Arbitration

The City of Chicago, Employer and The Fraternal Order of Police, Chicago Lodge No. 7, Union	Grv. No. 129-03-005 Arbitrator's File 03-153 Issue: Health Care Insurance for Police Officers on Occupational Disability Leave Herbert M. Berman Arbitrator Paul D. Geiger, Esq. Lodge Counsel Attorney for Union Cicely J. Porter, Esq. Senior Counsel David A. Johnson, Esq. (on the brief) Attorneys for Employer July 3, 2006

Opinion and Award

I. Statement of the Case

The Union represents the City's non-probationary "Police Officers below the rank of Sergeant" (Agreement (Joint Exhibit 1A):[1] Article 2).[2]

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[1] In the remainder of this Opinion, I shall cite Joint Exhibits as "JX ____," City Exhibits as "CX ____" and Union Exhibits as "UX ____." I shall cite non-testimonial portions of the transcript as "Tr. ____." I shall cite testimony by surname and page reference, for example, "Fitzgerald 26."

[2] Unless otherwise noted, all references to the "Agreement" are to Joint Exhibit 1A, the 7/1/99-6/30/03 "Supplement to the Collective Bargaining Agreement."

Aware of "different degrees of prescription drug" coverage for officers on disability leave, Union First Vice President William Dougherty formed a "Disability Committee" in the fall of 2002 (Dougherty 43, 51). Following a conversation with Commander George Rosebrock and Sue Conley, a member of the City's Committee on Finance (Dougherty 44), Dougherty addressed the following letter to Commander Rosebrock on May 5, 2003 (UX 1):

> Section 18.9 of the Agreement provides that "the Employer agrees to pay all hospital, medical and prescription costs of an officer who is on a leave of absence for duty or occupational disability purposes, all at no cost to the employee." The Lodge has been trying for some time now to address the issue of payment of prescription drugs for officers on disability but it has been unable to find a method by which officers can receive their medications at no cost as well as be reimbursed for such costs.
>
> Therefore, we are inviting representatives of the Employer to meet together and reach an agreement on how this can be accomplished. Please contact me with some dates when you are available to meet and discuss this matter.

By letter dated May 12, 2003, Stephen Murray, the City's Chief Administrative Officer, Committee on Finance, responded to Dougherty (JX 3):

> I am in receipt of your letter dated May 5, 2003 regarding Section 18.9 of your Collective Bargaining Agreement regarding the payment of all hospital, medical and prescription costs for members on a leave of absence or occupational disability, at no cost to the member. Please be advised that I contacted the Benefits Office of the City of Chicago and I am enclosing Article 25.1 of your Collective Bargaining Agreement that

> interprets Section 18.9. It is and has been the position of the Department of Law that Section 18.9 means that the City shall contribute the full cost of contribution for a member on a leave of absence or occupational disability. All co-pays and deductibles shall continue to be the responsibility of the officer.
>
> If you disagree with the City's interpretation of Section 18.9, obviously you may seek a remedy contained within the Collective Bargaining Agreement.

Dougherty filed a grievance on behalf of "all members" of the Union on May 21, 2003 (JX 2):

> This grievance is being filed by the Lodge at Step 3 on behalf of all its members receiving duty and/or occupational disability benefits. Section 18.9 states, "The Employer agrees to pay all hospital, medical and prescription costs of an officer who is on leave of absence for duty or occupational disability purposes, all at no cost to the employee." On May 12, 2003, the City of Chicago Committee on Finance issued a letter stating that all co-pays and deductibles are the responsibility of the disabled officers. The Lodge requests expedited arbitration of this class action grievance.

The City denied the grievance (JX 4). I conducted a hearing on February 22 and 23, 2005. At the hearing, the Union stated that it was "not pursuing a claim...on behalf of the officers receiving duty disability benefits" (Tr. 9-10). Rather, the Union represented, it was "arbitrating hospital, medical and prescription costs for officers on leave of absence for occupational disability...insofar as those hospital, medical and prescription costs relate to

the occupational disability itself," and not for anything "unrelated to the occupational disability" (Tr. 10-11).

II. The Issue

The parties did not agree on the issue to be resolved, and they authorized me to "define the issue on the basis of the evidence and arguments presented" (Tr. 8). The Union defines the issue as follows:

> Did the City of Chicago violate "Section 18.9 of the Collective Bargaining Agreement by refusing to pay all hospital, medical and prescription costs of an officer on leave of absence for occupational disability purposes, all at no cost to the employee as stated in 18.9? If so, what is the remedy?" (Tr. 9).

The City defines the issue as follows (Tr. 8):

> Did the City of Chicago violate Section 18.9 of the parties' Contract when it extended the Health Plan's provisions to officers on occupational disability and paid for their treatment and medication for their occupational disability pursuant to the Plan's provisions? If so, what is the appropriate remedy?

I define the issues:

> Was the grievance untimely or, alternatively, did the Employer waive its argument that the grievance was untimely?
>
> Did the City violate the Agreement by declining to pay the health insurance deductibles and copayments of Police Officers on occupational disability leave? If so, what is the appropriate remedy?

III. Relevant Provisions of the 1995-1999 and 1999-2003 Agreements[3]

Article 9, Section 9.2: Procedures, Steps and Time Limits for Standard Grievances

* * *

Step One: Initiating a Grievance. The grievant will first submit his grievance in writing to his immediate supervisor in his unit of assignment within seven (7) of the officer's working days following the events or circumstances giving rise to the grievance or where first known by the grievant, or thirty-five (35) days, whichever period is shorter. ...

Article 9, Section 9.6: Authority of the Arbitrator

A. Except as specified in Subsection B below, the Arbitrator shall have no right to amend, modify, nullify, disregard, add to, or subtract from the provisions of this Agreement. The Arbitrator shall only consider and make a decision with respect to the specific issue or issues presented to the Arbitrator and shall have no authority to make a decision on any other issues not so submitted. ... The decision shall be based upon the Arbitrator's interpretation of the meaning or application of the terms of this Agreement to the facts of the grievance presented, and shall be final and binding upon the parties.

Article 9, Section 9.7: Expense of the Arbitrator

The fee and expenses of the Arbitrator shall be borne by the party whose position is not sustained by the Arbitrator. The Arbitrator in the event of a decision not wholly sustaining the position of either party, shall determine the appropriate allocation of his fees and expenses. ...

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[3] Contract provisions in plain print are found in both the 1995-1999 and 1999-2003 Agreements. Provisions in **bold print** are found only in the 1999-2003 Agreement. By its terms, the 1999-2003 Agreement was in effect from July 1, 1999 through June 30, 2003. The parties signed it on April 16, 2002.

Article 18, Section 18.9: Employer Responsibility for Hospital, Medical and Prescription Costs and Pension Contributions.

Pending the final determination of benefits by the Fund, officers covered by this Agreement who apply for duty, ordinary, or occupational disability benefits will be required to contribute the same amount as active officers for health care benefits; and the Employer will continue to provide the same health care benefits.

Officers who receive duty or occupational disability benefits will continue to receive those benefits at no cost without any refund of their previous contributions. Officers who are awarded ordinary disability benefits will be required to contribute at the Public Health Services Act (PHSA) rate reduced by the administration fee of 2%, as of the first day of the month following the Fund's final determination of the officer's claim.

