STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: August 29, 2013)

TOWN OF WEST WARWICK	:	
	:	
V.	:	**C.A. No. PM-2012-4218**
	:	
INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 1104	:	

DECISION

SAVAGE, J. Before this Court are the Town of West Warwick's (Town) Motion to Vacate and International Association of Firefighters, Local 1104's (Union) Cross-Motion to Confirm an arbitration award issued on May 17, 2012 (Arbitration Award). In the Arbitration Award, the Arbitrator found that the Town's calculation of pensioners' disability benefits violated the parties' collective bargaining agreement and ordered the Town to make whole any individuals injured by the violation. For the reasons set forth in this Decision, this Court vacates the Arbitration Award.

I

Facts and Travel

The Union and the Town are parties to a collective bargaining agreement (CBA), entered into pursuant to the Fire Fighters Arbitration Act, § 28-9.1-1 et seq. See CBA, Town's Mot. to Vacate, Ex. 1. The CBA became effective July 2, 2011 and expired June 30, 2013. Article XVII of the CBA addresses the pension rights and benefits of "all permanent members of the West Warwick Fire Department." (Art. XVII, § 1, CBA.) Pursuant to § 7 of Article XVII, those "members covered by [the CBA]" who are rendered "physically unfit for duty" due to an

occupational injury or illness are entitled to a disability retirement benefit, payable "at the rate of two-thirds (2/3) of the salary of the rank they held at the time of their disability[.]" (Art. XVII, § 7, CBA.) That section further provides that the members' "disability pension payments shall continue to be NO LESS than two-thirds (2/3) of the salary being received by an active Fire Fighter holding the same rank during the time the member is on disability retirement." (Art. XVII, § 7, CBA.) (emphasis in original). This language concerning the calculation of disability benefits first appeared in the collective bargaining agreement in effect between the parties in 1988 to 1989 and has appeared substantially unaltered in each subsequent agreement through to the present one. See Arbitrator's Opinion, Town's Mot. to Vacate, Ex. 2 at 3.

Article IX of the CBA provides a procedure for "resolving all alleged grievances of members of the West Warwick Fire Department[.]" (Art. IX, § 1, CBA.) In addition, the CBA gives the Union "the right to bring a grievance on behalf of any employee or on its own behalf for any violation of any of the terms and conditions of" the CBA. (Art. IX, § 1, CBA.) If a grievance is not resolved through the procedures specified in Article IX, either party may refer the grievance to final and binding arbitration. (Art. IX, § 2, CBA.)

Sometime in early 2011, the Town undertook a review of the process for calculating firefighters' disability benefits. See Arbitrator's Opinion at 5. Based on its review, the Town concluded that disability benefits were being incorrectly calculated by including certain forms of compensation that were not intended to be included under the terms of Article XVII, § 7 of the CBA. See id. In particular, the Town concluded that retirees receiving disability pensions had been overcompensated by the inclusion of longevity pay, holiday pay and EMTC pay[1] in the

[1] The parties and the Arbitrator alternatively refer to "EMTC pay" as "EMT pay" or "rescue pay." Pursuant to the terms of the CBA, the additional compensation at issue is paid to those

calculation of their benefits.[2] See id. The Town therefore ordered its pension board to cease including these items in the calculation of disability benefits and, going forward, to recalculate those benefits in a manner consistent with the terms of the CBA. See Town's Mem. in Supp. of Mot. to Vacate at 5.

On August 19, 2011, the Union filed a grievance alleging that the Town's modification of disability benefits violated Article XVII of the CBA and the "duly established past practices of the parties." (Grievance, Union's Mem. in Supp. of Obj., Ex. 1-1.) The Union requested that all disability pensions be calculated as 66 2/3% of "weekly salary, longevity [pay], holiday pay and rescue pay." Id. Lieutenant Robbie Lopez of the West Warwick Fire Department, a disability retiree, filed a nearly identical grievance on September 29, 2011. See Lopez Grievance, Union's Mem. in Supp. of Obj., Ex. 1-2. The Town denied both grievances, and the Union filed a demand for arbitration.[3] See Memorandum from James H. Thomas to Bill Leahy, Oct. 7, 2011, Union's Mem. in Supp. of Obj., Ex. 1-3. The parties agreed to consolidate the two grievances. See Letter from Malcolm Moore to William Leahy, Dec. 8, 2011, Union's Mem. in Supp. of Obj., Ex. 1-5.

On February 22, 2011, Arbitrator Marc Greenbaum (Arbitrator) held a hearing on the consolidated grievances. See Arbitrator's Opinion at 1. The issues submitted for the Arbitrator's consideration were:

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firefighters who are certified as "Emergency Medical Technician[s] Cardiac." (Art. IV, § 1(B), CBA.) Accordingly, this Decision uses the term "EMTC pay."

[2] According to the Town, it began including longevity pay in the calculation of disability benefits sometime in the early 1990s and including holiday pay sometime in or around late 1993 to early 1994. See Town's Mem. in Supp. of Mot. to Vacate at 3. The Town and the Union agree that the inclusion of EMTC pay commenced in 2002. See id. at 4; Union's Sur-Reply Mem. at 5.

[3] The exact sequence of events leading up to the arbitration hearing is unclear. The Union's "Demand for Arbitration" is dated Sept. 7, 2011, one month before the date appearing on the Town's letter denying the two grievances. See Demand for Arbitration, Union's Mem. in Supp. of Obj., Ex. 1-6.

1. Whether the grievance is substantively arbitrable?

2. If so, did the Town violate Article XVII of the [CBA] by the manner in which it calculated disability pensions commencing in [] 2011?

3. If so, what shall be the remedy?

Id. at 2.[4]

In addition to submitting evidence of past practices,[5] both parties were allowed to submit post-hearing memoranda and reply memoranda. The Town argued to the Arbitrator that the grievances were not arbitrable because the terms of the CBA, in particular the grievance procedure provided for in the CBA, do not apply to retirees. [6] See id. at 8. The Town therefore asserted that the Union could not file a grievance on behalf of retirees. Id. With regard to the merits of the grievance, the Town argued that the unambiguous language of § 7 of Article XVII of the CBA clearly excluded longevity pay, EMTC pay, and holiday pay from the calculation of disability retirement benefits. See id. at 9. The Union, in contrast, asserted that the CBA allows it to bring grievances on behalf of retirees. See id. at 6. In addition, the Union argued that it had filed the grievance on behalf of both retirees and current firefighters. See id. On the merits, the Union suggested that the term "salary" as it appears in § 7 of Article XVII of the CBA is ambiguous such that the Arbitrator should look to the parties' past practices to determine the meaning of that term. See id. According to the Union, the evidence of past practices

[4] The record in this case does not contain a copy of the parties' submission agreement, if one exists.

[5] The various exhibits submitted for the Arbitrator's consideration included agreements between the Town and its retirees, correspondence between the pension board and the Town Council, and a restatement of the Town's Pension Plan. See Union's Sur-Reply Mem., Exs. 13A, 13B, 13C, 14 -17.

[6] The parties did not submit copies of their post-hearing memoranda or a transcript from the arbitration hearing to this Court. The description of the arguments made to the Arbitrator in this Decision is based on the summary of the parties' arguments contained in the Arbitrator's opinion. See Arbitrator's Opinion at 5-11.

conclusively establishes that the parties intended to include longevity pay, holiday pay, and EMTC pay in the calculation of disability benefits. See id. at 7.

