AMERICAN ARBITRATION ASSOCIATION
Michael C. Ryan, Esq., Neutral Arbitrator
Vincent F. Ragosta, Jr., Esq., City Member
Joseph A. Andriole, RISAFF, Union Member

In the matter of the arbitration between:

CITY OF WARWICK

- and -

LOCAL 2748, IAFF

AAA No. 01-17-0002-1208
Gr: Change in pension benefits

DECISION AND AWARD

For I.A.F.F., Local 2748

Joseph F. Penza, Jr., Esq.

For the City

Diana S. Pearson, Esq.

I. Background.

The hearing in this matter took place on December 13, 2017, and August 14, 2018. The parties were able to agree to a stipulation of one threshold issue:

Is the grievance procedurally arbitrable?

The parties did not agree to the issue on the merits. Their respective proposed statements of issues in the italicized language, below.

The Union proposed:

> Did the City violate Article XIV of the CBA when it began to implement the terms of the City's pension ordinance for post-July 1, 2012 hires of the Warwick Fire Department? If so, what shall be the remedy?

The City proposed:

> Did the City violate Article XIV of the CBA when it implemented the terms of the City's pension ordinance for post-July 1, 2012 hires of the Warwick Fire Department? If so, what shall be the remedy?

The parties agreed to allow the panel to frame the issue on the merits after considering the parties' evidence and arguments. It appears that the difference between the two proposed statements centers on the Union's uncertainty about exactly when the City began to implement the pension ordinance. Nonetheless, the concept of "implement" is sufficiently descriptive, and more precise than "began to implement." Therefore, the panel states the issue as:

> Did the City violate Article XIV of the CBA when it implemented the terms of the City's pension ordinance for post-July 1, 2012 hires of the Warwick Fire Department? If so, what shall be the remedy?

Both parties filed post-hearing briefs, and the Union filed a reply brief.

The following articles of the 2011-15 collective bargaining agreement ("CBA") are relevant to the grievance:

ARTICLE XII

Section 1. Grievance Procedure

The purpose of the grievance procedure is to establish effective machinery for the fair, expeditious and orderly adjudication of alleged grievances, involving the interpretation, application or alleged violation of the provisions of this Agreement and/or the rules and regulations of the Fire Department. [Emphasis added.]

STEP ONE

* * *

In addition to the foregoing procedure, Local 2748 shall have the right to bring a grievance on behalf of any employee or on its own behalf. In such a case, a grievance shall be presented directly to the Chief of the Fire Department in writing within thirty (30) days of the occurrence of the alleged grievance. … The Chief of the Department shall render a written decision within fourteen (14) days of time set for a meeting.

STEP TWO

If the Local is not satisfied with the decision of the Chief, it may notify the Mayor's Office within seven (7) working days of receipt of the Chief's written decision that it desires to process the grievance further. …

ARTICLE XIV

Section 1. Pension Payments

* * *

b. The City agrees to amend the pension plan under City code, Article IV as of the date of this agreement as set forth in Section 7-76(a) and (b) of the said article as it is written as of the date of this agreement and which is incorporated herein and made a part of hereof.

Section 2. Vesting

1. vesting

Upon the completion of ten (10) years of service, an employee shall become vested in the pension and at that time shall be eligible for a benefit of 25% of his or her highest salary while employed.

2. Payments

Payments of said pension shall commence upon the date that the employee would have completed 20 years of service under the provisions of the pension ordinance, had the employee continued as a member of the Fire Department.

3. Employees with More than 10 Years Of Service

Any employee who retires with more than 10 years of service, but less than 20 years of service, shall be eligible for a benefit at the percentage of his or her highest salary as follows:

Completed Years of Service	Percentage of Highest Salary
11	27.5
12	30.0
13	32.5
14	35.0
15	37.5
16	40.0
17	42.5
18	45.0
19	47.5

* * *

Section 4. Benefit Improvements

a. Military Buy Back after 20 years of service at Actuarial Value.

b. 1% for each additional year of service between 20 and 30 to a maximum pension of 60% In lieu of 25 to 30 years at 2% to 60% maximum.

c. Full Escalator at 20 years of service instead of 25 years.

d. 66 2/3% Disability Pension for all Heart, Respiratory, and Cancer disabilities and a Social Security qualified disability at time of pension application. …

Section 5 Pension – Section II

Section II of the firefighters' pension shall apply to all employees hired after May 20, 1992. Section II of the pension plan shall include, and the current pension ordinances of the City shall be modified, to reflect the following concepts:

- Non-Service related disability – same as Section I
- Widows and survivors benefits – same as Section I
- Income Offset – same as Sect on I
- Retirement after 20 years – 50%
- Retirement after 30 years – 75% (2% per year from 21 to year 25, and 3% per year from 26 and 30 years of service not to exceed 75% total.
- No smoking as a condition of employment
- Mandatory physical fitness program for all employees hired after May 20, 1992
- Age at hiring – no less than 21 years of age and no greater than 30 years of age
- Pension benefit based on the last three years of service. Effective January 1, 2005, pension benefits will be based upon the last year of service, which benefits shall be calculated by using daily pro-ration.
- Any employee retiring between July 1, 2005 and September 18, 2005, shall have his or her pension calculated at 50% of creditable income for 20 years of service plus 3% for each year of service between years 21 and 30 to a maximum of 80% (pro-rated daily for partial years of service). After September 18, 2005, no employee shall retire at a percentage higher than 75%.
- COLA capped at 3% annually

- 66 2/3% for job-related disabilities of heart, lung, cancer and Social Security qualified disabilities in the same manner as prescribed in Section 4(d) above.
- Conclusive presumption language as in the present collective bargaining agreement
- Funding for Section II Pension shall be 1/3 of the cost by the employee and 2/3 by the City. The initial contribution is expected to be 11% by the employee and 22% by the City.

Also relevant are the following provisions of the City's Code of Ordinances and Rhode Island statutes:

CITY OF WARWICK CODE OF ORDINANCES

CHAPTER 20 - FIRE PREVENTION AND PROTECTION

* * *

§ 20-263 Amendment of [firefighters' pension] plan

The city council shall have the right to amend the plan. The plan may not be altered or amended without consultation between the city as represented by the chairman of the board and the chairmen of the city council finance committee, and the city regular firefighters association as represented by the president thereof. ...

R.I.G.L. 28-9.1 - FIREFIGHTERS' ARBITRATION ACT

§ 28-9.1-4. Right to organize and bargain collectively

The firefighters in any city or town have the right to bargain collectively with their respective cities or towns and be represented by a bona organization in the collective bargaining as to wages, rates of pay, hours, working conditions, and all other terms and conditions of employment.

* * *

§ 28-9-27(a). Use of past practices in arbitration hearings.

(a) An arbitrator shall have the authority to consider the existence of a past practice that may exist between the parties to a collective

bargaining agreement only under the following circumstances:

(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.

(b) A party claiming the existence of a past practice shall be required to prove 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.

(c) A past practice that may exist between the parties to a collective bargaining agreement may not override any contrary provision of an existing collective bargaining agreement, statute or ordinance.

(d) A past practice that may exist between the parties to a collective bargaining agreement may not override any contrary provision of any written rule, regulation, or policy that has been promulgated, adopted, and published pursuant to either the Administrative Procedures Act or promulgated and published by the appropriate governing entity of a city or town.

The parties' bargaining relationship dates to 1963, for many years, they have negotiated provisions governing

the firefighters' pension benefits. During some or all of that time, the City's Code of Ordinances has also addressed those benefits. Until May 10, 2011, there was no conflict between the ordinances and the contract language.