The Employer agrees to pay all hospital, medical and prescription costs of an officer who is on a leave of absence for duty or occupational disability purposes, all at no cost to the employee. The Employer shall make pension contributions on behalf of the employee as if the employee had remained in active service.

Article 25, Section 25.2: Medical and Dental Plans

The officers' and dependents' medical, dental, optical and prescription drug plans are hereby incorporated in this Agreement.

* * *

The plans for medical, dental, optical, and prescription drug benefits, including the provisions on eligibility and self-contribution rules in effect as of the date of this Agreement, may not be changed by the Employer without the Agreement of the Lodge.

The Employer also agrees to make available to the following other persons the above-described hospitalization and medical program, the dental plan and the optical plan: officers covered by this Agreement who retire on or after age 60 and their eligible dependents; surviving spouse and children of officers covered by this Agreement killed in the line of duty; officers covered by this Agreement on a leave of absence for disability (both duty and occupational) and

their eligible dependents.... The Employer will contribute the full cost of coverage for any of the above-enumerated officers covered by this Agreement who elect coverage under any plan or plans. However, coverage, under a plan for officers covered by this Agreement shall terminate when an officer covered by this Agreement either reaches the age for full Medicare eligibility under federal law or ceases to be a dependent as defined in a plan, whichever occurs first. After an officer covered by this Agreement reaches the age for full Medicare eligibility, that officer shall be covered under the medical program for annuitants, provided the person pays the applicable contributions.

* * *

IV. Relevant Provisions of the Summary Plan Description

WHEN YOUR COVERAGE ENDS

* * *

Continuing Coverage (As an Inactive Employee)

The Benefits Management Office administers a direct pay program so that inactive employees can continue benefits. Benefits may be continued under the following circumstances or as otherwise required by the Family and Medical Leave Act of 1993:

- If you are on ordinary disability and receiving pension plan ordinary disability benefits, you may continue medical coverage by paying the full cost of coverage.

- If you are on an approved unpaid personal or medical leave, you may continue coverage for up to six months by paying the full monthly cost of coverage.

- If you are receiving paid or extended sick leave benefits, you can continue coverage for the length of the benefits, if you make the required employee contributions.

- If you are receiving Duty Disability benefits from an employer pension plan, you may continue coverage for the length of the benefits, if you make the required employee contributions.

- If you are receiving Duty Disability or occupational disability benefits from the Police or Fire pension plan,

you may continue coverage for the length of those benefits, at no cost to you.

* * *

V. Relevant Provisions of the Chicago Municipal Code

3-8-200 ADMINISTRATION OF FUND

(a) The committee on finance of the city council is hereby authorized, directed and empowered to provide for payment for proper medical care and hospital treatment for accidental injuries sustained by any policeman or fireman, while in the performance of his duties, and to that end may recommend to the city council the authorization of any such necessary expenses.

VI. Relevant Provisions of the Illinois Compiled Statutes

40 ILCS 5/5-154. DUTY DISABILITY BENEFIT...

Sec. 5-154. Duty disability benefit.... (a) An active policeman who becomes disabled on or after the effective date as the result of injury incurred on or after such date in the performance of an act of duty, has a right to receive duty disability benefit during any period of such disability for which he does not have a right to receive salary, equal to 75% of his salary, as salary is defined in this Article, at the time the disability is allowed....

40 ILCS 5/5-154.1 OCCUPATIONAL DISEASE DISABILITY BENEFIT

Sec. 5-154.1. Occupational disease disability benefit. (a) The General Assembly finds that service in the police department requires police officers in times of stress and danger to perform unusual tasks; that police officers are subject to exposure to extreme heat or extreme cold in certain seasons while performing their duties; and that these conditions exist and arise out of or in the course of employment.

(b) Any police officer with at least 10 years of service who suffers a heart attack or any other disabling heart disease but is not entitled to a benefit under Section 5-154...is entitled to receive an occupational disease disability benefit under this Section. The occupational disease disability benefit shall be 65% of the salary attached to the rank held by the police officer in the police serv-

ice at the time of his removal from the police department payroll. ...

VII. Summary of the Relevant Evidence

A. Benefits Provided to Police Officer John Fitzgerald

John Fitzgerald was employed by the City as an "active Police Officer" from June 15, 1970 until February 14, 2002 (Fitzgerald 26-7). Between February and April 2002, Fitzgerald was on leave of absence because a virus he caught from a prisoner resulted in cardiomyopathy and congestive heart failure (Fitzgerald 27-8). In April 2002, the Pension Board granted Fitzgerald occupational disability benefits equivalent to 65 percent of his Police Officer's salary (Fitzgerald 28-9; Dougherty 52).

While on active duty, Fitzgerald participated in a PPO that required him to assume the cost of deductions and co-payments (Fitzgerald 38). The City now provides the same PPO plan to Fitzgerald without requiring the payment of insurance premiums. As before, however, he must assume the cost of deductibles and co-payments (Fitzgerald 31, 38). Fitzgerald estimated that his monthly out-of-pocket health-care costs are $75 to $100 (Fitzgerald 34).

B. Bargaining History

1. Negotiation of the July 1, 1995 – June 30, 1999 Agreement (JX 1)

The parties agreed on Section 18.9 in their 1995 negotiations and incorporated it into their 1995-1999 Agreement

(JX 1). On June 15, 1995, the Union tendered to the City five proposals on Article 18 ("Disability Income"). (Pleines 150-51). None of these proposals referred to health care for police officers on occupational- or duty-disability leave (see UX 4).

After the Union had tendered these initial proposals, the Illinois General Assembly enacted the "Occupational Disease Disability Benefit" (also known as the "Heart Attack Bill"), which provided that a police officer "who suffers a heart attack or any other disabling heart disease but is not entitled to a [duty disability] benefit under Section 5-154" shall be paid 65% of his final active-duty salary.[4]

The Union's March 1996 Newsletter contained the following (JX 5, at 5):

> Due to the fact that we just received this [Heart Attack] bill and it was already in place in the fire department, we are addressing language in our new contract to pay the hospitalization for officers who take advantage of this bill. Only one officer has gone on this as yet, and the City has been taking care of his health care costs.

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[4] Since at least 1982 the contract between the City of Chicago and Fire Fighters Local 2 has provided health care benefits to firefighters on duty disability and occupational disability leave (CX 5, at 19).

Or as the City's chief negotiator James Franczek testified (Franczek 60-1)—

> The rationale that was articulated [by the Union] was fundamentally on two premises. One is that we had had an analogous provision with regard to duty and occupational disabilities in the Fire contract and had had for some period of time prior to 1995 and the Lodge sought parity on this issue with Local 2. Secondly, there had been legislation passed...the preceding legislative year ...that had provided for occupational disability for police officers and provided for a disability benefit of...sixty-five percent at the time. So the Lodge asserted that we needed language in there in response to both of those....

Having "been successful in getting legislation passed" that created a "new benefit...called the Occupational Disability Benefit," the Union sought to negotiate a "leave of absence for disability purposes [for] anyone...on a leave for any type of disability" (Pleines 154-55). Pursuing this benefit, Union chief negotiator Thomas Pleines tendered the following proposal (UX 5) to Franczek on February 21, 1996 (Pleines 156):

<u>Section 18.10. Employer Responsibility for Hospital, Medical and Prescription Costs and Pension Contributions</u>

The Employer agrees to pay all hospital, medical and prescription costs of an officer who sustains an injury or illness while in the performance of an act of duty, and further agrees to provide the same benefits and coverage to an officer who is on a leave of absence for disability purposes, all at no cost to the employee. The Employer shall make all pension contributions on behalf of the employee as if the employee had remained in active service.