After considering the parties' submissions, the Arbitrator issued his Arbitration Award on May 17, 2012. See Arbitrator's Opinion at 18. On the first issue, the Arbitrator concluded that the grievances were arbitrable, reasoning that the parties had agreed in the CBA that "the arbitral forum is available to determine the rights of retirees." Id. at 14. On the merits of the grievance, the Arbitrator concluded that the term "salary" in § 7 of Article XVII of the CBA was ambiguous. Id. at 14-15. He therefore decided that it was necessary to look to extrinsic evidence to interpret the CBA. See id. at 15. Based on the submitted evidence of the parties' past practices, the Arbitrator determined that the Town and the Union intended to include longevity pay, holiday pay, and EMTC pay in the calculation of disability benefits. Thus, he found that the Town had violated the CBA in 2011 by eliminating those items from disability retirees' benefits. See id. at 18. On the issue of remedy, the Arbitrator ordered the Town to make whole any individuals adversely affected by the Town's violation of the CBA. Id. The Arbitrator retained jurisdiction for sixty days to resolve any questions as to the implementation of the ordered remedy. Id.

On August 16, 2012, the Town moved to vacate the Arbitration Award pursuant to R.I. Gen. Laws § 28-9-18 and filed a petition to stay its enforcement pending resolution of its motion. The Union objected to the Town's Motion to Vacate and filed a Cross-Motion to Confirm the Arbitration Award pursuant to § 28-9-17 on August 24, 2012. On August 30, 2012, a hearing justice of this Court denied the Town's petition to stay enforcement of the Arbitration Award. See Town of West Warwick v. Int'l Ass'n of Firefighters, Local 1104, No. 12-4218, Aug. 30, 2012, (Order) (Hurst, J.). On November 2, 2012, the Union moved to dismiss the Town's

Motion to Vacate on the grounds that the Town had failed to implement the Arbitration Award as required by § 28-9-18(b). See Union's Mem. in Supp. of Mot. to Dismiss at 2-3. After the Town subsequently implemented the Arbitration Award, the Union withdrew its motion to dismiss on November 20, 2012. See Union's Mem. in Supp. of Obj. at 2 n.2. Thus, the only matters left for this Court to resolve are the parties' cross-motions to confirm and vacate the Arbitration Award.

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 a 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 § 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. An arbitrator may exceed his or her powers by arbitrating a grievance that is not arbitrable, see R.I. Dep't of Mental Health v. R.I. Council 94, 692 A.2d 318, 321-22 (R.I. 1997),

or by manifestly disregarding the plain language of the parties' agreement. See City of Newport v. Lama, 797 A.2d 470, 472 (R.I. 2002).

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 § 28-9-17.

III

Analysis

In support of its Motion to Vacate the Arbitration Award, the Town argues that the Arbitrator exceeded his authority by: (1) deciding a matter that was not arbitrable; and (2) interpreting § 7 of Article XVII of the CBA in disregard of the plain language of that provision. In reply, the Union argues that the Arbitration Award must be confirmed because there is no basis for vacating it. [7]

A

Arbitrability

On the threshold issue of arbitrability, the Arbitrator found that both the Union's grievance and Lieutenant Lopez' grievance were arbitrable. The Arbitrator expressly rejected the Town's argument that the CBA did not permit the Union to bring a grievance on behalf of

[7] In its Memorandum in Support of its Motion to Vacate, filed on August 16, 2012, the Town only addressed the issue of arbitrability. The Union likewise confined its argument in its Memorandum in Support of its Motion to Confirm to the issue of arbitrability. After the Town filed a reply memorandum addressing the merits of the Arbitration Award, the parties entered into a stipulated scheduling order whereby both parties were afforded an opportunity to file sur-reply memoranda addressing the merits of the grievance. See Letter from Counsel, Dec. 26, 2012.

retirees. He found it significant that the Union had allegedly filed its grievance on behalf of both active and retired firefighters. According to the Arbitrator, the lack of a definition of "grievance" in the CBA indicated that the parties did not expressly exclude disputes involving retirees from being the subject of arbitration. Thus, he determined that the parties had agreed to arbitrate grievances filed by or on behalf of retirees.

One way an arbitrator may exceed his or her authority is to arbitrate a dispute that is not arbitrable. See State v. R.I. Alliance of Soc. Serv. Employees, Local 580, 747 A.2d 465, 468 (R.I. 2000) (citing R.I. Bhd. of Corr. Officers v. State Dep't of Corr., 707 A.2d 1229, 1234 (R.I. 1998)). Since arbitration is a matter of contract, "a party cannot be required to submit to arbitration any dispute which he [or she] has not agreed so to submit." United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960). Thus, "a preliminary issue for a reviewing court must be whether the parties derive from the contract an arbitrable grievance." City of Cranston v. R.I. Laborers' Dist. Council, Local 1033, 960 A.2d 529, 532 (R.I. 2008) (internal quotation and citation omitted). In Rhode Island, there is a presumption in favor of arbitrability.[8] R.I. Court Reporters Alliance v. State, 591 A.2d 376, 378 (R.I. 1991). 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' Union, Local

[8] This presumption is rooted in the United States Supreme Court decision in United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960), one of the three arbitration cases that it decided in 1960 in the United Steelworkers trilogy. Since Warrior & Gulf involved a private-sector arbitration, some courts have held that the presumption in favor of arbitrability is not applicable to public sector arbitration. See Bornstein et al., 2 Labor and Employment Arbitration, § 47.04[2], "Public Sector Arbitration" (2013). Rhode Island, however, applies the presumption to public sector disputes. See, e.g., R.I. Court Reporters Alliance v. State, 591 A.2d 376, 377 (R.I. 1991); Providence Teachers' Union, Local 958 v. Providence Sch. Comm., 433 A.2d 202, 205 (R.I. 1981); Sch. Comm. of Pawtucket v. Pawtucket Teachers Alliance, Local 930, 120 R.I. 810, 814, 390 A.2d 386, 389 (1978).

958 v. Providence Sch. Comm., 433 A.2d 202, 205 (R.I. 1981). The court decides questions of substantive arbitrability de novo, without deference to the arbitrator. See id. When deciding whether a particular dispute falls within the purview of an arbitration clause, the court should not entangle itself in a review of the merits. See Warrior & Gulf, 363 U.S. at 585.

The Town argues that the grievances were not arbitrable because retirees are not parties to the CBA. According to the Town, the CBA does not permit the Union to file a grievance on behalf of retirees. In response, the Union points out that there is no definition of "grievance" in the CBA. It therefore concludes that the CBA should be given an expansive interpretation that allows for arbitration of disputes involving retirees. The Union further maintains that it filed a "general" grievance on behalf of both active employees and retirees. [9]

1

Grievance on Behalf of Retirees

In support of its argument that grievances on behalf of retirees are not arbitrable, the Town relies on Arena v. City of Providence, 919 A.2d 379 (R.I. 2007), and City of Newport v Local 1080, Int'l Ass'n of Firefighters, 54 A.3d 976 (R.I. 2012). In Arena, the City of Providence and a firefighters' union entered into interest arbitration pursuant to the Fire Fighters Arbitration Act (FFAA) to resolve a dispute about the cost-of-living adjustment benefits of

[9] In their respective memoranda, both parties characterize this issue as whether the Union has "standing" to bring a grievance on behalf of retirees. Other courts have clarified, however, that the issue of whether a party may bring a grievance under the terms of an agreement is not a question of justiciability, but solely a question of contract interpretation. See Perry v. Thomas, 482 U.S. 483, 492 (1987) (stating that appellee's "'standing' argument simply presents a straightforward issue of contract interpretation: whether the arbitration provision inures to the benefit of appellants and may be construed . . . to cover the dispute that has arisen between them"); Int'l Bhd. of Elec. Workers v. Citizens Telecomms. Co., 549 F.3d 781, 789 n.3 (9th Cir. 2008) ("Because standing is based on . . . limitations on the 'judicial [p]ower' . . . it does not bear on the issue of whether a certain claim can be brought before an arbitrator."). Thus, this Court will refer to the threshold question as one of arbitrability, not "standing."

several retired firefighters. See 919 A.2d at 387. Under the FFAA, arbitration panels have the authority to compel changes and amendments to active firefighters' pension plans. See id. at 388. The retirees in Arena had not consented to either the interest arbitration or the union's right to represent them before the arbitration panel. Id. Instead, the retirees had previously filed a request in Superior Court for a declaratory judgment to determine their rights to cost-of-living adjustment benefits. See id. at 384.