In the spring of 2011, the Warwick City Council began to consider amending its pension ordinances. Among the contemplated changes was creating a two-tier pension plan for the firefighters. Tier I would cover firefighters hired from May 30, 1992 through June 30, 2012, who would continue to receive the benefits to which they had been contractually entitled since their date of hire. Tier II would cover firefighters hired on or after July 1, 2012, who would receive somewhat lesser benefits.[1] The following table summarizes the differences between the two tiers:

	Tier I	Tier II
Date of hire	On/after 5/29/92 and before 7/1/12	On or after 7/1/12
Contribution/benefit	2.5% for 1st 20 years = 50% of final average salary 2% for next 5 years = 60%	2% to max of 70%

[1] It is necessary to clear up some confusion in the nomenclature of the pension plans at issue. As to the plan that City Council eventually enacted, witnesses sometimes referred to the plan covering Tier I firefighters (which is not at issue here) as "Pension 1" or "Tier 1." City witnesses sometimes referred to the plan covering Tier II firefighters as "Pension 2," but that means something quite different to the Union. As far as the Union was concerned, Pension 2 meant the plan set forth in Article XLV, § 5 Pension 2. To avoid confusion, the panel has avoided the terms "Tier 1" or "Pension 2," and has been careful to distinguish between the contractual plan and the two-tier plan in the Amended Ordinance.

It should also be noted that the contractual plan as to has two levels. But the second level applies to firefighters hired after May 29, 1992, so there are few, if any, currently employed firefighters who are in the first level.

	3% thereafter to max of 75 %	
Basis of "final average salary"	Last year of creditable service	Last 3 years of creditable service
Eligibility to retire	20 years, no minimum age	25 years, minimum age 50
Buyback of municipal service	4 years @ 6-month increments	None
Service disability	Heart, lung, cancer – 66 2/3% Other: If qualify for SSI, 66 2/3% If not, same as normal pension, but no less than 50%	66 2/3% until 25 years of service, then received is normal pension
Non-service disability	Same as normal pension, but no less than 50%	Same
Limitations on earnings	No more than salary of similar current employee	Same
COLA	3% compounded	Lesser of 75% CPI or 3%

At a public hearing before City Council on April 11, 2011, Union President William Lloyd spoke in opposition to the proposed amendments. He asserted that the City was obligated to negotiate over any changes in pension benefits. Officials from two other City unions spoke to the same effect. Despite these objections (which President Lloyd repeated on the date the amendments were enacted) City Council passed the amendments on May 9, 2011, and the mayor signed the amended ordinance (the "Amended Ordinance") the next day.

The Union took no immediate action to challenge the Amended Ordinance. Lloyd testified that he wanted to wait and see whether the City actually implemented it. He testified that the City has "ordinances in place that they don't necessarily follow. … There are several ordinances

that you could not be part in the hiring of firefighters that the City ordinance is not a ways to toxed."

The City retains actuaries to valuate the firefighters' pension fund and set the City's and firefighters' respective contribution rates. Until FY15, this took place every two years: the actuaries issued their report every other spring, and the City promptly sent a copy to the Union President. Shortly thereafter, the City Treasurer would notify the Union President of the firefighters' contribution percentage effective July 1.[2]

In the spring of 2012, the actuaries, Gabriel Roeder Smith & Co., submitted their report valuating the firefighters' pension fund as of July 1, 2011, and setting the contribution rates for FY13 and FY14 (the "2011 GRS Report").[3] The report was an eighteen-page document, consisting a seven-section discussion of the fund. In the "Plan Provisions" section, the report stated:

> A summary of the principal plan provisions recognized for purposes of the valuation is provided in Table 7. There were no changes to this plan adopted since the last actuarial valuation.

Table 7, entitled "Principal Plan Provisions," stated, in relevant part:

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[2] Historically, the firefighters' contribution rate has been "blended," that is, it was the same for all firefighters, regardless of their date of hire.

[3] There are no dates of submission on the actuarial reports. They are identified only by the date as of which the fund was valuated.

3. Tier:	Members who hire by June 30 2012 are in Tier I, while members who join later are in Tier II.
4. Final Average Salary (FAC)	Tier I: Salary received in the last year of creditable service. Tier II: Average of the salaries received in the last three years of creditable service. ..
5. Retirement:	
a. Eligibility	Tier I: Members who have completed 20 years of service may retire Tier II: Members attain age 55 or older and with at least 25 years of service may retire.
b. Benefit Formula	Tier I: The annual benefit at retirement is equal to 50% of the last year's salary at retirement, plus 2% of average salary for each year of service from 20 to 25, plus 3% of average salary for each year of service from 25 to 30. Tier II: 2% of FAC times years of service
c. Maximum Benefit	Tier I: 75% of FAC Tier II: 75% of FAC ... .
7. Disability Retirement:...	
b. Benefit Formula	Service Related (and invol'ns heart, lung, cancer or other Social Security disabilities): For Tier I members, the benefit would be equal to 66 2/3% of average salary, reduced for each dollar of earned income in excess of the salary the member would earn as an active employee, to a minimum of 50% of salary. For Tier II members the benefit would initially be the same, but once the member reached 25 years of service ... the benefit would be converted to a regular retirement benefit. ...
11. Retiree Cost-of-Living Increases	Tier I: All benefits in pay status are increased by 3% annually. Tier II: All benefits in pay status are increased by 75% of CPI, annual cap of 3%
12. Service Purchase	For Tier I member an active employee eligible to retire who has served in the U.S. armed forces may "purchase" additional years of service up to the number of years of military service, but no more than four years. A member may also purchase up to four years of prior civilian employment time with the City of Warwick. .. However the right to buy municipal service would be eliminated for Tier II members.

On June 25, 2012, soon after receiving this report, City Treasurer David Olsen sent the following memo to Union President Lloyd:

> The purpose of this correspondence is to advise you that our Actuary ... has determined the Fire II contribution rates for ... FY2013 and FY2014. I believe you have a copy of the Actuarial Valuation report. ..
>
> Under the new rates, the overall contribution rate will be increased to 37% (of payroll). Of that amount, the city will contribute 24.67% while the firefighter will contribute 12.33%. I believe the

major reason for the increase is the incorporation of new assumptions as reflected in the experience study the City conducted in compliance with the Rhode Island Retirement and Security Act of 2011.[5] ..

On July 11, 2012, Mayor Scott Avedisian sent an email to various public safety personnel, including Union President Lloyd:

> Now that we are in a new fiscal year, I wanted to make sure that everyone had the provisions of the pension plans that went into effect for new hires as of July 1.

Attached to the email was the following chart:

Provision	Current Ordinances	Proposed Ordinances	Comments
Years of service for "normal" pension	20 years for 50% pension	25 years for 50% pension	5 years less for pension payments – 5 years more for pension contributions from employee
Number of years of salary used in calculation	One year	Three years	Greatly reduces the base on which pension is calculated – up to 3 or 4 percent less
Maximum pension amount	75% after 30 years	70% after 35 years	5% savings on long-term employee's pension
Formula to calculate pension	2.5% per year of service from years 10 to 20; 2.0% per year of service from years 21 to 25; 3.0% per year of service for years 26 to 30 for a maximum benefit of 75%	2.0% for every year of service from year 10 to retirement with a maximum of 70%	Normal retirement age for 50% pension is proposed to be after 25 years of service rather than 20 years
COLA for retirees	3% annually	75% of the CPI to a maximum of 3%	Will yield about 2% or less
Disability pension	66 2/3% for life at any age	66 2/3% until attaining the point where retiree would have 25 years of service and 55 years of age	Pawtucket model

[5] The "experience study" had nothing to do with the amended Ordinance. It was a study presented to, and adopted by, the Municipal Employees' Retirement System (MERS) in April 2011.