Although, Pleines testified, this proposal "was not accepted in this form," it was "ultimately accepted in the form that...appears as 18.9 in the contract" (Pleines 156).

Pleines and Franczek did not fully agree on how the parties reached agreement on Section 18.9. Pleines testified that he did not "negotiate with Mr. Franczek over the language of...what became 18.9" (Pleines 160). According to Pleines, the parties worked out this language in Medical Subcommittee meetings that Franczek did not attend (Pleines 160). Franczek's recollection was that there was a "very modest amount of discussion concerning" health care benefits for police officers on disability leave, but that "when we talked about this proposal it was in the context of what had gone on in the Fire Department and in the context of the legislation" (Franczek 71). Noting that the City had never waived "occupational disability co-pays" for firefighters, "the predicate from the City's point of view was that there would be no contributions...because that was the practice we had in the Fire Department" (Franczek 72). Franczek also relied on an article written in March 1996 by Bob Podgorny (JX 5), the "Lodge's expert on health care matters"; Franczek considered this article an attempt "to get what was in place at the Fire Department" (Franczek 66, 67).

Pleines suggested, however, that "we were not trying to achieve parity with the Fire Department"; rather, he testified, consistent with the history of "constant one-upmanship between Police and Fire," "we were trying to get a benefit...better than what the Fire Department had" (Pleines 190).

2. The July 1, 1999 – June 30, 2003 Supplement to the Agreement (JX 1A)

The 1999-2003 Supplement, which was the "result of the negotiations and interest arbitration" (Franczek 81),[5] incorporated a new section on "Medical and Dental Plans" (§25.2). Franczek testified that as the parties were negotiating the Supplement, the City and Fire Fighters Local 2 agreed to extend "the health care plan to retirees between the ages of sixty and sixty-five"; the parties also agreed "to incorporate the sixty to sixty-five provision," extending "to...FOP the other categories of people that were eligible for the City's medical program, dental plan and optical plan" (Franczek 76-7).

The Employer's "hospitalization and medical program" is available to "officers...on a leave of absence for dis-

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[5] The interest arbitration award of arbitrator Steven Briggs was not offered into evidence, and the evidence did not disclose which parts of the 1999-2003 agreement were the product of interest arbitration and which the product of negotiations.

ability (both duty and occupational)" (Art. 25, §25.2, ¶4). Although, Franczek testified, the fourth paragraph of Section 25.2 did not change occupationally disabled officers' benefits, and Sections 25.2 and 18.9 seem, on their face, to treat occupationally disabled and duty-disabled officers identically (Franczek 93), the parties did not eliminate Section 18.9 "because we didn't think it made any difference" and because the last paragraph of Section 18.9 "wasn't a focus" (Franczek 78). Pleines testified that occupationally disabled and duty disabled officers were treated the same "because we had agreed that they be treated the same" (Pleines 191).

Podgorny was the "lead person for the Lodge on medical issues" in the negotiations that resulted in the 1999-2003 Supplement (CX 7, at 7-8). In the interest arbitration hearing before arbitrator Briggs on August 30, 2001, Podgorny testified about "health insurance rates for duty, occupational, and ordinary disability" (CX 7, at 8). He said that, pending the Pension Board's decision on duty disability leave, an officer has to "pay the full hospitalization cost" once he has exhausted his 365 days of injury-on-duty benefits (CX 7, at 8-11). According to Podgorny, the parties agreed that, "pending the final determination by the fund as to whether the officer would

be occupationally disabled [or] duty disabled,...he would ...pay his current rate...for his insurance...as an active employee," and "not ask for a refund when it was over" (CX 7, at 13). Podgorny also testified that once an officer is on duty or occupational disability leave, "he would no longer pay any insurance at all. That would be totally covered by the City" (CX 7, at 24-5).

C. Benefits Administration

Benefits Manager Nancy Currier testified about the City's administration of health insurance benefits for firefighters and police officers under the Summary Plan Description (JX 7) (Currier 122-23):

Q. One of the exclusions...for police officers is that if they receive duty or occupational benefit[s] from the Police or Fire pension plan it states:

> You may continue coverage for the length of those benefits, at no cost to you.

Based on that language...what have they been responsible for paying and what have we been responsible for paying?

A. This means that the officer or the fireman would receive the same plan, whatever plan of benefits he had, HMO, PPO or point of service plan, but he would have no employee contribution in terms of the health care contribution that any other employee makes, his is at no cost.

Q. Does it mean that he...or she won't have to pay for prescription co-pays?

A. No, it doesn't mean that.

Since the first officer was granted occupational disability in late 1995, Currier testified, slightly more than

100 officers have been granted occupational disability leave (Currier 128). None of the officers enrolled in a PPO, which by its terms requires payment of an insurance deductible, has been "exempt from meeting their deductible" (Currier 128-29, 130). The City has never paid the co-payments or deductibles for officers on occupational disability leave (Currier 143-44). The City has paid only "employee and employer contributions" (Currier 144). Occupationally disabled officers enrolled in a PPO receive an "explanation of benefits form" explaining "what portion they have to pay for co-insurance or co-payments" (Currier 129-30).

On cross-examination, Currier conceded that she was not "aware" that the Agreement "differentiates between the treatment of officers who receive duty disability benefits and officers [who] receive occupational disability benefits" (Currier 133). Nevertheless, she testified, officers on duty-disability leave do not pay deductibles or co-pays (Currier 133-34):

Q. So why is it that the City differentiates between the occupationally disabled...and the duty disabled?

A. It's my understanding that the duty disabled is covered under a pension statute or ordinance, City ordinance, that's why they are treated differently.

"On occasion," the Committee on Finance refunds "deductibles or co-pays that are paid by duty disabled

officers for treatment relating to their disabling injury" (Currier 138-39). According to Currier, these refunds are not made "pursuant to the plan" but in accordance with the Municipal Code (Currier 143). Currier's office does not process these refunds (Currier 139).

By letter dated November 27, 1996, Pleines wrote to Franczek as follows (CX 2):

> I have just been informed that the Retirement Board of the Policemen's Annuity & Benefit fund continues to require officers on occupational disability to pay 9% of their salary as their contribution towards further pension benefits.
>
> As you are aware, this matter was previously brought to your attention in the case of Frank Kromidas. You informed me that both you and David Johnson were of the opinion that section 18.9 provides that the employer—not the employee—was responsible for these contributions, as well as the payment of health insurance benefits. Apparently, this has not been communicated to the Fund, or the Fund does not afford your legal opinion the same great weight and respect which I always do. In any event, the Fund continues to require every officer on occupational disability to pay for pension and health insurance benefits out of his or her own funds.
>
> Please see that this is corrected immediately. The Lodge simply cannot stand to allow this to go any further.