Our Supreme Court held that the Superior Court had exclusive jurisdiction over the retirees' claims and that the arbitration panel's award had no bearing on those claims. Id. at 390. In so holding, the Court rejected the City's argument that the arbitration panel's statutory authority under the FFAA extended to retired firefighters. See id. at 388-90. The Court reasoned, in part, that retirees do not fit within the ordinary meaning of "employees" and do not fit within the FFAA's specific definition of "firefighters" as "permanent uniformed members" of the fire department. See id. at 389. Moreover, the Court emphasized that the motivating purpose of the FFAA's enactment was to provide a means of dispute resolution to firefighters who "'must, as a matter of public policy, be denied the usual right to strike.'" Id. at 390 (quoting § 28-9.1-2(c)). Such a rationale does not apply to disputes solely concerning retirees. Id. at 389-90. Finally, the Court reasoned that retirees and active employees do not share a "community of interests" with respect to retirement benefits, thereby creating the "danger that active employees will bargain for better terms and conditions at the expense of retirees' benefits." Id. at 389.

Here, the CBA was entered into pursuant to the FFAA, suggesting that retirees are not covered by the terms of the agreement.[10] See CBA at 1. The Arbitrator concluded, however,

[10] The CBA states that it was entered into pursuant to P.L. 1961, ch. 149, "An Act to Provide for Settlement of Disputes Concerning Wages or Rates of Pay and Other Terms and Conditions of

that the Court's holding and reasoning in Arena are not applicable to the instant matter because Arena involved interest arbitration, whereas this matter is a grievance arbitration. See Arbitrator's Opinion at 13. According to the Arbitrator, the interests of retirees and active employees become congruent once the terms of an agreement are established. See id.

The Town responds that our Supreme Court's decision in City of Newport, 54 A.3d 976, clearly demonstrates that Arena applies to grievance as well as to interest arbitrations. In City of Newport, a firefighters' union and the City were parties to a collective bargaining agreement that obligated the City to provide health insurance for active firefighters and to make the same health insurance coverage available to retired firefighters. 54 A.3d at 977. After the City changed the health benefits of both retirees and active firefighters, the union filed a grievance alleging that the City had violated the agreement by changing retirees' health benefits. Id. at 978. To determine the arbitrability of the grievance, the Supreme Court began its analysis by examining the FFAA and reiterating its pronouncement in Arena that the FFAA "'does not and cannot include retirees.'" Id. at 980-81 (quoting Arena at 390). The Court then went on to examine the language of the parties' agreement. See id. at 981. The Court stated that the presumption in favor of arbitrability "applies only when there is uncertainty about the arbitrability of a dispute—it does not operate to steer disputes into arbitration where, as here, the parties have clearly agreed against arbitration." Id. (citing AVCORR Mgmt., LLC v. Central Falls Det. Facility Corp., 41 A.3d 1007, 1012 n.11 (R.I. 2012)). The Court ultimately held that the grievance was not arbitrable and thus the dispute "must be resolved, if at all, judicially rather than through arbitration." Id. at 982.

Employment of Employees of Fire Departments," the short title of which is the "Fire Fighters Arbitration Act." See P.L. 1961, ch. 149, § 1; sec. 28-9.1-1.

While City of Newport clearly supports the Town's assertion that Arena is applicable to grievance arbitrations, our Supreme Court's recent decision in Providence School Board v. Providence Teachers Union, Local 958, No. 2012-147, slip op. (R.I., filed June 19, 2013), resolves any doubts about the reach of both Arena and City of Newport.[11] In Providence School Board, the school district provided health insurance coverage to active employees and retirees pursuant to the terms of a collective bargaining agreement. See id. at 1. Due to a change in the way that premiums were calculated, the premiums for retirees increased by approximately fifty-five percent while those of active employees increased by approximately ten percent. Id. at 2. The teachers' union filed a grievance alleging that "the difference in the increase of premium costs for retirees compared with the more modest increase in premium costs for active employees" violated several provisions of the parties' collective bargaining agreement. Id. at 2-3. The Court held that the union's grievance on behalf of retirees was not arbitrable. In so holding, the Court looked at the relevant language from the parties' agreement and relied on its previous decisions in Arena and City of Newport. See id. at 7-10. In particular, the Court reiterated its statement in Arena that retirees do not share "'a community of interests'" with active employees when it comes to retirement benefits.[12] Id. at 10; see also Anderson v. Alpha

[11] To argue that its grievance on behalf of retirees is arbitrable, the Union relies on the consolidated cases of City of Cranston v. Int'l Bhd. of Police Officers, Local 301, C.A. No. P.M 04-1043 and City of Cranston v. Int'l Ass'n of Firefighters, Local 1363, C.A. No. P.M. 04-1646 (R.I. Super. Ct., filed Feb. 11, 2005) (Procaccini, J.). Filed in 2005, the City of Cranston cases were decided without the guidance of our Supreme Court's decisions in Arena, City of Newport, and Providence School Board in 2007, 2012, and 2013, respectively. To the extent that there is any inconsistency between the decisions in City of Cranston and our Supreme Court's recent holdings in Arena, City of Newport, and Providence School Board, this Court must be guided by the latter.

[12] To a certain extent, there is always the possibility for conflicting interests in any arbitration proceeding that involves the benefits of retirees and active employees: "If a retiree victory reduces the employer's assets, there will be less available for future benefits to active employees." Anderson, 727 F.2d at 183. Moreover, "union leadership has a political interest in

Portland Indus., Inc., 727 F.2d 177, 183 (8th Cir. 1984) ("Though the conflict is clearer in the negotiation process, there is also a conflict of interest between active employees and retirees in the contract administration process."). Thus, City of Newport and Providence School Board clearly indicate that the limitations on arbitrating disputes involving retirees, first announced in Arena, are equally applicable to grievance arbitrations.[13]

a

Retirees' Status as Grievants under the CBA

The Union concedes that under City of Newport, certain disputes concerning retirees' benefits may not be arbitrable, but maintains that the specific language of the CBA, or lack thereof, takes this matter outside the reach of City of Newport. The Union points out that unlike the agreement in City of Newport, the CBA in the instant case does not define the term "grievance." According to the Union, the absence of such a definition in the CBA demonstrates that the parties intended the CBA to apply broadly to all grievances, including those on behalf of retirees.

The Union is correct that the CBA in this case does not define the term "grievance." This Court does not agree, however, that the absence of a definition of "grievance" is somehow dispositive of whether a grievance may be filed on behalf of retirees. In City of Newport, the Supreme Court did not so much find the definition of a grievance significant, as it did the agreement's declaration that "[t]he purpose of the grievance procedure is to settle Firefighter

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serving the interests of the active employees because the active employees vote in union . . . elections." Id.