There was no explanation of the inconsistency between the headings "Current Ordinance" and "Proposed Ordinance," and the Mayor's statement that the plans "went into effect for new hires as of July 1."

After July 1, 2012, the City hired a total of 42 firefighters, in three successive groups: twelve in December 2012; twenty in March 2013; and thirteen in September 2014. In the meantime, in or about mid-March 2013, the parties had commenced negotiations for the CBA effective July 1, 2012 through June 30, 2015. The City made the following proposal:

> ARTICLE XIV
> Sections 1-5, Pension Payments. Revise Employer and Employee contributions to be consistent with pension contributions set forth in pension ordinances and/or as set by actuarial payment requirements for funding; vesting and payment provisions.
>
> Section 6. Plan Selection. Add a new section with provisions, as follows:
>
> > Effective on July 1, 2012, employees hired prior to May 20, 1992 may make a one-time election to participate in the Five El pension as outlined in Section 5 of this Article. Such election is irrevocable. Employees making such an election will be required to make the same pension contributions as those employees hired after May 20, 1992. This election must be made in writing to the City Treasurer no later than August 1, 2012.

The Union rejected this proposal. Later in the negotiations, while the parties were ironing out the details of a tentative agreement, the City again submitted a modified proposal:

> IAFF, Local #2748 acknowledges that it will not interpose any objection to the pension ordinance amendments adopted by the Warwick City Council as it concerns the hiring of new firefighters and employees of the fire department eligible to participate in the firefighters pension provided by the City of Warwick for the benefit of eligible plan participants. **(This will not be inserted into the contract but will constitute a provision of this TA.)** [Emphasis in original.]

> Establish a provision so that ex for Firefighters to apply for pension service credit by applying to the ERS through an Administrative process to seek an actuarial analysis at the applicant's cost to purchase service credit and for the applicant to pay for the entire cost to purchase any pension service credits at no cost whatsoever to the City.

The Union rejected this proposal as well, and ultimately Article XIV was carried forward unchanged.

In or around May 2014, Union President Lloyd received the actuarial report setting the rates for FY15 (the "2013 GRS Report"). Lloyd testified that when he reviewed the tables at the back, he saw that they contained the two-tier plan in the Amended Ordinance. He further testified that the 2013 GRS Report was the first actuarial report that did so, but he was mistaken; as shown above, the 2011 GRS Report, which Lloyd received two years earlier, had

described the two-tier plan in place, exactly the same format and terms.

On June 18, 2014, Lloyd received a memo from the City's Finance Director, similar to the one he received from Treasurer Olsen in 2012. It stated that effective July 1, 2014, the firefighters' contribution would be 11.68%. Like the previous memo, it did not mention either the Amended Ordinance or the contractual pension plan. Unlike the previous memo, it did not set forth any reason for the change in premium contribution.

Lloyd testified that, based on the 2013 CAFR Report, and the reduction of the contribution percentage from 12.03% to 11.68%, he assumed that the City was about to actually implement the two-tier plan in the Amended Ordinance. When firefighters received their first paycheck in July, and their pension contribution was in fact reduced from 12.3% to 11.6%, Lloyd believed that this confirmed his suspicions. He testified that it was at that point that he decided to take action, because it was not until that first paycheck that "the City actually implemented the percentage change, indicating that they had now started affecting my members under the Tier II [amended] ordinance."

On July 3, Lloyd and another Union officer met with Mayor Avedisian. Lloyd testified that he told the Mayor that we had

> a problem with Tier II. It's now going to be implemented, and we would like to put it into the contract, but we had some stipulations and some agreements that we needed to reach, so we wanted to negotiate and have further discussions on it.

There was some further email communication between Lloyd and the Mayor, during which the Mayor seemed open, or at least not averse, to resolving the matter.[5] Nevertheless, Lloyd decided to file a grievance so as not to miss the 20-day contractual deadline.

On July 31, 2014, the Union filed this grievance, alleging that the City violated the 2012-15 CBA by implementing changes to the contractual pension plan. The remedy sought was that all firefighters hired after May 26, 1982 remain on, or be returned to, the contractual pension plan. On the same date, Lloyd sent the following letter to Chief Edmund Armstrong:

> I have received information that the City of Warwick is interested in negotiating changes to [the contractual pension plan] of the current collective bargaining agreement. In light of this, the Union requests that the time constraints as outlined in the grievance procedure be waived until such time as either party feels impasse [has been reached] and notifies the opposite party in

[5] According to the email documentation, the Mayor correctly interpreted Lloyd's remarks as suggesting that the parties get an early start on successor bargaining, which ordinarily would have begun in early 2015.

> writing. This agreement will not limit either party in seeking resolution thru Arbitration or legal action.

Armstrong countersigned the letter under the word "Agreed."

The parties began negotiating the 2015-18 CBA in September 2014. Their hopes to resolve the pension issue proved to be vain. The City submitted a proposal that was substantively identical to its initial proposal during the 2012-15 negotiations; once again the Union rejected it. The parties executed the 2015-18 CBA again without any changes to Article XIV.

During the ensuing months, the parties continued to meet and try to resolve the pension issue, without success. Voluntary mediation was [illegible].[5] On August 2, 2016, counsel for the Union sent a letter to City Attorney Peter Ruggiero, notifying him that the Union wished to go "to arbitration with respect to the pending grievance that

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[5] In this meantime, there were two changes in the City's management of the fund. First, the City resolved to have the actuaries validate the term annually, instead of every two years. Second, under "Purpose and Summary," the actuaries' report that set the contribution rates effective July 1, 2015 (the "2015 GRS report") contained the following statement:

> The member contribution rate of 11.15% is a blended rate between Tier I and Tier II members [sic]. The difference between the two is a constant 2.35%. Based on this difference and the size of the current population of active members, that produces a member contribution rate of 11.52% for Tier I members and 9.17% for Tier II members.

As far as the evidence reveals, this was the first time the actuaries calculated and identified the separate components of the blended rate. They maintained that practice in subsequent years.

arbitration has been held in abeyance." Attorney Ruggiero forwarded the letter to the City's counsel in this matter, who responded that the City would neither consider nor arbitrate the 2014 grievance, or "any grievance you file on this matter," because the grievance was "well out of time by any set of facts."

The City then initiated an action for declaratory and injunctive relief in Kent County Superior Court, seeking a declaration that the grievance was not arbitrable, and that the City had the authority to amend its pension ordinance. On February 22, 2017, the court denied the City's application, on the grounds that the question of "whether or not the grievance is timely or ripe for adjudication" should be resolved by an arbitrator. City of Warwick v. IAFF, Warwick, Local 2748, Super. Ct., No. KC-2016-0988 (Hampbaar, 2/22/17), slip op. at 5. The court also instructed the parties to comply with the grievance procedure, "commencing with Step One." Id.[1]

Apparently in an abundance of caution, the Union resubmitted the original grievance on February 23, 2017. In a lengthy response, Chief James McLaughlin denied the grievance, on four separate grounds: that the original

[1] The court did not declare the rights of the parties, and dismissed the action, rather than staying it.

grievance was late filed; that Chief Armstrong lacked authority to stay the grievance deadlines; that the Union never invoked interest arbitration of the unresolved pension issue during the negotiation of the 2015-18 CBA; and that the parties effectively settled the grievance when they executed the 2015-18 CBA. On April 7, 2017, Mayor Scott Avedisian denied the grievance, for the reasons stated in Chief McLaughlin's response.