Franczek testified that Pleines's "characterization" of his opinion that the "employer—not the employee—was responsible for these contributions, as well as the payment of health insurance benefits" was "pretty fair" (Franczek 73). By "health insurance benefits," Franczek testified, "we were referring to it in the context in which we had

100 officers have been granted occupational disability leave (Currier 128). None of the officers enrolled in a PPO, which by its terms requires payment of an insurance deductible, has been "exempt from meeting their deductible" (Currier 128-29, 130). The City has never paid the co-payments or deductibles for officers on occupational disability leave (Currier 143-44). The City has paid only "employee and employer contributions" (Currier 144). Occupationally disabled officers enrolled in a PPO receive an "explanation of benefits form" explaining "what portion they have to pay for co-insurance or co-payments" (Currier 129-30).

On cross-examination, Currier conceded that she was not "aware" that the Agreement "differentiates between the treatment of officers who receive duty disability benefits and officers [who] receive occupational disability benefits" (Currier 133). Nevertheless, she testified, officers on duty-disability leave do not pay deductibles or co-pays (Currier 133-34):

Q. So why is it that the City differentiates between the occupationally disabled...and the duty disabled?

A. It's my understanding that the duty disabled is covered under a pension statute or ordinance, City ordinance, that's why they are treated differently.

"On occasion," the Committee on Finance refunds "deductibles or co-pays that are paid by duty disabled

been negotiating it, which was...what we had in place for a long time with the Fire Department" (Franczek 74).

Pleines testified that until the instant grievance was filed he was not aware that police officers on occupational disability leave were paying co-payments and deductibles (Pleines 173-74).

VIII. Summary of Arguments

A. The Union

1. Section 18.9 is not ambiguous (Un. Brief, 11). A "collective bargaining agreement is ambiguous if it is susceptible to more than one reasonable interpretation (Un. Brief, 11, citing *Brewer v. Protexall,* 50 F.3d 453, 458 (7th Cir. 1995)). An "[i]ntrinsic or patent ambiguity exists when the contract's terms are internally unclear and the agreement is thus susceptible to more than one reasonable interpretation" (Un. Brief, 11, citing *Home Ins. Co. v. Chicago and Northwestern Trans. Co.,* 56 F.3d 763, 768 (7th Cir. 1995)). The City did not establish that "the contract is intrinsically ambiguous" (Un. Brief, 11). The "employer has agreed to pay *all* hospital, medical and prescription costs, *all at no cost* to the employees," and "[e]ven the City conceded that 'all' means 'everything'" (Un. Brief, 12).

2. "Extrinsic or latent ambiguity exists if the contract appears 'clear on its face but someone who knows the

context of the contract would know that the contract means something other than what it seems to mean'" (Un. Brief, 11, citing *Home Ins. Co., supra*). While extrinsic evidence "may be used to show that an agreement contains extrinsic ambiguity, the evidence may not be used to create an ambiguity" (Un. Brief, 11, citing *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 608 (7th Cir. 1993)).

3. The party claiming an ambiguity "bears the burden of presenting objective evidence, rather than subjective and self-serving testimony" (Un. Brief, 12, citing *Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560, 565 (7th Cir. 1995)). The "evidence presented by the City on the subject of potential ambiguity was subjective and self-serving" (Un. Brief, 12).

4. To "use extrinsic evidence, 'there must be either contractual evidence on which to hang the label of ambiguity or some yawning void that cries out for an implied term'" (Un. Brief, 12, citing *Murphy v. Keystone Steel, supra*)). Here, there was neither (Un. Brief, 12). The "City will not produce any authority for the bizarre proposition that 'all' means something less than 'all' or 'everything'" (Un. Brief, 13).

5. If, as Franczek testified, it was the City's "understanding" that the Union's proposal "was meant to

achieve the same set of benefits that the Chicago Firefighters had obtained for their occupational disabled members in the early 1980's," "why not use the same language in each collective bargaining agreement?" (Un. Brief, 13). Franczek "does not provide *any* [italics in original] reason for the difference in language..." (Un. Brief, 13).

6. Even though Section 18.9 treats duty disabled officers and occupationally disabled officers identically, "Franczek testified that 18.9 means something different to each set of disabled officers" (Un. Brief, 14). The City often reimburses officers on duty disability their co-pays, but Franczek "maintained that the City cannot treat these two groups of officers the same in terms of refunds because there is no additional ordinance that covers occupational disability" (Un. Brief, 14-15). This position is "disingenuous given the fact that Franczek testified...that the Collective Bargaining Agreement itself 'is passed as an ordinance...'" (Un. Brief, 15). This argument is undercut by the Agreement, which provides, among other things, for payments to officers "without any additional City ordinance requiring such payment," for example, duty availability allowance and uniform allowance (Un. Brief, 15).

7. Contrary to Franczek's testimony, the Code does not provide "different benefits" to duty disabled officers and

occupationally disabled officers (Un. Brief, 16, citing Chicago Municipal Code §3-8-200). Section 18.9 "provides ***more*** [emphasis in original] benefits for duty disabled officers in reference to medical expenses than does the Chicago Municipal Code" (Un. Brief, 17).

8. The "City did not present one live witness to establish that the Lodge and the City had the same understanding of Section 18.9," but relied on Franczek's testimony "on what he believed the Lodge took Section 18.9 to mean" (Un. Brief, 22). The City cited a newsletter article written by Robert Podgorny that "makes no mention of co-pays and deductibles"; in fact the newsletter states, "'Those who receive duty or occupational disability receive all benefits at no cost'" (Un. Brief, 22).

9. The "City apparently believes that it is important that Mr. Podgorny's testimony" at interest arbitration for the 1999-2003 bargaining agreement "does not mention refunds for co-pays or deductibles" (Un. Brief, 23). However, "it was revealed that Podgorny was never asked any question about [these] refunds" (Un. Brief, 23).

10. Currier "testified that she understands that duty disability and occupational disability are not differentiated under the Collective Bargaining Agreement" (Un. Brief, 17-18). She also "stated that she did not believe the City

would have to obtain a new insurance plan if the City was required to pay co-payments and deductibles for occupational disabled officers" (Un. Brief, 18).

11. Pleines's testimony "was logical and unimpeached" (Un. Brief, 19). As Franczek, unlike Pleines, "did not participate in the negotiation of Section 18.9 at the subcommittee level," Pleines's testimony has "substantially more weight" (Un. Brief, 19). As Currier "had essentially no recollection of the negotiations that led to the creation of Section 18.9," Pleines's testimony on these negotiations is "far more" credible (Un. Brief, 19).

12. Franczek did not refute Pleines's testimony that "'there was never a discussion between Jim Franczek and anybody who represented the Lodge that this language of 18.9 was limited to the contribution for the cost of the health care premium...'" (Un. Brief, 20).

13. The "City maintains that the Lodge did not bring the instant grievance for a number of years because the Lodge shared the same understanding as the City in reference to 18.9" (Un. Brief, 20). However, the City offered no evidence with respect to the "Lodge's motivation" (Un. Brief, 20).

14. The City's argument that the grievance should be barred because "the Lodge did not complain about the issue

of co-pays and deductibles for occupational disabled officers until it filed its grievance in 2003" is untimely; "the City never objected to the grievance on the basis that it was untimely" (Un. Brief, 21). In any event, "this is an ongoing violation that is renewed or repeated [on] a regular basis and, in particular, each time another officer joins the ranks of the occupational disabled" (Un. Brief, 21).

15. The "grievance was filed in 2003 because that is when the Lodge first became aware of the violation"; a "union cannot file a grievance about a problem that it is unaware of" (Un. Brief, 21).