[13] The Arbitrator in the case at bar stated, in remarkably conclusory fashion, that all of the Rhode Island case law relied upon by the Town was "distinguishable" from the instant matter. See Arbitrator's Opinion at 12. Other than his discussion of Arena, however, the Arbitrator did not indicate to which cases he was referring or offer any explanation as to why he found the unidentified cases to be distinguishable.

grievances . . . as quickly as possible to assure efficiency and high moral." 54 A.3d at 981. The Court equally relied upon the fact that the grievance procedures outlined in the agreement called for "'[t]he Firefighter or Firefighters involved [to] meet with the Supervisor, Officers or Deputy Chief, immediately[.]'" Id. The Court reasoned that these clauses, in conjunction with the definition of a grievance, limited arbitrable grievances to only those disputes involving active firefighters. See id. at 982.

In Providence School Board, the Supreme Court did not expressly discuss whether the agreement defined "grievance." See slip op. at 7. Instead, the Court relied on several different provisions of the agreement to hold that the parties did not intend to arbitrate disputes concerning retirees. In particular, the Court noted that the recognition clause of the agreement stated that the school board recognizes the teachers' union "as the exclusive bargaining representative for all those persons in the bargaining unit which consists of all certified teaching personnel, long-term substitute teachers, long-term substitute teachers in-pool, home visitors, social workers and nurses but which excludes all administrators and per-diem substitute teachers." Id. at 7. Notably absent from the detailed list of those represented was retirees. The Court further observed that the agreement described the "[t]he jurisdiction of the [u]nion [to] include those persons now or hereafter who perform the duties or functions of the categories of personnel in the bargaining unit." Id. (emphasis in original). According to the Court, retirees could not conceivably be included as employees who perform the duties of teachers "now or hereafter." Id. Finally, the Court found it significant that the agreement defined the term "teacher" as a person "employed by the [b]oard," which language the Court interpreted as excluding retirees. Id.

The language of the CBA in the instant case, like the language of the agreements analyzed in Providence School Board and City of Newport, clearly compels the conclusion that the parties did not intend to arbitrate disputes concerning retirees' benefits. Here, the recognition clause contained in § 1 of Article I of the CBA states that the Town "recognizes [the Union] as exclusive bargaining agent for all uniformed members and all other employees of the West Warwick Fire Department[.]" (Art. I, § 1, CBA.) That section further states that "[t]he rights of the Town . . . and employees shall be respected and provisions of the Agreement shall be observed for the orderly settlement of all questions." (Art. I, § 1, CBA.) The CBA declares that the purpose of the grievance procedure is to "resolv[e] alleged grievances of members of the West Warwick Fire Department[.]" Art. IX, § 1, CBA; see City of Newport, 54 A.3d at 981 (retirees not covered by agreement where grievance procedure's stated purpose is resolving disputes of members of the fire department). The CBA further provides that the Union "shall have the right to bring a grievance on behalf of any employee[.]" (Art. IX, § 1, CBA.) Retirees do not fit within the ordinary meaning of "employees." See Arena, 919 A.2d at 389. Similarly, retirees are not "members" of the fire department or "members" of the Union. See Providence School Board, slip op. at 7 (retirees not covered by recognition clause). In addition, as the first step in the grievance procedure, the "member . . . shall take the matter up with his [or] her immediate superior[.]" (Art. IX, § 1, CBA.) In contrast to current employees, retirees no longer have an "immediate superior." See City of Newport, 54 A.3d at 981. The language of the CBA as a whole plainly precludes grievances on behalf of retirees, notwithstanding the fact that it contains no definition of "grievance."

Accordingly, this Court finds that the Arbitrator exceeded his contractual authority insofar as he attempted to arbitrate the Union's grievance brought on behalf of retirees.[14] See R.I. Alliance of Soc. Serv. Employees, 747 A.2d at 468 (arbitrator exceeds his or her authority by arbitrating a matter that is not arbitrable); City of Newport, 54 A.3d at 981 (presumption in favor of arbitrability not applicable where parties have clearly agreed not to arbitrate). In addition, since Lieutenant Robbie Lopez was also a retiree and the CBA does not cover disputes involving retirees, the Arbitrator exceeded his authority by arbitrating the second of the consolidated grievances filed by Lieutenant Lopez.

2

Grievance on Behalf of Current Firefighters

The Union maintains that it filed a "general" grievance on behalf of both retirees and active employees. In his opinion, the Arbitrator reasoned that the Union's grievance concerning the future retirement benefits of those firefighters who have yet to retire was arbitrable because "incumbent employees are at risk of suffering the type of illness or injury that may lead to their receiving disability retirement benefits."[15] (Arbitrator's Opinion 12.)

[14] In support of its argument that grievances on behalf of retirees are arbitrable, the Union cites several extra-jurisdictional cases. Whatever the law may be in other jurisdictions, after City of Newport and Providence School Board, this Court considers the law to be well-settled in Rhode Island that disputes involving retirees are not arbitrable if the language of the parties' agreement indicates that the parties did not intend to submit retirees' grievances to arbitration.

[15] The union in Providence School Board made an argument similar to the one the Union makes here, asserting that it had brought the grievance on behalf of active teachers who will soon retire. See slip op. at 11. The Supreme Court, however, declared that "[t]he issue addressed by this arbitrator belies any suggestion that the union brought this grievance in its own stead or on behalf of active teachers; it clearly brought this grievance on behalf of retirees[.]" Id. The arbitrator had stated that the union was "protesting what it termed the increased cost for health care insurance for retirees beyond 'the Group Rate' for active teachers." Id. Thus, the Court declined to address the question of "whether, in some other case, the union may pursue a grievance on behalf of active teachers who will eventually retire[.]" Id.

It is well established that "the future retirement benefits of active workers are part and parcel of their overall compensation." Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 180 (1971); see also Town of Barrington v. Int'l Bhd. of Police Officers, Local No. 351, 621 A.2d 716, 717 (R.I. 1993) (provisions of pension plan are part of employees' terms and conditions of employment). To plan for the future or to prepare for the possibility of injury or illness, a current employee needs reliable information about the benefits that he or she may expect to receive when unable to work. See id.; see also Indep. Lift Truck Builders Union v. Hyster Co., 2 F.3d 233, 237 (7th Cir. 1993) (union's grievance brought on behalf of employee who had allegedly been considering retirement until he learned of change in benefits was arbitrable.). Thus, "an impermissible reduction in retirement benefits under [a] CBA affects current employees[.]" Int'l Bhd. of Elec. Workers, Local 1245 v. Citizens Telecomms. Co., 549 F.3d 781, 787 (9th Cir. 2008).

The CBA in this case expressly gives the Union "the right to bring a grievance on behalf of any employee . . . for the violation of any of the terms and conditions of this Agreement." (Art. IX, § 1, CBA.) The provision governing disability pensions, Article XVII, § 7, is one of the "terms and conditions" of the CBA. Thus, the CBA's arbitration clause may clearly be interpreted to cover the Union's grievance on behalf of active firefighters. See Providence Teachers' Union, 433 A.2d at 205 (grievance is arbitrable so long as "the arbitration clause of the collective-bargaining agreement can[] be interpreted to include the asserted dispute"). The fact that current firefighters are not yet eligible to receive retirement benefits does not render the dispute non-arbitrable. See Int'l Bhd. of Elec. Workers, 549 F.3d at 787 ("The CBA here imposes a duty to arbitrate a disputed reduction in benefits, and nothing . . . suggests that [the union] cannot enforce this duty because current workers are not yet eligible to receive the

contested benefits."). Accordingly, the Court finds that the Union's grievance on behalf of current firefighters is arbitrable.[16]

B

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 R.I. Alliance of Soc. Serv. Employees, 747 at 468). 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., Lama, 797 A.2d at 472; 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). In particular, if an

[16] The Union's grievance on behalf of active employees includes Lieutenant Lopez, who was an active member of the West Warwick Fire Department when the Union's grievance was filed on August 19, 2011. See Union's Mem. in Supp. of Obj. at 5. Sometime after the Union filed its grievance, but before Lieutenant Lopez filed his grievance, Lieutenant Lopez retired on a disability pension. See id. The fact that Lieutenant Lopez retired after the Union's grievance was filed, but before the Arbitrator rendered a decision, does not preclude the Union from pursuing the pending grievance on his behalf. See Schweizer Aircraft Corp. v. Local 1752, Int'l Union, United Auto. Workers of Am., 29 F.3d 83, 86-87 (2d Cir. 1994) (where grievance was filed while grievant was active employee and parties were mutually responsible for any delay in resolving grievance, grievance was arbitrable notwithstanding the fact that employee retired after filing).

arbitrator "ignores clear-cut contractual language or assigns to that language a meaning that is other than that which is plainly expressed, the arbitrator has exceeded his [or her] authority and the award will be set aside." State v. Rhode Island Employment Sec. Alliance, Local 401, 840 A.2d 1093, 1096 (R.I. 2003) (citation and internal citation omitted).