II. Contentions of the Parties.

The Union

Arbitrability.

The Union had 30 days from the "date of the occurrence of the alleged grievance" to file the grievance. Until the first paychecks in July 2014, there was no concrete "occurrence" that triggered this obligation. Neither the enactment of the amendments, nor the actuarial reports, nor the email from the Mayor put the Union on notice that the City was about to actually violate the CBA.

In referring to the City's habit of not applying ordinances, President Lloyd was describing his state of mind, not using past practice to interpret a section of the contract. Lloyd assumed that the City would ultimately comply with its obligation to bargain any change in pension benefits, notwithstanding the passage of the amendments. It

the City has suffered prejudice, it has only itself to blame. It could have taken the issue of pension benefits to interest arbitration to resolve this issue of collective bargaining. Instead, it decided to take its chances and disregard the CBA. Even if the date of the "occurrence" is debatable, the well-established presumption favoring arbitrability tips the balance in the Union's favor.

The City's refusal to honor the contractual pension benefits is also a continuing violation. It is far better for the City to resolve the grievance now than twenty years hence, when post-July 1, 2012 hires seek to retire in accordance with the CBA.

Merits.

Pension benefits for firefighters are a mandatory subject of bargaining under the Fire Fighters Arbitration Act ("FFAA"). The obligation to bargain takes precedence over any contrary municipal ordinance. Fraternal Order of Police Westerly Lodge No. 10 v. Town of Westerly, 659 A.2d 1104 (R.I. 1995); City of East Providence v. Local 850, IAFF, 386 A.2d 1151 (R.I. 1978). Accordingly, Arbitrator Marcia Greenbaum ruled that the Town of Johnston violated the firefighters' CBA when it passed a pension ordinance that conflicted with the CBA. Town of Johnston and

Johnston Firefighters, Local 1950, AAA No. 11-390-00520-11 (Greenbaum, 2012).

It is undisputed that, for firefighters hired on or after July 1, 2012, the Amended Ordinance conflicts with the pension benefits set forth in Article XIV of the CBA. At its peril, the City deliberately chose to disregard the contractual language after it twice failed to negotiate the change it wanted. The panel should sustain the grievance, rule that the terms of Article XIV apply to all 45 members of the bargaining unit who were hired from July 1, 2012 through June 30, 2015; order the City to cease enforcing any portion of the Amended Ordinance as it applies to those employees; and further order the City to make those employees whole for incorrectly deducted pension contributions. The Panel should retain jurisdiction for 60 days to resolve any disputes over the remedy.

The City

Arbitrability.

The grievance is not arbitrable because it was late filed. The court's order did not give the Union permission to re-file the grievance but required the panel to decide the procedural arbitrability of the initial grievance.

The change in contribution percentage in the firefighters' July 2014 paychecks was hardly the union's

first notice that the City had implemented the Amended Ordinance. The Union undeniably knew of changes to the pension plan in mid-May 2014, when Union President Lloyd received the 2013 GRS Report, but it also received notice much earlier. Mayor Avocision's email in July 2012 described the two-tier pension plan in detail. One month earlier, Lloyd received the 2011 GRS report, which also described the two-tier plan. One year before that, Lloyd attended the very meeting at which City Council adopted the Amended Ordinance. Since the ordinance was effective upon its passage, its enactment effectively implemented changes to the pension benefits, even if no person was immediately affected.

The Union attempted to justify its delay by alleging that the City has a "past practice" of not consistently enforcing its ordinances. However, under the PERA, the panel cannot consider the existence of a past practice because the CBA (1) contains a clear, unambiguous, express provision governing the time limit for filing a grievance, and (2) contains no language preserving existing past practices. Even if the Union had proved the existence of the practice, it could not override the clear deadlines of the contractual grievance procedure. § 38-9-7(c),

Permitting the Union to pursue the grievance at this late date would substantially prejudice the City. Before the Union filed this grievance, the City hired 32 new firefighters, calculated premium contributions, and negotiated two CBAs, all in reliance on the two-tier plan in the Amended Ordinance.

In any event, the Chief did not have the authority to agree to place the grievance process on hold while the parties negotiated a possible agreement.

Merits.

The City's charter and associated legislation authorizes it to provide a pension to its firefighters. St. 1953, c. 3136. Those enactments prevail over any contrary provisions of the PFMA. Accordingly, Article XLV(b) of the CBA provides: "The pension plan under City code … as it is written as of the date of this agreement … is incorporated herein and made a part of hereof."

City Ordinance §20-263 gives City Council the right to amend the firefighters' pension plan, provided there is "consultation" between the City and the Union president. Rhode Island courts have repeatedly held that there is a presumption of regularity in the acts of municipal officials. Applying that presumption, the firefighters must be deemed to have been consulted prior to the 2011

amendment, because the amendment could only take place after such consultation. In any event, the Union was well aware of the amendments, and should be deemed to have consented to them by virtue of its inaction.

III. Opinion

Arbitrability.

Article 11, Section 1 of the CBA requires the Union to file a grievance "within thirty (30) days of the occurrence of the alleged grievance." Whether this grievance is arbitrable turns on the meaning of the word "occurrence." The parties implicitly agree that the word does not necessarily connote a single, fixed, immutable event. The City identified a number of possible dates at which this grievance could have "occurred." Its favored candidate is May 9, 2013, when the City Council enacted the Ordinance, but it is willing to entertain other possibilities: the date Union President Lloyd received the 2012 GRS report; July 11, 2013, when he received the mayor's email describing "the pension plans that were [to be] effect for new hires as of July 1"; mid-May, 2014, when Lloyd received another GRS report describing the two-tier plan; or even June 19, 2014, when he received a memo stating that firefighters' contribution for FY15 would be reduced to 11.66%. However, the City is unwilling to go so far as the

date the Union actually did file the grievance, which was July 31, 2014, over three years after the Ordinance was amended.

In general, arbitrators find it acceptable for a union to refrain from filing a grievance until the employer actually implements an announced change. There are sound reasons for this. Employers announce many initiatives that either do not eventuate or end up taking a different form than the one originally publicized. It would waste everyone's time and resources if the union filed grievances before such initiatives actually take effect, if they do at all. The Amended Ordinance could not take immediate effect under any circumstances since it applied to firefighters hired more than a year hence. There was plenty of time for things to change in the meantime, and given the general experience of this panel, Union President Lloyd's testimony that even duly enacted ordinances occasionally remain merely words on paper is plausible.

Furthermore, as Article IV(I)(B) and Section 3 Pension (II) demonstrate, the parties have a history of amending the City's pension ordinance to conform to the CBA. Indeed, at the same time the City was preparing to implement the pension plan under the Amended Ordinance, the parties were negotiating the 2012-15 CBA. During those

negotiations, the Union successfully fended off the City's proposals to amend the CBA to conform to the Amended Ordinance. This provided a firm foundation for the Union's belief that the City did not plan to enforce the Ordinance.

Moreover, it was rather difficult to discern whether the City had actually implemented the two-tier plan under the Amended Ordinance. The City and its Fund Administrator were certainly aware of the plan's inner workings, but from an employee's point of view, most of the action took place "behind the curtain," so to speak. The plan had no tangible effect on any bargaining-unit member and, as the Union points out, might not have done so for many years.