B. The City

1. The "Lodge bears the burden of establishing that the language of section 18.9 comports with its interpretation, that is, that officers on Occupational disability are exempt from the parties' health care Plan only as it relates to their Occupational disability and are entitled to free health care without paying deductibles, copayments, and coinsurance as it relates to their Occupational disability" (Emp. Brief, 9, citing *City of Chicago & PBPA, Unit 156* (Briggs 3/4/02)).

2. The "plain language of the contract prevents the Lodge from meeting its burden. Alternatively, the parties' practice and bargaining history signify that the City and

the Lodge did not agree to exempt officers on Occupational disability from the health care Plan as it relates to their Occupational disability" (Emp. Brief, 9).

3. The grievance must be denied "based on the plain language of Section 18.9" (Emp. Brief, 9). Section 18.9 "states that at no cost to the employee, the City will pay all hospital, medical and prescription costs for such officers" (Emp. Brief, 9). The "term 'costs'...does not reference copayments, deductibles, or coinsurance. The costs associated with the health care Plan for employees on disability are two fold—the employer's contributions and the employee's contributions. The City pays both of these costs" (Emp. Brief, 10). Section 18.9 does not "suggest... that coinsurance, copayments, and deductibles are to be paid by the City..." (Emp. Brief, 10).

4. Employees on leave of absence "pay 102% of the costs to have the Plan extended to them," after which they are subject to co-payments, deductibles, and coinsurance (Emp. Brief, 10). "Instead of having to pay the full cost of contributions as is normally required for an employee on leave of absence, or the employee's contribution as required for some types of leave..., the officers and firefighters on Occupational receive the benefit at no cost" (Emp. Brief, 10). This "is exactly what the City has done

since Occupational disability was extended to police officers" (Emp. Brief, 10).

5. The "plain language of Section 18.9" does not support the Union's position (Emp. Brief, 10). Section 18.9 "does not state that the Employer will pay the coinsurance, deductibles or co-payments for officers on occupational disability. It refers specifically to costs" (Emp. Brief, 10). Section 18.9 does not state, as alleged by the Union, that "18.9 provides for free health care for officers on Occupational only as it relates to the reason for their Occupational disability" (Emp. Brief, 11). Section 18.9 "seems to equate 'costs' with 'contributions' as evidenced by paragraph 3..." (Emp. Brief, 11).

6. Even if Section 18.9 is ambiguous, "the parties' practice demonstrate[s] that the Lodge's position is untenable" (Emp. Brief, 11). The "parties never intended for officers on Occupational disability to [receive] free health care.... Rather, the practice and the bargaining history both illustrate that officers on Occupational were exempt from making contributions in order to receive the Plan's benefits" (Emp. Brief, 11).

7. Section 18.9 "was drafted and negotiated...in light of the 'heart attack' legislation being passed," which "provided officers who suffered a heart attack or disabling

heart condition with 65% of their salary" (Emp. Brief, 12). Firefighters have "Occupational benefits for heart and lung conditions" (Emp. Brief, 12). Firefighters "who were on Occupational disability received the health care Plan at no cost" subject to "copayments, coinsurance, and deductibles" (Emp. Brief, 12). As explained to the City by the Lodge, it was the "Lodge's goal...to ensure these same insurance benefits for officers on Occupational" (Emp. Brief, 12). The Lodge also "wanted language in the Contract to address the benefits of those taking advantage of" the heart attack statute (Emp. Brief, 12).

8. Based "on the Lodge's representation, the City understood the proposal to provide benefits for officers on Occupational in the same manner it had been doing with members of the Fire Department" (Emp. Brief, 12). The City did not "agree by this language, or any other language, to waive copayments, coinsurance, or deductibles" (Emp. Brief, 12).

9. Bob Podgorny, a member of the Union's negotiating team responsible for "medical issues," wrote in an FOP newsletter that "the Lodge's goal was to obtain insurance for officers who take advantage of the 'heart attack' legislation, just as was being done in the Fire Department" (Emp. Brief, 13).

10. In an interest arbitration hearing, Podgorny testified that "[o]nce the Pension Board made the determination" on occupational disability, "officers were refunded the employees' contributions...they paid," but not "the co-payments, coinsurance or deductibles" (Emp. Brief, 13-14).

11. Podgorny admitted that "the Lodge was seeking health insurance for officers on Occupational in the same manner that existed within the Fire Department," and the "Lodge's Chief Negotiator" stated that, in negotiations for the 1999-2003 Agreement, "the Lodge secured the City's promise to provide health care insurance to officers on Occupational disability by way of the language found in 18.9" (Emp. Brief, 14).

12. "In a letter to Franczek, Pleines stated that the City believed that under 18.9, the employer was responsible for pension contributions and payment of health insurance benefits"; Pleines did not say that "the Lodge had a different opinion as to the meaning of 18.9" (Emp. Brief, 14).

13. The Lodge got "health care insurance for officers on Occupational disability" (Emp. Brief, 15). Had it got "what it is now claiming, that is, free health care for officers on Occupational as it relates to their Occupational injury, this would have required the parties to negotiate a separate health plan for officers on Occupa-

tional disability..., or a revision of the Municipal Code..." (Emp. Brief, 15).

14. The "practice amply demonstrates that 18.9 was intended to extend the Plan's provisions by exempting officers on Occupational from paying the employer and employee contributions" (Emp. Brief, 16).

15. Since 1995, the "parties have had an uninterrupted practice...of providing the health care Plan's benefits to officers on Occupational disability," and the "Lodge cannot merely set it aside by insisting that 18.9 has a meaning different from the enshrined practice" (Emp. Brief, 16, citing *Mason and Hanger-Silas Mason Co.*, 75 LA 106, 109 (Johannes 1980); *City of Meriden,* 71 LA 699, 701 (Mallon 1978); *Duquesne Brewing Co.*, 54 LA 1146, 1149 (Krimsly 1970); and *City of Chicago/FOP Lodge 7* (Feuille 1995)).

16. "Since the first officer received Occupational in 1995, every officer on Occupational disability has received the same benefit—health care without paying the employer or employee contributions" (Emp. Brief, 17-18).

17. The "Lodge was acutely aware of this practice" (Emp. Brief, 18). "Pleines, General Counsel for the Lodge who has also represented hundreds of officers over the last 12 years who applied for Duty disability and Occupational disability..., knew or should have known that officers on

Occupational were receiving the benefits of the health care Plan subject to copayments and deductibles" (Emp. Brief, 18-19). "[E]ach time a member goes to the doctor, he either pays a co-payment or receives an Explanation of Benefits form telling him that he has to pay a deductible or co-insurance" (Emp. Brief, 19). Arbitrators "have consistently charged the Union with knowledge of practices that are known to the employees" (Emp. Brief, 19, citing *City of Chicago/FOP Lodge 7,* Grv. 009-98-001/201 (Warnke Grievance) (Goldstein 2000)).

18. The Union's argument that because "its new administration was unaware of this practice" it was "justified in filing a grievance some 7-8 years after the practice has been enshrined" "must be rejected" (Emp. Brief, 19-20). The "election of new officers is not enough to set the Contract language aside as defined by the practice..." (Emp. Brief, 20).