The Town argues that the Arbitrator exceeded his authority by manifestly disregarding the unambiguous language of the CBA and failing to give it a passably plausible interpretation. According to the Town, the Arbitrator improperly relied on evidence of the parties' past practices to interpret the CBA. In response, the Union asserts that the Arbitrator properly considered the parties' past practices because the relevant language of the CBA is unclear and ambiguous.

1

Arbitrator's Consideration of Past Practices

In Rhode Island, an arbitrator's reliance on past practices is governed by statute. Under § 28-9-27(a), an arbitrator may only consider the existence of a past practice between the parties if:

> (1) the collective bargaining agreement does not contain an express provision that is the subject of the grievance, or
>
> (2) the collective bargaining agreement contains a provision that is unclear and ambiguous, or
>
> (3) the collective bargaining agreement contains a provision which has been mutually agreed upon by the parties that preserves existing past practices for the duration of the collective bargaining agreement.[17]

[17] In certain instances, bargaining agreements may contain either "zipper" clauses that effectively eliminate the binding effect of custom and practice or "savings" clauses that expressly preserve some or all of the parties' past practices. See Elkouri & Elkouri, How Arbitration Works, § 12.7 (7th ed. 2012). Here, the CBA does not expressly preserve the parties' past practices, but

Sec. 28-9-27(a).[18] "[A]n established past practice . . . [does] not automatically become enshrined as part and parcel of the collective bargaining agreement, with the same binding effect on the parties as their contractual provisions." Chicago Web Printing Pressmen's Union, No. 7 v. Chicago Newspaper Publisher's Ass'n, 772 F.2d 384, 388 (7th Cir. 1985). "[I]f a past practice, although in existence for several years arose from an obviously mistaken view of a contractual obligation, it need not be allowed to continue." Elkouri & Elkouri, How Arbitration Works, § 12.9 (7th ed. 2012). "[W]here there is a conflict between the past practice of the parties and the contract language, the contract language governs." Lama, 797 A.2d at 472 (citing Town of N.

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appears, instead, to allow past practices to have effect to the extent otherwise allowed by law. Section 2 of Article XXIV of the CBA provides:

> As of the date of the signing of this Agreement, there are no other written agreements between the parties. This provision is not intended to limit or increase any rights the parties may have otherwise to retain the duly established past practices of the parties.

(Art. XXIV, § 2, CBA.) (emphasis added). The Arbitrator did not mention this language in his Opinion. The Union generally asserts that the CBA contains neither a past practices clause nor a zipper clause.

[18] In addition to satisfying one of the three prongs in § 28-9-27(a), the party claiming the existence of a past practice bears the statutory burden of proving, by clear and convincing evidence, that the 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 representatives of the parties who possess the actual authority to accept the practice.

Sec. 28-9-27(b).

Providence v. Local 2334, Int'l Ass'n of Firefighters, 763 A.2d 604, 606 (R.I. 2000)) (internal citation omitted).

In this case, the Arbitrator found that the language of the CBA governing the calculation of disability benefits is ambiguous. (Arbitrator's Opinion 15.) The relevant language from § 7 of Article XVII of the CBA provides:

> [T]hose members covered by this Agreement, who remain away from their regular employment as Fire Fighters for the Town, due to injury or illness contracted in the performance of their duties, shall, at the expiration of eighteen (18) continuous months, return to regular duty within thirty (30) days thereafter, or shall be deemed physically unfit for duty, and therefore shall be placed on disability retirement, and shall be paid at the rate of two-thirds (2/3) of the salary of the rank they held at the time of their disability, and that their disability pension payments shall continue to be NO LESS than two-thirds (2/3) of the salary being received by an active Fire Fighter holding the same rank during the time the member is on disability retirement.

(Art. XVII, § 7, CBA.) (emphasis in original). The Arbitrator reasoned that to restrict the term "salary," as it appears in Article XVII, § 7, to the weekly salary for each rank of firefighter "would lack any basis in the reality of public sector collective bargaining." (Arbitrator's Opinion 14.) According to the Arbitrator, "[t]he provisions for holiday, rescue and longevity pay are good examples of how the parties have, often ingeniously, separated salary into more components than is true in the private sector." Id. at 15. He therefore concluded that "the one thing unambiguous about the term 'salary,' as used in [Article XVII, § 7 of the CBA,] is that it is ambiguous and thus subject to construction by using extrinsic evidence." Id. at 15. Based on his review of the submitted evidence of the parties' past practices, the Arbitrator determined that the parties had customarily included longevity pay, EMTC pay, and holiday pay in the calculation of disability benefits. See id. at 15-16.

The Town asserts that the phrase "salary of the rank they held" is unambiguous. It argues that the Union and the Arbitrator have rendered otherwise clear language ambiguous by divorcing the term "salary" from the qualifying language "of the rank they held." In reply, the Union asserts that firefighters receive compensation over and above their weekly base pay on a periodic basis throughout the year. According to the Union, these other forms of compensation are all components of "salary."

While a generic reference to "salary" might be considered ambiguous, the parties in this case agreed on specific language to govern the calculation of disability benefits. The CBA clearly states that disability pensioners' benefits are to be calculated based on the "salary of the rank they held at the time of their disability" and that the pensioner shall continue to receive no less than two-thirds "of the salary being received by an active Fire Fighter holding the same rank[.]" (Art. XVII, § 7, CBA.) By including such language, the parties have created a fluctuating pension whereby the benefits of disability retirees rise or fall with the salaries of active firefighters of the same rank. See Banish v. City of Hamtramck, 157 N.W.2d 445, 448 (Mich. Ct. App. 1968). Rather than being calculated based on the individualized compensation received by a particular employee, disability benefits are calculated based on the compensation that adheres to a particular rank. See Kreeft v. City of Oakland, 80 Cal. Rptr. 2d 137, 142 (Cal. Ct. App. 1999) ("'compensation attached to the average rank held' at the time of retirement" is pay that "adhere[s] to, as an appertaining quality or circumstance of a particular rank, or is incident to that rank") (alteration in original). Put differently, it is compensation that a firefighter is entitled to "by virtue of [his or her] rank, and not his [or her] individual efforts over and above what are required to obtain the rank." Kreeft, 80 Cal. Rptr. 2d at 144; accord Chancellor v. Dep't of Ret. Sys., 12 P.3d 164, 168 (Wash. Ct. App. 2000) ("salary attached to position or rank"

includes "payments received for duties performed, not compensation for other personal characteristics and achievements") (internal quotation omitted).