Individually and in context, the notices that Lloyd received from June 2012 to June 2014 were ambiguous. They did not clearly state that the City had implemented the two-tier plan under the Amended Ordinance despite the contrary CBA provision. The 2012 and 2013 GDS reports described the two-tier plan under the Amended Ordinance but did not come from the City or state the City's intentions. The 2012 report and the City Treasurer's memo that followed announced an increase in the firefighters' contribution for the next two years. Since one would expect the two-tier plan to reduce the contribution, Lloyd concluded that there had been no actual

change implementation, particularly since the Treasurer's memo did not mention the two-tier plan. Lloyd's reasoning may have been erroneous or unsophisticated, but it was understandable, given his imperfect knowledge of a complex subject.

The Mayor's July 11, 2012, email describing "the pension plans that went into effect for new hires as of July 1" had a significant ambiguity. The detailed chart included in the email designated the traditional plan as "current" and the two-tier plan as "proposed." Finally, the June 19, 2012, memo stating that the firefighters' contribution for FY13 would be reduced to 11.68% did put Lloyd on alert, but he cannot be faulted for waiting until the City "actually implemented the percentage change [and] ... started withholding my members."

All of the foregoing leads to the conclusion that, while the Union could have filed the grievance earlier, alleging an incorrect "interpretation" of the CBA,[6] it was not late-filed as an "alleged violation" of the CBA.[7] After all, the fact that there was a City ordinance change that conflicted with the CBA, was not actually effectuated until the City began actually changing the pension plan contrary

[6] Article XI, Section 1, (definition of grievance)
[7] Id.

to the CBA, on July 1. In any event, even if we were to conclude that that the implementation of this pension plan happened with the ordinance, this grievance would certainly be valid as a "continuing" violation, which would have the same remedy because nothing had actually changed more than 30 days before the grievance was filed.

The City also argues that the Chief did not have the authority to agree to stay the processing of the grievance until further notice while the parties negotiated a possible resolution. This contention must be rejected. There is no evidence that the Chief did not have the authority to exercise this discretion in the course of his role as a management representative in the defined grievance process in the furtherance of a potential voluntary resolution of the grievance. This exercise of discretion by a management official during the grievance procedure is both standard and common. No provision of the CBA has been cited that suggests otherwise.

Merits.

There is really no dispute that the two-tier plan under the Amended Ordinance violates the CBA. Mayor Avedisian's chart tells the whole story succinctly. For first responders hired on and after July 1, 2013, contrary to the pension plan in the CBA, the plan requires five more

years of service for a 50 percent pension; reduces the base and the percentage for calculating the pension; reduces the maximum pension and requires five more years to obtain it; and puts a ceiling on disability pensions. All of those are significant reductions in the contractually guaranteed benefits, each of which the Union specifically and repeatedly rejected during collective bargaining.

The City's defense rests on its contention that, as a matter of law, the Amended Ordinance supersedes the CBA even though the CBA says that the City agrees to amend the pension plan under City code. In any event, the cases strongly suggest the opposite. In City of East Providence v. Local 850, International Association of Firefighters, 366 A.2d 1151 (1976), the issue was whether an arbitration panel under the Fire Fighters Arbitration Act had the authority to amend the firefighters' pension plan. The court held that the FFAA is "an act of general application which supersede[s] any conflicting home rule charter provisions. . . . The provisions of the [FFAA] granting the [arbitration panel] the power to amend firemen's pension funds take precedence over any inconsistent provisions of the East Providence City Charter." Id. at 1156. See also Providence Lodge No. 3, Fraternal Order of Police v. City of Providence, 609 A.2d 1104 (R.I.1992) (FFAA and MFAA are

acts of general application that would supersede an inconsistent home rule charter provision); City of Cranston v. Hall, 384 A.2d 415 (1978) (Under PERA, promotional procedures are a bargainable issue, notwithstanding home-rule charter provision prescribing promotional procedures).

It is notable, however, that all of those cases concerned the awards of interest arbitration panels under the PERA. R.I.G.L. 28-9.1-7 through 28-9.1-10. They do not address the precise issue in this case, which is whether the City has the authority to amend its pension ordinance in a manner that conflicts with a collective bargaining agreement.

As a general matter, the task of a labor arbitrator is to interpret and apply the collective bargaining agreement. The grievance-arbitration forum is not a court of general jurisdiction, and the expertise and authority of arbitrators do not extend to construing statutes and court precedent. More specifically, the parties here have agreed, in Article XII, §1, that the contractual grievance procedure "involve[es] the interpretation, application or alleged violation of the provisions of this Agreement and/or the rules and regulations of the Fire Department." This language does not include external law.

Since the two-tier plan under the Amended Ordinance violates the CBA, we find for the Union on the merits issue. As a remedy, we will order the City to cease any enforcement or implementation of that plan, to comply with the terms of Article XIV, and to make whole all affected members of the bargaining unit.

AWARD

The grievance is arbitrable.

The City violated Article XIV of the CBA when it implemented the terms of the City's pension ordinance, for post-July 1, 2013, hires of the Warwick Fire Department.

The City shall forthwith cease and desist from implementing or enforcing any portion of the two-tier plan under the Amended Ordinance enacted on May 10, 2013, as determined in the opinion above. The City shall make all bargaining-unit members whole for any losses caused by the Amended Ordinance.

The panel shall retain jurisdiction for 60 days following the date of this decision and award, to resolve any dispute that arises concerning the remedy. Either party may invoke jurisdiction.

Michael C. Ryan
Neutral Arbitrator

Joseph A. Andriole, RESA/T

Union Member
I Agree.

Vincent F. Racosta, Jr., Esq.

City Member
I dissent. 3/18/2019

Dated:

3/18/19

Arbitrator Bagueta, dissenting.

Although I concur with the panel's statement of the issues, I dissent from the panel's conclusions on both the procedural arbitrability and the merits of this matter.

First, and "[a]s a matter of law, procedural questions arising out of an arbitrable dispute should be left to the arbitrator." *Providence Teachers Union v. Providence School Committee*, 440 A.2d 124, 128 (R.I. 1982). Accordingly, the panel was obligated to determine whether the Union's grievance comported with the requirements of the CBA. Although procedural questions can often be nuanced, the one raised herein was, in my opinion, rather straightforward and readily resolved because the Union filed so far after the occurrence of the alleged grievance that there was only one fair and reasonable conclusion: the Union filed its grievance late and the panel could not consider it.

The CBA provides that "Local 2748 shall have the right to bring a grievance . . . on its own behalf. In such case, a grievance shall be presented directly to the Chief of the Department in writing within thirty (30) days of the date of the occurrence of the alleged grievance." Joint Exhibit 1 (CBA, Art. XII, § 1, Step One). The date the Union presented its grievance directly to the fire chief was July 31, 2014. Accordingly, to be timely the "date of the occurrence of the alleged grievance"

must have been 30 or less days prior to July 31, 2014, that is, to be timely the earliest that the "date of the occurrence of the alleged grievance" could be was July 1, 2014.

Before exploring this further, I must establish what the "alleged grievance" was. Fortunately, the parties stipulated that there was no dispute as to what the grievance was and that "the 2014 statement of the grievance will satisfy," Tr. 23: 17-21 (Dec. 13, 2017). Accordingly, the grievance was:

> "Pursuant to Article XII, of the Collective Bargaining Agreement dated July 1, 2012 to June 30, 2018 [sic] between the City of Warwick, Rhode Island and Local 2048, International Association of Fire Fighters, AFL-CIO, the Union hereby files this grievance in relation to a violation of the terms and conditions of employment, Article XIV, Section 5, of the Collective Bargaining Agreement, all other applicable articles and sections of the Collective Bargaining Agreement and the duly established past practices of the parties. It is the position of the Union that the city has violated the above-cited terms and conditions of employment, articles and sections of the Collective Bargaining Agreement, and the duly established past practice of the parties, when the City implemented changes to pension system outlined in the Current Collective Bargaining Agreement.
>
> As remedy, the union requests that the City include all members hire [sic] after May 28, 1992 be placed [sic] in Pension 2 as outlined in Article XIV, Section 5 of the Collective Bargaining Agreement." Joint Exhibit 3, at p. 101.