19. The contract provides that grievances "are to be filed either within 7 working days of when the officer has knowledge of the events that give rise to the grievance, or thirty-five days, whichever period is shorter" (Emp. Brief, 20). "Any officer would have had knowledge when he went to his doctor and paid the co-payment," and the "grievance

should have been filed within 7 working days of that event..." (Emp. Brief, 20).

20. If Pleines believed that "no cost" meant that Chicago Firefighters were not responsible for co-payments, co-insurance and deductibles, he could not have been trying to get anything more than "parity" with them, not, as he testified, "a better benefit" (Emp. Brief, 16, n. 1). If he believed that Firefighters "actually paid copayments, deductibles and coinsurance," that "would mean that full costs is equivalent to contributions" only (Emp. Brief, 16, n. 1).

21. Pleines contradicted the Lodge's argument that Section 18.9 is unambiguous, that "all means all" and that therefore an "officer on Occupational pays nothing" (Emp. Brief, 20-1). The "Lodge admits that an officer on Occupational disability must pay copayments, coinsurance, and deductibles for all of his illnesses" and that he must make these same payments for his dependents for "all injuries and illnesses" (Emp. Brief, 21). "Thus, 'all' of the officer's costs are not covered"; he receives "free health care" only for his occupational disability (Emp. Brief, 21).

22. To "accept the Lodge's argument presupposes that 18.9 is ambiguous": the plain language of 18.9 does not

"limit...the cost...to the disabling condition" (Emp. Brief, 21). "Hence, 'all' does not mean 'all'" (Emp. Brief, 21). The Lodge admits that the officer "does bear some costs," but Section 18.9 "does not, in fact, tell us what the officers must pay" (Emp. Brief, 21). There is, therefore, "an ambiguity as to what costs officers on Occupational are exempt from" (Emp. Brief, 21).

23. Even if the language is unclear, the Lodge argues, the "City must extend the same benefits to officers on Occupational disability as it does to officers on Duty disability. After all, 18.9 references both Duty and Occupational" (Emp. Brief, 22). The "Lodge's argument is correct": the City "extends the same benefit to officers...on Duty and Occupational pursuant to 18.9" (Emp. Brief, 22).

24. The "difference in how the two groups are treated is not based on 18.9, but...on the Municipal Code" (Emp. Brief, 22). Section 18.9 does not obligate the City "to pay for any duty related injury"; "duty related injuries are exempt from the Plan and subject to the terms of the Municipal Code" (Emp. Brief, 22).

25. Section 18.9 "was not negotiated in a vacuum" (Emp. Brief, 23). It was the parties' intent "to achieve parity with the Fire Department and to extend health care insurance to officers based on the 'heart attack' legisla-

tion" (Emp. Brief, 23). The Lodge drafted the language of Section 18.9, and the "interpretation less favorable to the Lodge is to be preferred," (Emp. Brief, 23, n. 2, citing Alan Miles Ruben, ed., *Elkouri & Elkouri: How Arbitration Works*, 6th ed. (Washington: Bureau of National Affairs, 2003), at 477).

26. "If the language is read to unambiguously state that officers on Occupational are entitled to free health care without copayments, coinsurance, or deductibles as it relates to their disabling heart disease or a heart attack, the parties' practice of never affording officers on Occupational this kind of health care has modified the plain language" (Emp. Brief, 24, citing Ruben, *supra*; Richard Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, 42-3; Goldstein Award, *supra*; *City of Chicago/Firefighters Local 2* (Elson 1993); and *City of New Haven*, 100 LA 22 (Freedman 1992)).

27. If "there was no meeting of the minds" on the meaning of Section 18.9, "the practice must be applied" (Emp. Brief, 24, n. 3, citing *Montgomery County Public Schools*, 104 LA 815, 818 (Hockenberry 1995)).

28. If the contract is silent "on the issue of who pays the copayments, coinsurances, and deductibles," the "parties' practice can be used to fill in the 'gap'...

(Emp. Brief, 27, n. 4, citing *City of Chicago*/FOP Lodge 7 (Baikie Grievance) (Goldstein Award 1992)).

IX. Discussion and Findings

A. Timeliness of the Grievance

At the hearing, the Employer argued that the "grievance should have been filed within 7 working days" after the grievant "went to his doctor and paid the copayment" (Emp. Brief, 20; see also Tr. 20-22). By alluding to Section 9.2, Step 1 of the Agreement, the Employer claimed that the grievance was untimely. As the Employer did not present this claim prior to the hearing, it waived its defense of untimeliness:

> In most cases...a waiver is found because the employer did nothing to apprise the union of its procedural objections until the arbitration hearing. In these situations, the union has been misled and may have incurred expenses in preparing for arbitration. The union may well have believed that the employer's silence was a waiver. Indeed, the arbitrator may question the sincerity of a defense never raised until arbitration. Moreover, the rejection of an untimeliness argument made for the first time at arbitration encourages the parties to address a grievance meaningfully at the lower steps.[6]

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[6] Harvey A. Nathan & Sara McLaurin Green, "Challenges to Arbitrability," Tim Bornstein, Ann Gosline & Marc Greenbaum, eds., *Labor and Employment Arbitration* (New York: LexisNexis/Matthew Bender, 2006), Vol. I, Chap. 8, §8.03[6][a], at 42-3.

B. Section 18.9: Ambiguity and the Use of Parol Evidence

As arbitrator William Stix noted in *Associated General Contractors of St. Louis,* 61 LA 473, 479-80 (1973), and reiterated in *Circle Steel Corp.,* 85 LA 738, 739 (1984), there are two rules on the admissibility of parol evidence, The "plain-meaning" or "four-corners" rule and the "surrounding circumstances" rule. These rules are succinctly described in *The Common Law of the Workplace: The Views of Arbitrators:*[7]

> 1. The Plain Meaning Rule: "[I]f words 'are plain and clear, conveying a distinct idea, there is no occasion to resort to interpretation, and their meaning is to be derived entirely from the nature of the language used.'"
>
> 2. The Surrounding Circumstances Rule: "'[T]he meaning of a writing '...can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words.''"[8]

Although the plain-meaning rule may seem to have achieved almost canonical status, the current trend is otherwise:

> It is a rare contract that needs no interpretation. It has been widely observed that there is no "lawyer's Paradise [where] all words have a fixed, precisely ascertained meaning,...and

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[7] Theodore J. St. Antoine, ed., 2nd ed. (Washington: BNA Books, 2005), at 72, citing Ruben, *supra*, at 434.

[8] St. Antoine, *supra*, n. 7, citing *Pacific Gas & Elec. Co. v. G.W. Drayage & Rigging Co.,* 442 F.2d 641, 643 (Cal. 1968).

> where, if the writer has been careful, a lawyer having a document referred to him may sit in his chair, inspect the text and answer all questions without raising his eyes." As Holmes cautioned, "a word is not a crystal, transparent and unchanged." It is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used.[9]

The Restatement (Second) of Contracts follows this lead:

> It is sometimes said that extrinsic evidence cannot change the plain meaning of the writing, but meaning can almost never be plain except in a context.... Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties.... But after the transaction has been shown in all its length and breadth, the words of an integrated agreement remain the most important evidence of intention.[10]

Arbitrators Arnold Zack and Richard Bloch seem willing to do away altogether with the parol evidence rule:

> [T]he entire parol evidence rule hangs, in one sense, on a weak hook. [T]he "plain meaning rule," itself a form of the parol evidence rule, has been all but repudiated. One may understand what is required in terms of staying within the four corners of the agreement, yet, if the words are clearly ambiguous, the arbitrator may stray outside. And...one party may generally present

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[9] Ruben, *supra*, at 437, citing FARNSWORTH, CONTRACTS, §7.8, at 454. Other citations are *Towne v. Eisner*, 245 U.S. 418, 425 (1918) and THAYER, PRELIMINARY TREATISE ON THE LAW OF EVIDENCE 428-29 (1898).