The Arbitrator fixated on the ambiguity of the term "salary" and ignored the phrase "of the rank" despite the fact that the Town had presented the Arbitrator with two Superior Court decisions finding the phrase "salary of the rank" to be clear and unambiguous.[19] See Arbitrator's Opinion at 15; Town's Sur-Reply Mem. at 4. In particular, the Town submitted for the Arbitrator's consideration a bench decision in which another justice of this Court found that the phrase "salary of the rank," as it appeared in the collective bargaining agreement then in effect between the Town and the Union, clearly and unambiguously excluded additional compensation for EMTC certification from disabled retirees' benefits. See O'Connell v. Bruce, C.A. No. PC 95-0176, (R.I. Super. Ct., Jan. 22, 2001) (Bench Decision) (Vogel, J.).[20] The Town also presented the Arbitrator with a decision in which a different justice of this Court concluded that by linking disability retirees' benefits to the salaries of active firefighters of the same rank, the parties clearly and unambiguously agreed that disabled retirees would not receive cost-of-living

[19] It is unclear to this Court whether the Arbitrator's focus on the term "salary," as opposed to the phrase "salary of the rank held" used in the CBA, was based on the parties' arguments presented to him. He characterizes both the arguments of the Union and the Town as focusing on the term "salary." While clearly the Union would have had an incentive to delink the word "salary" from the phrase "of the rank held" in order to strengthen its argument as to ambiguity, the Town would have had the incentive to do the opposite. As the parties have not supplied this Court with the record of their arguments before the Arbitrator, this Court is unsure of whether the Town's argument here that the Arbitrator erred in finding the phrase "salary of the rank held" to be ambiguous was the same argument that it made before the Arbitrator. If the Town made that argument before the Arbitrator—as it suggests to this Court—the Arbitrator's characterization of the Town's argument in his Opinion would be in error and his focus on the term "salary" to find ambiguity would be disingenuous.

[20] The plaintiffs in O'Connell, disability retirees of the West Warwick police and fire departments, initially filed a complaint in Superior Court seeking to increase the rate of their benefits from 66 2/3% to 100%. See O'Connell v. Bruce, 710 A.2d 674, 675 (R.I. 1998). After the Court granted judgment in favor of the Town, the plaintiffs filed a supplemental complaint seeking to increase their benefits by including a cost-of-living adjustment and EMTC pay.

adjustments. See O'Connell v. Bruce, C.A. No. KC 95-0176 (R.I. Super. Ct., Sept. 5, 2006) (Decision) (Thompson, J.). The Arbitrator expressly declined to follow either decision, reasoning that:

> If anything, the one thing unambiguous about the term "salary", as used in the Agreement, is that it is ambiguous and thus subject to construction by using extrinsic evidence. This is not to imply any disrespect for the Superior Court decisions cited by the Town. One cannot know what record was before the judges in those cases. Moreover, while the analytical tools used by judges and arbitrators are similar they are not identical. The parties have designated the arbitrator as the contract reader presumably because the arbitrator's background and experience is considered likely to yield the most accurate interpretation of the Agreement. Thus, as in so many other instances, two neutrals can come to different conclusions based on the factual record before them and on the experience brought to the dispute resolution process. That is what happened here.

See Arbitrator's Opinion at 15.

It is clear from his decision that rather than using his self-proclaimed expertise to interpret the phrase "salary of the rank held," critical to the issue of contract construction in this case, the Arbitrator ignored that language—and the apt Superior Court authority interpreting it—and proceeded to rely on extrinsic evidence. For him to suggest, under those circumstances, that he is a better "contract reader" than the courts is disappointing. It also is unfair for him to suggest that those Superior Court decisions may have depended on different factual records from the case at bar when the question in those cases, as in this one, is a question of law. In addition, the Arbitrator's conclusion that Article XVII, § 7 of the CBA is ambiguous appears to be based not on the language of that provision—the only relevant consideration—but on his assumptions about the differences between salaries in the private sector and salaries in the public sector. See id.

Although it is true that the Arbitrator is not strictly bound by a judicial interpretation of a contract, see Local 1445, United Food and Commercial Workers Int'l Union v. Stop & Shop

Cos., Inc., 776 F.2d 19, 22 (1st Cir. 1985), he nonetheless lacks the authority to disregard the unambiguous language of the parties' agreement. See Woonsocket Teachers' Guild, 770 A.2d at 839. Furthermore, while the decision of the Arbitrator is entitled to deference based on his presumed expertise in interpreting bargaining agreements, it is a fundamental tenet of arbitration law that the Arbitrator "does not sit to dispense his own brand of industrial justice" by rendering a decision wholly untethered from the parties' agreement. See Jacinto, 120 R.I. at 919, 391 A.2d at 1179 (quoting United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960)). He cannot ignore unambiguous language in an effort to find ambiguity that will enable him to elevate the parties' past practices over the unambiguous terms of their agreement. Instead, both the Arbitrator and this Court are duty-bound to give effect to the parties' intentions as embodied in the plain language of the CBA, regardless of whether the parties remained faithful to that language thereafter. Accordingly, this Court finds that the Arbitrator exceeded his authority by disregarding the plain language of Article XVII, § 7 of the CBA. See Woonsocket Teachers' Guild, 770 A.2d at 839.

Since the Arbitrator bypassed the plain language of Article XVII, § 7 of the CBA and went straight to evidence of the parties' past practices, he failed to address whether the phrase "salary of the rank held" includes longevity, EMTC, and holiday pay. He likewise failed to interpret the specific provisions of the CBA that govern those additional items of compensation. This Court must go on to consider, therefore, whether the plain language of the CBA can be read to include those other forms of compensation. Specifically, it must determine whether longevity pay, EMTC pay, and holiday pay are included in the phrase "salary of the rank held" as it appears in Article XVII, § 7 of the CBA.

a

Longevity Pay

In this case, the weekly and annual salaries for each rank of firefighter are set forth in a schedule appearing in Article XIII, § 1 of the CBA. Section 3 of that Article governs longevity payments. See Art. XIII, § 3, CBA. According to that section, any firefighter who has served at least four years with the department is entitled to a longevity payment which is calculated as a percentage of the firefighter's annual salary. See Art. XIII, § 3, CBA. As a firefighter's years of service increase, so does the percentage of his or her longevity payment. See Art. XIII, § 3, CBA. The CBA further states that "[l]ongevity [p]ayments shall be paid . . . in one (1) lump sum in the first pay period of November in each year. All Longevity Payments shall be made in separate checks." (Art. XIII, § 3, CBA.)

The longevity payments provided for in § 3 of Article XIII are not included in "salary of the rank held." A firefighter's longevity payment is determined by his or her individual years of service, not by his or her rank. A Lieutenant with eight years of service, for example, would receive a different payment than a Lieutenant with seven years of service. See Art. XIII, § 3, CBA. In addition, longevity payments are not included in a firefighter's weekly or annual salary. Instead, they are lump-sum bonuses, paid in separate checks only once a year. See Art. XIII, § 3, CBA. While the longevity payments may be partly to reward loyal service or partly to incentivize continued service, they are not regular compensation for the duties performed by each rank of firefighter. See Grabicki v. Dep't of Ret. Sys, 916 P.2d 452, 457-58 (Wash. App. Ct. 1996) (absent specific statutory inclusion, longevity pay paid to a member for his or her years of service without regard to position was not "salary attached to rank"); State v Schuele, 267 N.E.2d 590 (Ohio 1971) (upholding pension board's interpretation of "salary for the rank held"

as not including longevity pay); cf. Dunham v. City of Berkeley, 86 Cal. Rptr. 569, 573 (Cal. Ct. App. 1970) ("average salary attached to [] rank" included longevity pay that was part of "a system of general pay raises" and resulted in "restructuring of ranks"). The form and timing of the payments further demonstrates, therefore, that the longevity payments at issue here are not embraced by the phrase "salary of the rank held."

b

EMTC Pay

The CBA further provides for additional compensation for those firefighters who are certified as Emergency Medical Technicians Cardiac (EMTC). Pursuant to Article XIX, § 4, a Private who is EMTC certified will "receive as salary an amount equal to that paid a Lieutenant." (Art. XIX, § 4, CBA.) Similarly, "[t]he officer in charge of rescue, who is currently EMTC [c]ertified, shall receive a pay differential equal to the next highest rank above the rank which such officer holds[.]" (Art. XIX, § 4, CBA.) In the event that the officer in charge of rescue is promoted to a higher rank, "he [or] she shall receive the pay applicable to the higher rank only." (Art. XIX, § 4, CBA.) Finally, any officer who, as of the effective date of the CBA, is EMTC certified is also entitled to "receive a pay differential equal to the next highest rank above the rank which such [officer] holds[.]" (Art. XIX, § 4, CBA.)