Thus, the "alleged grievance" was the City's implementation of changes to the pension system outlined in the then-current collective bargaining agreement. According to the Union president, the Union first became aware of these changes when

the Union received the actuarial report as of July 1, 2013, which he received around May 2014. However, even if that was true, if the Union was aware of the changes in May 2014, then its July 3rd, 2014 grievance was still late because there are more than 30 days between May and July 3rd. Moreover, the Union president testified that a change in his paycheck's pension deductions in early July 2014 helped him realize that "the contribution is consistent with the Tier I and Tier II situations," Tr. 101-02 (Dec. 13, 2017). But even if that is true, the fact remained that the Union knew in May 2011 that the City had then changed its pension fund for firefighters by the passage of the significant pension fund amendments. Indeed, the Union president argued against the passage of the pension fund amendments and was actually there when it passed. Thus, the Union's argument that it first realized that the City had implemented changes to the pension fund in mid-2014 is, in my opinion, unpersuasive and disingenuous.

The Union attempted to establish a past practice whereby the City adopted and manned that it did not enforce, and thus, the long delay between the City's May 2011 adoption of the pension fund amendments and the Union's July 2014 filing of its grievance was excusable. The Union president testified that "[i]f the City passed an ordinance and never acted on it, which it has done, and it never acts on it, then my members haven't

been harmed," Tr. 191: 14-17 (Dec. 13, 2017). And in answer to whether that "rationale [was] the same as what you have applied in this case?" the Union president replied "[i]t is." Tr. 191: 19-21 (Dec. 13, 2017). Unfortunately for the Union, its evidence of alleged quasi-"selective enforcement" is not the stuff upon which a past practice can be established.

Preliminarily, "[a] past practice is a consistent prior course of conduct between the parties to a collective-bargaining agreement that may assist the arbitrator in determining the parties' intent." Rhode Island Court Reporters Alliance v. State, 591 A.2d 376, 378 (R.I. 1991). However, an arbitrator has authority to consider the existence of a past practice only in limited circumstances: "(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." R.I.G.L. § 28-9-27(a). Moreover, "[a] party claiming the existence of a past practice [is] . . . required to prove 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; [and] (3) has been accepted by representatives of the parties who possess the actual authority to accept the practice," R.I.G.L. § 28-9-27(b). Finally, "[a] past practice that may exist between the parties to a collective bargaining agreement may not override any contrary provision of an existing collective bargaining agreement, statute or ordinance." R.I.G.L. §§ 28-9-27(c).

In my opinion, the panel was not authorized to consider the existence of any past practice herein because (1) the CBA contains an express provision pertaining to the procedural requirements for a grievance to be timely and arbitrable, (2) the collective bargaining agreement is neither unclear nor ambiguous, and (3) the collective bargaining agreement does not contain any provision whereby the parties mutually agreed to preserve existing past practices for the duration of the collective bargaining agreement. But even if it is assumed that the panel had authority to consider whether any relevant past practice existed between the parties, the Union simply failed to prove by clear and convincing evidence the existence of any "established policy or practice." In this regard, the teaching of the Rhode Island Supreme Court is instructive:

> "The phrase 'clear and convincing evidence' is more than a mere exercise in semantics. It is a degree of proof different from a satisfaction by a 'preponderance of the evidence' which is the recognized burden in civil actions and from proof

'beyond a reasonable doubt' which is the required burden in criminal suits. If we could erect a graduated scale which measured the comparative degrees of proof, the 'preponderance' burden would be at the lowest extreme of our scale; 'beyond a reasonable doubt' would be situated at the highest point; and somewhere in between the two extremes would be 'clear and convincing evidence.'

To verbalize the distinction between the differing degrees more precisely, proof by a 'preponderance of the evidence' means that a jury must believe that the facts asserted by the proponent are more probably true than not; proof 'beyond a reasonable doubt' means the facts asserted by the prosecution are almost certainly true; and proof by 'clear and convincing evidence' means that the jury must believe that the truth of the facts asserted by the proponent is highly probable.

One of the more articulate and descriptive definitions of clear and convincing evidence appears in the following portion of an approved instruction to a jury[:]

> . . . it must be shown by clear and convincing evidence, and by that term is meant the witnesses to a fact must be found to be credible and that the facts to which they have testified are distinctly remembered and the details thereof narrated exactly and in due order and that the testimony be clear, direct and weighty and convincing, so as to enable you to come to a clear conviction without hesitancy of the truth of the precise facts in issue."

Parker v. Parker, 103 R.I. 435, 238 A.2d 57 (1968) (internal citations and quotation marks omitted).

The statutory standard in Rhode Island is that the alleged past practice must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable; (4) in existence for a substantial period of time; and (5) accepted by representatives of the parties who possess the actual authority to accept the practice. Furthermore, "unequivocal" means that the practice

must have been "[c]lear; plain; capable of being understood in only one way[;] . . . [f]ree from uncertainty, or without doubt; and, when used with reference to the burden of proof, it implies proof of the highest possible character and it imports proof of the nature of mathematical certainty." Black's Law Dictionary 1526 (6th ed.). Nothing in the Board evidence presented by the Union comes even close to satisfying these rigorous standards. Accordingly, in my opinion the Union did not prove any past practice in this case.

But even if the panel was somehow inclined to find a past practice whereby the City ignored its own ordinances and permitted the Union to grieve them as it saw fit, "[a] past practice that may exist between the parties to a collective bargaining agreement may not override any contrary provision of an existing collective bargaining agreement, statute or ordinance." R.I.G.L. §§ 28-9-21(c). Because the CBA requires that a grievance be presented within 30 days of the date of the occurrence of the alleged grievance, any alleged past practice to the contrary is ineffective and void. Furthermore, because the law is clear that "[a] municipal ordinance is presumed to be valid," *In re Petition for Review Pursuant to Section 39-1-36 of Ordinance Adopted by City of Providence*, 743 A.2d 769, 777 (2000); *see also Johnson v. Falange*, 397 A.2d 528, 528 (1979) (referencing "the well-established principle that . . . a

statute or ordinance is presumptively valid"); *Carpionato v. Town Council of North Providence*, 104 R.I. 490, 244 A.2d 861, 863 (1968) ("the action of a local legislature . . . is presumed to be valid"), and because the pension fund amendments were effective upon passage, *see* Union Exhibit 2, at p. 209 (Ord. No. 0-11-6, § 11 ("[t]his Ordinance shall take effect upon passage and publication as prescribed by law")); *see also Nauro v. Lombardi*, 172 A.3d 297, 304 (2018) ("When construing or interpreting an ordinance, this Court applies the 'same rules of construction that we apply when interpreting [a] statute[ ].' We 'give clear and unambiguous language in an ordinance its plain and ordinary meaning.'"), the City's very adoption in May 2011 of the pension fund amendments implemented changes to the firefighters' pension.