[10] RESTATEMENT (SECOND) OF CONTRACTS §212 cmt. b (1979), cited by Ruben, *supra*, at 437-38.

> evidence to show that otherwise "plain meanings" are not so plain. Considering this, as well as the less rigid approach to rules of evidence in arbitration, one should scarcely place great weight on the parol evidence rule.[11]

Assuming, *arguendo*, that a contractual provision is "clear on its face"—that it contains no obvious or "patent" ambiguity—it may nevertheless embody a "latent" ambiguity. An ambiguity is latent "where the language employed is clear and intelligible and suggests but a single meaning, but some extrinsic fact or extraneous evidence creates a necessity for interpretation or a choice among two or more possible meanings...."[12]

The Union argues that Section 18.9 is unambiguous—that, simply put, *all means all:* "All...medical...costs" "all at no cost to the employee."[13] Nevertheless, and despite the fact that Section 18.9 covers employees on leave "for duty or occupational disability," the Union concedes that it is "not...making a claim that the City of Chicago would be paying for" anything "unrelated to the

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[11] Zack & Bloch, *Labor Agreement in Negotiation and Arbitration* (Washington: Bureau of National Affairs, 1983), at 9.

[12] Henry Campbell Black, Joseph R. Nolan & Jacqueline M. Nolan-Haley, *Black's Law Dictionary*, 6th ed. (St. Paul: West Publishing Co, 1991). See also *Associated General Contractors of St. Louis, supra*; *Circle Steel Corp., supra*; and *Minnesota State Board for Community Colleges*, 84 LA 307, 313 (Gallagher 1985).

[13] Hereinafter, the phrase "all medical costs" will be shorthand for "all hospital, medical and prescription costs," including deductibles and co-pays.

occupational disability" (Tr. 11). The Union thus agrees that the Employer is not required to pay all the medical costs of an employee on Section 18.9 leave "for duty or occupational disability purposes." In at least one respect, therefore, "all" does not mean "all." Accordingly, it's not "illogical and absurd" to maintain that in the context of Section 18.9, "'all' means something less than 'all' or 'everything'" (See Un. Brief, 13). In short, both parties agree that ***in the context of Section 18.9*** the phrase *all medical costs* does not necessarily mean *all medical costs* for all employees on occupational disability leave.[14] Having determined what the phrase *all medical costs* does not mean in the context of Section 18.9, I shall determine what it does mean.

Bidlack v. Wheelabrator, supra, a case cited by the Union, is instructive. In *Bidlack,* a class action was filed to determine the "lifetime health benefits" of retired

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[14] This is not a trivial point. It has ramifications beyond the immediate context of this grievance. Group medical insurance does not normally distinguish among the types of injuries or illnesses to be covered—for example, heart disease but not infectious disease or head and neck injuries but not back injuries. This distinction would not only be inconsistent with normal and anticipated insurance coverage, it could, if applied, lead to serious administrative problems. For example, it might not be easy in all cases to determine whether an illness (such as pneumonia or asthma, for example) is "related to" the initial "heart disease." Thus, the Union's concession that "all" does not necessarily mean "all" embodies several levels of ambiguity.

employees. The Seventh Circuit reversed the Northern District of Indiana's dismissal of the complaint on motion for summary judgment. The court wrote, at 993 F.2d 605:

> The main question briefed...by the parties is whether the absence from the collective bargaining agreements of any provision that explicitly vests the health benefits of retired employees defeats those employees' claims even though some contractual language and a great deal of "extrinsic" evidence—evidence apart from the language of the agreements—suggest that the parties may have intended to confer vested rights on the retired employees, that is, rights that would outlast the expiration of the last collective bargaining agreement.

Noting that "there must be either contractual language on which to hang the label of ambiguous or some yawning void," the Court pointed out that the contracts under review "are not silent on the issue; they are merely vague" (993 F.2d at 608). And, the court noted, "...the parol evidence rule, which enforces integration clauses by barring evidence of side agreements, does not bar the use of extrinsic evidence to clarify the meaning of an ambiguous text" [citation omitted] (993 F.2d at 608). In the end, the court held that the contracts "say that once retired employees reach the age of 65 the company will pick up the full tab for their health insurance..."; and "[t]his could be thought a promise to retired employees that they...will be covered for the rest of their lives" (993 F.2d at 608).

I concur with the Union that "[w]hile extra-contractual evidence may be used to show that an agreement contains extrinsic [or latent] ambiguity, the evidence may not be used to *create* [my italics] an ambiguity" (Un. Brief, 11). However, this particular exclusion of "extra-contractual evidence" is not inconsistent with the view, as previously suggested, that—

> The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.[15]

Or as arbitrator Jay Grenig wrote:

> Whether contract language is ambiguous can frequently be determined only after considering the circumstances existing at the time the contract was adopted and the parties' administration of the contract.[16]

Since the parties agree that in the context of Section 18.9 "all medical costs" are not "all medical costs"—that, in fact, the grievance does not even seek "all medical costs"—it is appropriate, indeed necessary, to look at extrinsic evidence to determine a "meaning to which the

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[15] *Pacific Gas & Electric Co. v. G.W. Thomas Drayage Co.*, *supra*, n. 8, also cited in Zack & Bloch, *supra*, n. 11, at 7.

[16] Grenig, "Contract Interpretation and Respect for Prior Proceedings," Tim Bornstein, Ann Gosline & Marc Greenbaum, *Labor and Employment Arbitration* (New York: LexisNexis/Matthew Bender, 2001), Vol. I, Chap. 9, §9.01[4], at 6.

language of the instrument is reasonably susceptible"—to determine what the parties meant by "all hospital, medical and prescription costs."

C. The Extrinsic Evidence

Bargaining history and past practice (the "parties' administration of the contract") are the primary sources of extrinsic evidence arbitrators examine when interpreting disputed contract language:

> Resort to such extrinsic sources as bargaining history and past and collateral agreements is permissible even where the terms of the agreement are superficially clear, if the arbitrator discerns a latent ambiguity in any of the terms or if the language of the agreement does not appear fully to express the intent of the parties....[17]

1. Bargaining History

> Bargaining history may be particularly relevant in contract interpretation, as arbitrators are concerned with determining what the parties intended the contract language to mean at the time of incorporation into the agreement, rather than determining the infinite possible meanings of the language.[18]

Although the parties devoted time and effort to describing "bargaining history," particularly that of the

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[17] *Ozark Air Lines v. Air Line Pilots Assn'n,* 744 F.2d 1347 (8th Cir. 1984 (en banc), vacated, adhered to, 761 F.2d 1259, cert. denied, 474 U.S. ____, 120 LRRM 2728 (1985), cited in Marvin F. Hill, Jr. & Anthony V. Sinicropi, *Evidence in Arbitration,* 2nd ed. (Washington: Bureau of National Affairs, 1987), 355-56.

