbitration where employer had not "acted, or [] threatened to act, in a manner inconsistent with the union's interpretation of the contract" and union had merely imputed inconsistent interpretation to employer). The CBA clearly calls for any alleged grievances of either party that concern the contractual terms and conditions of employment to be resolved in accordance with the procedures set forth in Article XIV of that agreement. See Art. XIV, § 1, CBA. In executing such an agreement, the parties intended each individual dispute to be resolved and judged on its merits. See Alum. Co. of Am. v. Intern. Union, 630 F.2d 1340, 1344 (9th Cir. 1980) (in providing for arbitration of grievances, parties did not intend for arbitrator to decide that employer's "policy in the abstract violated the agreement[]" simply because it "might result in disciplinary action."); see also Elkouri & Elkouri, supra, at § 7.5.B ("[E]ach case must be judged on its own merits when, and if, it arises.") (internal quotation omitted). To preemptively enjoin enforcement of the Ordinance is essentially to prejudge any disputes that may—or may not—arise. If and when the Town threatens to apply the Ordinance in a manner that aggrieves a firefighter, the firefighter may invoke the grievance procedure in Article XIV of the CBA and if necessary, proceed to arbitration.[29] At that time, if a violation is found,[30] an arbitrator may tailor an appropriate

[29] The Union maintains that a firefighter need not wait until he or she suffers actual harm before

remedy to either prevent the aggrieved employee from being harmed or to make him or her whole. Accordingly, the cease and desist order fails to draws its essence from the CBA[31] and exceeds the Arbitrator's authority.[32]

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filing a grievance. The Court is aware that arbitrators can and do formulate remedies intended to prevent employees from suffering a deprivation. See for example Goodyear Aerospace Co., 86 L.A. 584 (Fullmer, 1985) (deciding if benefits provided for in collective bargaining agreement would cover employee's surgery, even though the operation had yet to take place and no claim for fees had been denied); Long Beach Oil Co., 41 L.A. 583, 584 (Block, 1963) (where company assigned one employee a seniority ranking that union believed was inconsistent with the agreement, other employees did not have to wait to be denied a promotion before filing a grievance to determine proper seniority ranking). Nonetheless, this Court's review of arbitrators' awards demonstrates that there is an important distinction between preventing an employer from inflicting a specific and discernable harm and preventing an employer from implementing a policy whose contractual propriety has only been adjudged in the abstract. See id. (although employee had yet to be denied benefits, his grievance presented "a discrete fact situation" and not an "abstract request[] for [a] ruling on the validity of rules"); compare Pacific Southwest Airlines, 70 L.A. 833, 834 (Jones, 1978) (refusing to set aside newly promulgated attendance policy that employer had yet to apply) with, Altec, 71 L.A. 1064 (Hays, 1978) (employees did not have to wait to be subjected to discipline for rule violation where company's new policy had become effective and employees found it difficult to comply with new rules). As one arbitrator has wisely remarked, whether or not an employer's policy runs afoul of a collective bargaining agreement is properly "determined [when] those charged with its implementation have had a chance to translate its abstract expressions into specific applications. The intent which lies inchoate within the words only emerges when the concepts are drawn down to function, which is when the contractual propriety may most realistically—and fairly—be assessed." Pacific Southwest Airlines, 70 L.A. 833, 834 (Jones, 1978). Thus, while the Court agrees with the Union that a firefighter need not suffer a deprivation before filing a grievance, the cease and desist order nonetheless circumvents the parties' intention in the CBA to have each discrete grievance judged on its merits.

[30] As a general rule, the precedential effect of earlier arbitration awards on later grievances is a matter for subsequent arbitrators to determine. See W.R. Grace and Co. v. Local Union 759, 461 U.S. 757, 765 (1983); see also R.I. Dep't of Corr. v. R.I. Bhd. of Corr. Officers, 64 A.3d 734, 741 n.10 (R.I. 2013) (confirming arbitrator's decision to follow award of previous arbitrator and rejecting party's argument that previous award was unworkable where party did not seek to have previous award vacated or modified).

[31] The Town also argues that the Arbitrator's cease and desist order is irrational. The Town points out the Arbitrator repeatedly disavowed any authority to rule on whether enactment of the Ordinance was in violation of the Town's statutory duty to bargain, indicating that such a question was for the State Labor Relations Board to decide. (Decision 131, 134, 146.) Moreover, the Arbitrator recognized that the Ordinance was a valid exercise of the Town's corporate authority under its charter. See id. at 132-33. Since the Court has already found that

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Arbitrator's Exercise of Jurisdiction

An arbitrator may retain limited remedial jurisdiction to resolve questions that may arise as to the implementation of a remedy. See, e.g., Cuna Mut. Ins. Soc. v. Office and Prof. Employees Int'l Union, Local 39, 443 F.3d 556, 565 (7th Cir. 2006); Sterling China Co. v. Glass, Molders, Pottery, Plastics & Allied Workers Local No. 24, 357 F.3d 546, 554 (6th Cir. 2004); Engis Corp. v. Engis Ltd., 800 F. Supp. 627, 632 (N.D. Ill. 1992). In the instant case, however, the Arbitrator did not retain limited jurisdiction for resolution of remedial issues. Instead, she gave herself jurisdiction "over any matter that arises under the [CBA] that was not brought forth in this case, that involves Article XX . . . and calls for a remedy other than those set forth" in her award. (Decision 148.) (emphasis added). Although the Arbitrator characterized her remedy as "retention" of jurisdiction, the remedy she has fashioned can more aptly be described as an attempt to vest her with jurisdiction over grievances that have yet to arise. By prospectively giving herself jurisdiction over matters not submitted for her decision in this case, the Arbitrator

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the injunction cannot stand because it fails to effectuate the parties' intention as expressed in the CBA, it need not also decide if the Arbitrator's remedy rises to the level of irrationality.