The grievance was about the exclusion of post-1992 hires from Pension 2. But their exclusion was pre-ordained upon passage of the pension fund amendments in 2011. The Union president testified that although the pension fund amendments "took effect as of . . . [May 10, 2011], it had no impact until, at the earliest would have been July 1st 2012," Tr. 97-98 (Dec. 13, 2017). But that is wrong. The impact was immediate because the City's pension regime had fundamentally changed even though no actual person was then affected. The expectancy had changed and contribution rules would be based on the new benefits

regime. Accordingly, the Union delayed to its peril and its grievance was not procedurally arbitrable.

The Union offered testimony that it first became aware of the alleged grievance when it received the "Actuarial Valuation as of July 1, 2013" in around May 2014. This is demonstrably false. The Union president admitted that he received the "Actuarial Valuation as of July 1, 2011" in July of 2012. The "Actuarial Valuation as of July 1, 2011" clearly reflected that it was an "actuarial valuation of the City of Warwick, Rhode Island Fire II[1] Pension Fund" that was "performed at the request of the City of Warwick for purposes of determining the employer and member contribution rates for the City's fiscal years beginning July 1, 2012 and July 1, 2013." Moreover, the "Actuarial Valuation as of July 1, 2011" clearly indicated the contribution rates were determined based upon "City furnished data." A comparison of Table 7 ("Outline of Principal Plan Provisions") in each of the "Actuarial Valuation as of July 1, 2011" and the "Actuarial Valuation as of July 1, 2009" reveals that the City had implemented the pension fund amendments because it provided its actuary with the provisions of the pension fund amendments for the actuary to use in establishing the contribution rates. This is obvious from the fact that Table 7 in the "Actuarial Valuation as of July 1, 2011" references and

[1] "Fire II" is referred to as Fire 2 or Pension 2 herein.

differentiates for the first time between Tier I and Tier II employees—the only reason for which would be because that distinction had taken on meaning and been implemented. Thus, contrary to the Union president's testimony that he first learned of the City's implementation of the pension fund amendments in May of 2014 when he received the "Actuarial Valuation as of July 1, 2013," the Union had that same information way back in July 2012, when he received the "Actuarial Valuation as of July 1, 2011."

The Union president also testified that the change in pension contribution deductions between his June and July 2014 paychecks clued him in to the fact that the City was implementing the pension funds amendments. While those changes were certainly part of the City's implementation, in no way was that change the first manifestation of that implementation. Indeed, it was not even the second, third, or fourth manifestation of that implementation. The first manifestation was the adoption of the pension fund amendments in May 2011, the second manifestation was the June 2012 memorandum from the City Treasurer to the Union president, the third manifestation was the July 2012 receipt by the Union president of the "Actuarial Valuation as of July 1, 2011," and the fourth manifestation was the July 2012 e-mail from the mayor to the Union president regarding the pension fund amendments and which included a chart

of the changes. Thus, at best, the changes in the Union president's paycheck represented the fifth manifestation of the City's implementation of the pension fund amendments.

In 2011, at the time of the pension fund amendments, the City's Actuary calculated pension contribution rates every two years and had last calculated them as of July 1, 2009 for fiscal years 2010 and 2011. Thus, in May 2011, the next actuarial evaluation was not due to be released until July 2012 for the 2012 and 2013 fiscal years. In any event, using the pension contribution amount as a barometer as to whether the City had implemented changes to the pension fund was somewhat misplaced because prior to July 2014 the Union had opted to have the members' pension contribution rates based upon a blended amount whereby all firefighters contributed the same amount.

The CBA mandates that "[t]he rights of the city of Warwick and employees shall be respected, and the provisions of this Agreement shall be observed for the orderly and smart of all questions," Joint Exhibit 1 (CBA, Art. I, § 3). Moreover, the Rhode Island Supreme Court has "long held the use of the word 'shall' denotes something mandatory or the imposition of a duty," *City of Providence v. Estate of Tarro*, 973 A.2d 597, 605 (R.I. 2009) (internal quotations omitted). The panel thus should have applied the CBA and its grievance procedure to further the parties' expressed purposes. *See generally Rhode Island Council*

94, *AFSCME, AFL-CIO v. State*, 714 A.2d 584, 590 (1998) ("[t]he provisions of the parties' CBA cannot be read in isolation but must be viewed in the context of the entire contract, with due regard being given to the purpose each provision provides"); *Town of Coventry v. Turco*, 574 A.2d 143, 147 (1990) ("[t]he arbitrators had the power and the authority to interpret the contract, giving due regard to each provision, but they did not have the power and authority to rewrite it."). One of the parties' expressed purposes was "to establish effective machinery for the fair, expeditious and orderly adjudication of alleged grievances." In my opinion, permitting the Union to prosecute its grievance at such a late stage after the pension fund amendments had manifested, is patently unfair to the City, and results in an extremely delayed and disorderly adjudication of the Union's alleged grievance.

Finally, when considering the timeliness of the Union's grievance, it must be recalled that before the Union filed its grievance, the City hired a total of 32 new firefighters: 12 in December 2012 and 20 in March 2013.[2] Because there is a minimum staffing of 186 firefighters in the 2012-2015 CBA, see Joint Exhibit 1 (CBA, Art. X, § 3(d) (minimum staffing of 46 employees on each of four platoons)), this hiring represented over 17% of

[2] An additional 13 were hired in September 2014, after the Union had filed its grievance.

the total firefighter staffing of the department. And all of this hiring occurred without so much as a peep from the Union! Our Supreme Court has "noted that '[l]aches is an equitable defense that precludes a lawsuit by a plaintiff who has negligently sat on his or her rights to the detriment of a defendant.' To order to pass upon the applicability [vel non] of the doctrine of laches in a particular case, the court looks to two considerations: (1) whether there has been negligence that has led to 'a delay in the prosecution of the case'; and (2) whether that delay has prejudiced the adverse party." *Cigarrubo v. City of Providence*, 64 A.3d 1205, 1214 (2013) (internal citations omitted). The Union was plainly negligent in not filing its grievance sooner because the occurrence of the alleged grievance was not only a public act, but it was one that actually occurred in the Union president's presence! Moreover, after adopting the pension fund amendments, and before the Union filed its grievance, the City hired 32 new firefighters. Since the adoption of the Tier II pension plan for all new hires by the City beginning after June 30, 2012, the City has, by actuarial calculations, changed employee-pension contributions based on the pension fund amendments. And, the Union has begun to bargain for changes within two collective bargaining agreements, including pay raises and other monetary and non-monetary benefits, based on the acceptance of the pension fund

amendments. The Union should not now be allowed to challenge what has changed since the enactment of the pension fund amendments. Likewise, the City cannot take back raises and other monetary and non-monetary benefits provided to the Union in the two most recent collective bargaining agreements. To my mind, the City was prejudiced by the Union's inaction over the pension reforms, and the Union's laches ought to have precluded the panel from considering the grievance.

Just as our Supreme Court in *Arena v. City of Providence*, 919 A.2d 378, 385-86 (2007), could "[f]ind no satisfactory justification for plaintiffs' decision to sit on their rights for approximately five years before seeking" relief, I can find no satisfactory justification for the Union's decision to sit on its rights for approximately three years before filing its grievance. Bluntly stated, the Union's tactic of waiting in the weeds has been purely disingenuous. To my mind, the panel should have so concluded as well, and denied the Union's grievance as procedurally non-arbitrable and untimely; but the majority opted to become willfully blind to the Union's obviousness.

But even if the Union's grievance was procedurally arbitrable, because the City did not violate the CBA when it began to implement the terms of the City's pension ordinance for

post-July 1, 2012 hirees of the Warwick Fire Department, the grievance ought to have been denied on the merits.