This language concerning EMTC pay has been analyzed previously by another justice of this Court. See O'Connell v. Bruce, C.A. No. PC 95-0176, (R.I. Super. Ct., Jan. 22, 2001) (Bench Decision) (Vogel, J.). In O'Connell, the plaintiffs argued that under the bargaining agreement then in effect for the West Warwick Fire Department, the calculation of disability benefits should include EMTC pay. (Tr. 17, Jan. 22, 2001, Town's Reply Mem., Ex. 2) Like the CBA at issue in the case at bar, the agreement in effect at that time provided that firefighters who

were unable to perform the duties of their position due to an occupational injury or illness were entitled to a disability pension "'paid at the rate of two-thirds of the salary of the rank they held at the time of their disability.'" Id. at 20 (emphases added). The agreement further provided that a firefighter who was EMTC certified was entitled to a pay differential equal to that of the next highest rank. See id. at 17-18. There, the Court found that "salary of the rank held" was unambiguous and did not include additional compensation for EMTC certification. See id. at 25-26. The Court reasoned that "[t]he certification is merely an accomplishment that gives an officer a salary of a higher-ranked officer[,]" but does not actually change the officer's rank. Id. at 18-19. According to the Court, the lack of any reference to EMTC pay in the relevant provision of the agreement belied the plaintiffs' assertion that disability benefits should include additional compensation for EMTC certification:

> If the parties had intended a disabled retired individual's payments to be increased[] if that individual was E.M.T.C. certified when disabled, [the provision governing disability benefits] would instead say that an officer placed on disability retirement shall be paid at the rate of two-thirds of the salary of the rank they held at the time of their disability, subject to adjustment in the event that such individual was E.M.T.C. certified at the time he or she was disabled. It does not say that.
>
> That being the case, I find the agreement to be clear and unambiguous.

See id. at 25-26.

In determining that the language of the CBA in this case was ambiguous, the Arbitrator declined to follow the decision in O'Connell. See Arbitrator's Opinion at 15; Town's Sur-Reply Mem. at 4. He stated that different decision-makers "can come to different conclusions based on the factual record before them[.]" Id. Contrary to the Arbitrator's suggestion, both O'Connell and the instant matter present questions of legal interpretation, rather than questions of fact.

Notwithstanding any differences in the factual records of the two cases, therefore, this Court agrees with the holding in O'Connell that the phrase "salary of the rank held" unambiguously excludes EMTC pay. EMTC pay compensates a firefighter for his or her individual efforts in obtaining and maintaining certification.[21] It does not actually affect the firefighter's rank or constitute part of the regular compensation associated with that firefighter's rank. See Art. IV, § 1(E), CBA (firefighters who are promoted to higher rank and who maintain EMTC certification "shall continue to receive their EMTC pay in addition to their weekly salary[]") (emphasis added). Thus, EMTC pay is not part of "salary of the rank held." See Chancellor, 12 P.3d at 168 (compensation for individual achievements is not salary of rank).

c

Holiday Pay

Article XIV, § 1 of the CBA sets forth the holiday pay to which firefighters are entitled. Under the terms of that provision, firefighters are entitled to fourteen paid holidays. See Art. XIV, § 1, CBA. A firefighter's holiday pay is "computed at the employee's most recent daily rate of the member's salary and shall be paid to each member . . . over and above his [or her] weekly salary." (Art. XIV, § 1, CBA.) In addition, a firefighter who is required to work on any of those fourteen holidays "shall receive time and one-half (1-1/2) for those hours worked on the celebrated day of the holiday."[22] (Art. XIV, § 1, CBA.)

[21] To be placed on the list of employees eligible to fill a vacancy in the rank of Private, a firefighter must obtain EMTC certification. See Art. IV, § 1(A), CBA. Firefighters are then allowed to drop their EMTC certification after ten years. See Art. IV, § 1(B), CBA. EMTC certification is not listed as a requirement for promotion beyond the rank of Private. See Art. IV, § 4, CBA.

[22] For most of the effective period of the CBA, however, holiday pay was reduced or eliminated. From July 1, 2011 to June 30, 2012, the Union agreed "to forego payment for all [fourteen] paid holidays." (Art. XIV, § 1, CBA.) The Town did not have to pay Union members for holidays "except if the . . . member works on an identified holiday, in which case pay shall be as set forth

A firefighter's holiday pay, as described in the CBA, is not "salary of the rank held." The CBA clearly states that holiday pay is compensation "over and above [a firefighter's] weekly salary." (Art. XIV, § 1, CBA.) Thus, holiday pay is expressly excluded from the weekly compensation paid to each officer according to rank. In addition, whether a firefighter receives the time and one-half premium for hours actually worked on holidays depends entirely on the schedule of that particular firefighter, not on his or her rank. See Kreeft, 80 Cal. Rptr. 2d at 143 (Premium pay for overtime hours is not compensation "attached to the rank" of a retiree because the premium "has nothing to do with 'rank,' and everything to do with a particular firefighter's schedule."); see also Holland v. City of Chicago, 682 N.E.2d 323 (Ill. App. Ct. 1997) (holiday pay is not part of the salary for the position occupied by a firefighter or the salary attached to the firefighter's position). Thus, the plain language of the CBA clearly excludes holiday pay from the calculation of disability benefits.

In summary, therefore, when the plain language of the CBA is given effect, it is clear that longevity, EMTC, and holiday pay, as provided for in the CBA, are not included in "salary of the rank held." By focusing exclusively on the word "salary," and disregarding the qualifying language "of the rank held," the Arbitrator created an ambiguity where none exists. See Excel Corp. v. United Food and Commercial Workers Int'l Union, 102 F.3d 1464, 1469 (8th Cir. 1996) (by ignoring plain language of CBA, arbitrator created ambiguity where none existed). In the absence of any ambiguity in the language of the CBA, the Arbitrator's reliance on the parties' past practices violated § 28-9-27(a). Any past practice that the parties may have had of including longevity, EMTC, and holiday compensation in the payment of disability benefits is inconsistent

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in the Agreement." (Art. XIV, § 1, CBA.) From July 1, 2012 through to the expiration of the CBA on June 30, 2013, the Union agreed to forego payment for seven out of the fourteen paid holidays. See Art. XIV, § 1, CBA.

with the clear language of the CBA and, under the controlling dictates of our Supreme Court, cannot be given precedence over that language. See Town of Providence, 763 A.2d at 606 (plain language of agreement must be given effect over a conflicting past practice).[23] Accordingly, this Court finds that the Arbitrator exceeded his authority in finding that the Union and the Town intended to include longevity, EMTC, and holiday pay in the calculation of disability retirement benefits under the CBA, as his conclusion disregarded the plain language of the CBA and improperly relied on evidence of the parties' past practices. See Lama, 797 A.2d at 473 (vacating award where arbitrator relied on past practices and manifestly disregarded clear and unambiguous contract language).