[32] An arbitrator lacks the authority to issue, and a court will not enforce, a remedy that contravenes state law or a well-established public policy. See, e.g., Dep't of Corr. v. R.I. Bhd. of Corr. Officers, 867 A.2d 823, 829 (R.I. 2005); R.I. Laborers' Dist. Council v. State, 592 A.2d 144, 146 (R.I. 1991); W.R. Grace and Co., 461 U.S. at 766. Although this Court finds that the cease and desist order must be vacated because it exceeded the Arbitrator's contractual authority, the Court also questions whether, as a matter of law, a municipality may contractually bestow upon an arbitrator the power to issue such a remedy. See Casa DiMario, Inc. v. Richardson, 763 A.2d 607, 610 (R.I. 2000) (Town council lacked power to bind future council by promising in contract not to enforce ordinances against plaintiff's business) (citing Parent v. Woonsocket Hous. Auth., 87 R.I. 444, 447, 143 A.2d 146, 147 (1958) (In performance of sovereign or governmental functions, legislative body may not take actions that will bind its successors)); see also Chopmist Hill Fire Dep't v. Town of Scituate, 780 F. Supp. 2d 179, 187 (D.R.I. 2011) ("Under well-established Rhode Island law, any contract made by a governmental authority involving the performance of a governmental function that . . . improperly ties the hands of subsequent officials" is void.) (internal quotation omitted).

has issued a remedy concerning matters that are beyond the scope of the grievance. See Elkouri & Elkouri, supra, at § 18.1.A (arbitrator lacks authority "to fashion a remedy that transcends the underlying grievance"). Accordingly, this attempt to exercise jurisdiction over any and all future pension disputes exceeds the Arbitrator's authority and cannot stand. See Coventry Teachers' Alliance, 417 A.2d at 888 (parties' submission circumscribes arbitrator's powers).

C

Severability

The Arbitrator was acting within her authority by giving a side-by-side interpretation of the CBA and the Ordinance. As discussed above, most of those interpretations are passably plausible, rational, and draw their essence from the CBA. She also acted within her authority in recommending that the Town and the Union negotiate to bring the terms of the CBA and the Ordinance into conformity with one another. The Arbitrator strayed beyond the bounds of her contractual authority, however, when she issued an injunction, when she vested herself with jurisdiction over disputes that have yet to arise and in those few instances when she gave an interpretation on the merits that was not passably plausible and/or failed to draw its essence from the CBA.

If part of an arbitrator's award is found to exceed his or her contractual authority, the award "is not invalid in toto but only insofar as it is excessive, provided that the award is of such a character that the court can separate its parts without doing an injustice." City of E. Providence v. Local 850, IAFF, 117 R.I. 329, 340, 366 A.2d 1151, 1157 (1976) (citations omitted); accord D & E Const. Co. Inc. v. Robert J. Denley Co., Inc., 38 S.W.3d 513, 520 (Tenn. 2001); Edward Elec. Co. v. Automation, Inc., 593 N.E.2d 833, 843 (Ill. App. Ct. 1992). In determining whether severance of an award is appropriate, the court should consider whether the execution of one part

of the award without the other parts "would produce an untoward or unworkable result." Local 589, Amalgamated Transit Union v. Mass. Bay Transp. Auth., 467 N.E.2d 87, 95 (Mass. 1984). The entire award should not be set aside "if the excess may be disregarded and a valid award left standing[.]" 6 C.J.S. Arbitration § 174 (2004).

The Town argues that the Arbitrator should have ended her inquiry after rendering an opinion on the merits. The Union acknowledges that the Arbitrator could have stopped short of issuing an injunction by simply leaving her award in the form of a declaratory judgment. See Tr. 26-27; Apr. 17, 2013; see Elkouri & Elkouri, supra, at § 7.5.B (arbitrator may issue an advisory opinion where both parties agree). If the invalid injunction and retention of jurisdiction are severed from the rest of the award, the parties would still receive the bargained-for interpretation of the CBA and the Ordinance. See Cmty. Coll. of Beaver County v. Cmty. Coll. of Beaver County, Soc. of the Faculty, 513 A.2d 1125, 1128 (Pa. Commw. Ct. 1986) (arbitrator's granting of grievance was separable from invalid remedy where remedy did not affect other portions of award). Thus, the invalid remedies and those of the Arbitrator's rulings on the merits that exceeded her authority may be separated, and a valid and workable award left standing.

IV

Conclusion

For the reasons discussed herein, the Union's Motion to Confirm is denied, and the Town's Motion to Vacate is granted, as to (1) part three of the Arbitrator's award ordering the Town to cease and desist; (2) part four of the Arbitrator's award vesting herself with jurisdiction over future grievances; and (3) those of the Arbitrator's rulings on the merits found to be in excess of her authority in part III-A of this Decision. The Union's Motion to Confirm is granted, and the Town's Motion to Vacate is denied as to all other portions of the Arbitrator's award.

The Town's Motion to stay implementation of the award is denied. Both parties' requests for attorneys' fees are denied.

Counsel shall confer and submit to this Court for entry, a form of order and judgment that is consistent with this Decision.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Town of Johnston v. International Association of Firefighters, Local 1950, AFL-CIO, by and through its President, Keith A. Calci
CASE NO:	PM 2012-3370
COURT:	Providence County Superior Court
DATE DECISION FILED:	June 26, 2013
JUSTICE/MAGISTRATE:	Carnes, J.
ATTORNEYS:	
For Plaintiff:	William J. Conley, Jr., Esq.; Gina Renzulli Lemay, Esq.
For Defendant:	Marc B. Gursky, Esq.; Elizabeth A. Wiens, Esq.