Preliminarily, it was the Union's burden to prove by a preponderance of the evidence that the City's implementation of the pension fund amendments violated the CBA. See Frost v. City of Newport, 706 A.2d 1354 (1998). In elucidating the contours of the preponderance-of-the-evidence burden of proof, the Rhode Island Supreme Court has taught that "[i]f we could erect a graduated scale which measured the comparative degrees of proof, the 'preponderance' burden would be at the lowest extreme of our scale . . . To verbalize the distinction between the differing degrees more precisely, proof by a 'preponderance of the evidence' means that a jury must believe that the facts asserted by the proponent are more probably true than false," Parker v. Parker, 103 R.I. 435, 442, 238 A.2d 57, 61 (1968). Thus, to establish a violation, the Union must have proven to the panel that the City more probably than not violated the CBA. I am not persuaded that it did so.

"Warwick is controlled by a legislative charter which specifically sets forth the powers, duties, and responsibilities of the . . . departments and agencies of the municipality. We should look, therefore, to the charter to discern the intention of the General Assembly in respect to the conferring of powers upon the government of the City of Warwick." Warwick School

Committee v. Gibbons, 122 R.I. 670, 410 A.2d 1354, 1356-57 (1980). In addition to its legislative charter, in 1953 the Rhode Island General Assembly passed special legislation specifically authorizing the City to provide a pension fund for its firefighters. See P.L. 1953, ch. 3130. Contrarily, "the Fire Fighters' Arbitration Act made a collective bargaining procedure available to firefighters of any city or town, and . . . [is] an act of general application," *City of East Providence v. Local 850, Intern. Ass'n of Firefighters, AFL-CIO*, 117 R.I. 329, 366 A.2d 1153, 1156 (1976). Just as "special legislation that 'authorizes or permits a municipality to establish its own pension fund' supersedes the ICD statute, even though both enactments relate to the same subject matter," *Hagenberg v. Woonsocket*, 879 A.2d 436, 442 (R.I. 2005), so too does the City's special legislation authorizing it to adopt a pension for its firefighters prevail. *See generally Morry v. City of Warwick*, 742 A.2d 1205, 1207 (R.I. 2000) ("Recently, in *Palazzo v. DeLuca*, 694 A.2d 747, 748 (R.I. 1997), we dealt with a factually similar case in which retired firefighters from the City of Cranston claimed they were entitled to the greater disability benefits provided by § 45-19-1 rather than the lesser disability benefits provided by ... ordinance. We explained that a general statute does not repeal special legislation that authorizes or permits a municipality to establish its own

pension fund. Like Pelizzo, the ordinance in the instant case adopted by the city in accordance with the special act of the General Assembly provides a comprehensive plan for the retirement of disabled police officers. Once adopted, this plan would not be superseded by general statutes, even though applicable to the same subject matter."); *Pelizzo v. DeLuca*, 694 A.2d 747, 748 (R.I. 1997) ("a general statute does not repeal special legislation which authorizes or permits a municipality to establish its own pension fund"); *Trombley v. City of Warwick Bd. of Public Safety*, KC2001-0035 (R.I. Superior Court, Jan. 11, 2007) (Thompson, J.) ("The pension fund established for police officers in Warwick was authorized by special enabling legislation and is thus not in conflict with sections 45-19-1 or 45-19-19, which are general statutes. It is also clear from the special enabling acts that the legislature intended for Warwick to create its own pension plan and that it did not intend for section 45-19-1 to supersede that plan."); R.I.G.L. § 43-3-26 ("Wherever a general provision shall be in conflict with a special provision relating to the same or to a similar subject, the two (2) provisions shall be construed, if possible, so that effect may be given to both; and in those cases, if effect cannot be given to both, the special provision shall prevail and shall be construed as an exception to the general provision.").

Moreover, pursuant to the CBA, "the pension plan under City code . . . as it is written as of the date of this agreement . . . is incorporated herein and made a part hereof." See generally Rotella v. Catanzaro, 686 A.2d 91, 93 (R.I. 1996) ("[I]nstruments referred to in a written contract may be regarded as incorporated by reference and thus may be considered in the construction of the contract."). The pension fund amendments were a part of the pension plan under the City code at the time the CBA was adopted and thus the amendments were incorporated into the CBA. Because "[a] general rule of contract law in Rhode Island is that if a party signs a written contract, he or she is presumed to know of and understand its contents; the party will not be heard to complain that he did not read the contract or that he or she did not understand it." Ricci-Drain-Laying Co., Inc. v. Rackin, 744 A.2d 406, 408 (R.I. 1999), the Union must be deemed to have understood that the CBA incorporated the pension fund amendments into the CBA, which amendments specifically detailed the pension provided to post July 1, 2012 hirees.

Finally, pursuant to City Ordinance § 20-263 (City Exhibit 17), "[t]he city council shall have the right to amend the plan. The plan may not be altered or amended without consultation between the city as represented by the chairman of the board and the chairman of the city council finance committee, and the city

regular firefighter's association as represented by the president thereof." Because the pension plan was in fact amended in 2011, and because such amendment could have been made only after consultation with "the city regular firefighter's association as represented by the president thereof," the city's firefighters must be deemed to have been consulted before the amendment. *See Elliott v. Town of Warren*, 818 A.2d 552, 557 (2003) (there is a "presumption of regularity that attaches to acts by municipal officials and . . . 'sworn citizens of the law are entitled to the presumption that their official acts have been properly performed, until the contrary is proved.'"). In all events, the Union was well aware of the fact that the City adopted the pension funds amendments and must be deemed to have consented to such adoption by virtue of its inaction.

For these reasons and more, I respectfully but vigorously dissent. That said, notwithstanding and without prejudice to the foregoing legal contentions of the City, a retrospective assessment of the City's and Union's approach to pension reform in their labor relationship leaves much to be desired. Critically needed pension reform was commendably and responsibly addressed by the City Council's pension fund amendments. Yet despite the Union's awareness of these worthy reforms, it lay in the proverbial weeds, and apparently rebuffed the former City

administration's efforts[1] to migrate them into the collective bargaining agreements for the terms July 1, 2012 to June 30, 2015 and July 1, 2015 to June 30, 2018. Such cat-and-mouse maneuvering is deleterious to the labor relationship, bringing fiscally pernicious burdens upon the City's budget and the taxpayers who ultimately shoulder them. Ironically, the financial fallout of the panel's decision will not help the Union, as the City's ability to pay for salaries, health care and various other direct and indirect components of fire fighters' total compensation will be substantially impaired by the estimated $2.4 million impact of the cease-and-desist and make-whole awards. The panel's arbitral ruination of the pension fund amendments simply fuels the avarice of the Union and unwinds the City's efforts to maintain an affordable and sustainable pension for its fire fighters. And so, to the Union it must be said, be careful what you wish for.

Vincent [illegible], Esq.
City Arbitrator in Dissent
March 18, 2019

[1] These efforts fell markedly short of prudent advocacy to effectuate the City's pension reform objectives. In particular, given the Union's unequivocal rejection at the negotiating table of the City's proposal to incorporate the legislatively-enacted pension fund amendments into the collective bargaining agreements, the prior City administration would have declared impasse. Then, it ought to have proceeded to the Interest arbitration forum under R.I.G.L. § 28-9.1-7, in which the City could have obtained an award for the incorporation of those amendments into those agreements. Instead, the City apparently abandoned its efforts and inexplicably went on to sign successor labor agreements lacking the pension reforms. This is, to say the least, regrettable.