2

Arbitrator's Finding that CBA Expressly Includes Longevity, EMTC, and Holiday Pay

In addition to relying on the parties' past practices, the Arbitrator alternatively suggested that the CBA expressly includes longevity, holiday, and EMTC pay in the calculation of disability benefits. He stated that the CBA's definition of "basic annual salary," which appears in Article XIX, § 3, "could be deemed expressly applicable to disability retirements." (Arbitrator's Opinion 17.)

The Arbitrator reached this conclusion even though the term "basic annual salary" does not appear anywhere in the provision governing disability benefits. See Art. XVII, § 7, CBA. Instead, the term "basic annual salary" is referenced in Article XVII, § 5, which is entitled

[23] Since the Town is not contractually required to include those items of compensation in disability retirees' benefits, the fact that the Town may have done so in the past does not create a binding obligation on the Town to continue that practice. See Chicago Web Printing Pressmen's Union, No. 7 v. Chicago Newspaper Publisher's Ass'n, 772 F.2d 384, 388 (7th Cir. 1985) (past practice does not have same binding effect as contractual provisions); see also R.I. Dep't. of Mental Health v. R.I. Council 94, 692 A.2d 318, 320 & 325 (R.I. 1997) (rejecting union's argument that past practices created an obligation for state to bargain before changing the status quo). Faced with financial pressure, the Town carefully re-examined the benefits that it was awarding disabled retirees and properly determined that those individuals were receiving compensation above and beyond that required by § 7 of Article XVII of the CBA. See Elkouri & Elkouri, How Arbitration Works, § 12.9 (7th ed. 2012) (a mistaken view of a contractual obligation need not be allowed to continue).

"Normal Retirement." Section 5 governs the eligibility for, and benefits of, a service retirement. See Art. XVII, § 5, CBA. Subsection C of that provision states that "[b]ase salary for pension purposes shall be calculated by the last twelve (12) months of the employee's basic annual salary as defined in Article XIX, Section 3 of this Agreement." (Art XVII, § 5, CBA.) In turn, Article XIX, § 3 defines "basic annual salary" as "the basic rate of annual earnings, longevity payment, and all holiday pay at the employee's hourly rate of pay during each fiscal year as set forth in Article XIII, Sections 1 and 3, and Article XIV, Section 1." (Art. XIX, § 3, CBA.) The definition of "basic annual salary" also includes EMTC pay. (Art. XIX, § 3, CBA.)

In support of the Arbitrator's decision, the Union points out that although Article XVII, § 5 is entitled "Normal Retirement," the text of that provision states that base salary "for pension purposes" is to be calculated using "basic annual salary." According to the Union, the phrase "for pension purposes" effectively means "for all pension purposes," both service and disability pensions.

The Arbitrator's conclusion again ignores the plain language of the CBA. While the benefits for a "Normal Retirement" are to be calculated using "base salary," which is further defined as "basic annual salary," neither of these terms appears anywhere in the provision governing disability benefits. Instead, the parties specifically agreed that disability benefits are to be calculated using "salary of the rank held," not "base salary" or "basic annual salary."[24] As

[24] Throughout the CBA, the parties have agreed on distinct and specific language to govern the calculation of the different kinds of benefits to which an injured or ill firefighter may be entitled. Unlike disability retirement benefits, which are solely based on "salary of the rank held," the benefits for an injured or ill firefighter who is placed on light duty include "full salary, wages, allowances, benefits, etc. . . . based on the Fire Fighter[']s rank, years of service, certification, marital status etc." (Art. XI, § 6(D), CBA.) There is also a significant distinction between the compensation that a firefighter receives when he or she initially leaves service with an injury or illness and the compensation received if the injured firefighter eventually retires on a disability pension. Under § 1 of Article XI of the CBA, a firefighter who is incapacitated due to an

discussed previously, "salary of the rank held" unambiguously excludes longevity, EMTC, and holiday pay. The Union's argument that the definition of "basic annual salary" should be used for "all" pension purposes likewise ignores the specific language of § 7 of Article XVII and effectively seeks to rewrite the parties' agreement by impermissibly adding language to it. Indeed, the language of the CBA concerning the payment of disability benefits, when contrasted with the language of the agreement concerning the payment of other retirement benefits, suggests that the parties knew how to provide expressly for retirement benefits, inclusive of longevity, EMTC, and holiday pay, but specifically did not provide for inclusion of those benefits in the CBA. See Lama, 797 A.2d at 473 (comparing provisions of bargaining agreement and concluding that parties "knew how to preserve the applicability of the [disability] ordinance . . . but failed to include the appropriate language" in the relevant provision). Accordingly, this Court finds that the Arbitrator exceeded his authority by interpreting §§ 5 and 7 of Article XVII in disregard of the intent of the parties as manifested in the plain language of the CBA. See Town of Coventry v. Turco, 574 A.2d 143, 147-48 (R.I. 1990) (arbitrators effectively rewrote contract and exceeded their authority by including sick leave payment in "base pay" for purposes of calculating pension benefits when the contract did not provide for such inclusion).

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occupational injury or illness "shall be entitled to their full pay during the period of such incapacity[.]" (Art. XI, § 1, CBA.) A firefighter who was temporarily assuming the responsibilities of a higher rank at the time of the injury or illness is entitled to the same benefits, "including pay[] at the rate he [or] she was receiving while serving out of rank." (Art. XVI, § 1, CBA.) The incapacitated firefighter may remain away from employment for eighteen continuous months. See Art. XVII, § 7, CBA. At the expiration of the eighteen month period, if the officer is unable to return to duty within thirty days, she or he "shall be placed on disability retirement, and shall be paid at the rate of two-thirds (2/3) of the salary of the rank they held at the time of their disability[.]" (Art. XVII, § 7, CBA.)

IV

Conclusion

For all of these reasons, this Court finds that the Arbitrator exceeded his authority by purporting to decide the Union's non-arbitrable grievance on behalf of retirees, but that the grievance, in all other respects, was arbitrable. It also finds that the Arbitrator exceeded his authority by disregarding the unambiguous language of the CBA that makes it clear that longevity, EMTC, and holiday pay are not to be included in the calculation of disability benefits to be paid to retirees. Accordingly, and to that extent, this Court grants the Town's Motion to Vacate and denies the Union's Motion to Confirm the Arbitrator's Award.

In vacating the Arbitration Award, and allowing the Town to take corrective action to bring its calculation of disability benefits into conformance with the language of the CBA, this Court is not, as the Arbitrator suggests, seeking to rescue the Town from its financial woes. Indeed, it takes no position on the wisdom of enhancing disability retirement benefits to include longevity, EMTC, and holiday pay. Instead, this Court is simply fulfilling its obligation under § 28-9-18 to ensure that the Arbitrator stays within the bounds of his contractual authority and gives effect to the intent of the parties as expressed in the CBA.

Counsel shall confer and submit to this Court forthwith for entry an agreed upon form of Order and Judgment that is consistent with this Decision.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Town of West Warwick v. International Association of Firefighters, Local 1104**
CASE NO:	**PM-2012-4218**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**August 29, 2013**
JUSTICE/MAGISTRATE:	**Savage, J.**
ATTORNEYS:	
For Plaintiff:	**Jeffrey W. Kasle, Esq.**
For Defendant:	**Joseph F. Penza, Jr., Esq.**