[18] Ray J. Schoonhoven, ed., *Fairweather's Practice and Procedure in Labor Arbitration,* 4th ed. (Washington: Bureau of National Affairs, 1999), at 251.

1995-1999 agreement, the evidence did not clarify the critical language of Section 18.9. James Franczek, the Employer's chief negotiator, described his understanding of Section 18.9, but he did not testify about words the parties exchanged on Section 18.9—other than the written proposals themselves. He testified only that "there was a very modest amount of discussion" about Section 18.9 (Franczek 71). In short, Franczek's understanding of the meaning of Section 18.9 rested primarily on discussions "in the context of what had gone on in the Fire Department and in the context of the legislation" (Franczek 71). On the bases of these discussions and Podgorny's February 1996 article (JX 5, at 5), Franczek concluded that the Union was seeking only to achieve parity with the Firefighters whose contract with the City did not provide for "occupational disability co-pays" (Franczek 72).

The testimony of Tom Pleines, the Union's chief negotiator, was equally clear and equally unavailing. Noting that the Union was "not trying to achieve parity with" but to get a better benefit than the Fire Department, Pleines pointed out that the parties worked out the language of Section 18.9 in subcommittee meetings that Franczek did not attend (Pleines 160, 190). Like Franczek, however, Pleines

did not testify in probative detail about the discussions that culminated in agreement on Section 18.9.

Although Franczek and Pleines were both credible witnesses, I cannot rely on their unexpressed (and differing) opinions, beliefs and perceptions concerning Section 18.9:

> The intent manifested by the parties to each other during negotiations by their communications and by their responsive proposals—rather than undisclosed understandings and impressions—is considered by arbitrators in determining contract language.[19]

It is of interest, if not dispositive, that in 2001 in the open-ended forum of interest arbitration Bob Podgorny, the Union's "lead person on medical issues," testified with respect to his understanding of Section 18.9, but did not even suggest that the parties had agreed that the City would assume the burden of co-pays and deductibles for employees on occupational disability leave (see CX 7).

2. Past Practice

It is, of course, well settled that—

> Where practice has established a meaning for language contained in past contracts and continued by the parties in a new agreement, the language will be presumed to have the meaning given it by that practice.[20]

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[19] *Kahn's and Company*, 83 LA 1225, 1230 (Murphy 1984).

[20] *Mason and Hanger-Silas Co., supra*, 75 LA at 109. See also Feuille Award, *supra*, at 23 and Goldstein Award, *supra*, at 24-5.

Benefits Manager Nancy Currier testified without contradiction that since late 1995 about 100 police officers have gone on occupational disability leave, that none was "exempt from meeting [his/her] deductible," and that the City has never paid "any co-payments or deductibles for an officer on occupational disability" leave (Currier 143; see also Currier 128-30, 144). The Union argues, however, that it "first became aware of the violation" when "the grievance was filed in 2003" (Un. Brief, 21; see also Pleines 173-74).

Obviously, only a *mutual* practice is significant:

> [I]t is well recognized that the contractual relationship between the parties normally consists of more than the written word. Day-to-day practices mutually accepted by the parties may attain the status of contractual rights and duties, particularly where they are not at variance with any written provision negotiated into the contract by the parties and where they are of long standing and were not changed during contract negotiations.[21]

"Mutuality," the key to any contractual obligation, may be explicit or implicit. Mutuality is explicit in a written contract supported by consideration and an exchange of promises. Mutuality is implicit if based on "day-to-day practices mutually accepted by the parties." Mutual

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[21] *Metal Specialty Co.*, 39 LA 1265, 1269 (Volz 1962).

acceptance of day-to-day practices may be inferred from the parties' conduct over time. Thus, "'past practice,' to be binding on both Parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; [and] (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties.'"[22]

In City of *Chicago/FOP Lodge 7*, Grv. 009-98-001/201 (2000) (hereinafter "Goldstein Award") arbitrator Elliott Goldstein denied a grievance "challeng[ing] the...Department's practice of buying out retiring officers' accrued leave time at their...pay rate at...retirement rather than the pay rate based on their continuous service date" (Goldstein Award, 4). Under the contractually based salary schedule an officer reaches Step 9 ($54,646) after 20 years and Step 10 ($56,262) after 25 years. The City's Classification and Pay Plan provides:

> The effective date of any advancement within the Compensation Plan shall be at the first day of the next pay period following the date advancement is...authorized...and approved....

It was a "longstanding practice" to compensate officers on the 1st and 16th of the month, and for at least 30 years the "buyout" of "unused compensation" was based on

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[22] Ruben, *supra*, at 608, citing the watershed award of arbitrator Jules Justin in *Celanese Corp. of America*, 24 LA 168, 172 (1954).

the officer's rate of pay at the time of retirement. The grievant, whose "seniority date" was June 4, 1973, retired on June 8, 1998 (Goldstein Award, 6). She was not eligible to receive a Step-10 (25-year) pay increase until June 16, 1998, eight days after she'd retired; and her buyout was based, therefore, on her Step-9 (20-year) pay, even though she had more than 25 years of service (Goldstein Award, 6).

The grievant credibly testified that "no one at the City had ever explained to her the rate she would receive for her 'buyout' or compensation for unused time" (Goldstein Award, 4-5). Although the contract provided for an annual salary of $54,646 after 20 years (Step 9) and $56,262 after 25 years (Step 10), the contract was silent on the "buyout" rate (Goldstein Award, 21). Arbitrator Goldstein rejected the Union's argument that the only "logical or fair reading" of the salary schedule was that "the Grievant, who had attained 25 years at the time of her retirement, should have been paid at the Step 10 rate when her buyout was calculated" (Goldstein Award, 22). Goldstein agreed with the City that "Section 26.5 is silent as to the rate at which the unused accumulated compensatory time is to be paid, and therefore it is appropriate in ascertaining the parties' intent to look at past practice" (Goldstein Award, 22). And, he held, whether the contract has a "gap"

that must be filled or whether "the evidence of practice is seen as amending the terms of the contract, the outcome should be and is the same" (Goldstein Award 24-5):

> [T]he Department has calculated the buyouts for five hundred to six hundred officers annually, implementing the City's Classification and Pay Plan and cashing out the retirees at their existing rate, rather than the rate they could have received had they stayed on the payroll until the effective date of the anticipated step increase (Goldstein Award, 25).

Arbitrator Goldstein rejected the Union's claim of "lack of notice or knowledge of the claimed practice":

> [T]he Union knew or should have known how the buyouts were calculated, I find. After all, Arbitrators have consistently held that past practices known to the employees are considered to be within the knowledge of the union. *** A union cannot erect lack of knowledge as a shield when its bargaining unit members are fully aware of what is transpiring... (Goldstein Award, 25-6).

For thirty years, arbitrator Goldstein noted,

> ...thousands of officers were subject to... implementation [of the buyout practice], and perhaps hundreds were in the same position as the Grievant. The failure of <u>any</u> [underlining in original] of these officers to grieve, particularly when they had specific knowledge as to how their buyout payments were calculated, strongly cuts against the Union's claim of lack of knowledge or mutuality... (Goldstein Award, 27).

Chattanooga Box & Lumber Co., 44 LA 373 (Tatum 1965) and *Wagner Electric Corp.*, 76 LA 773 (Roberts 1981), awards cited by arbitrator Goldstein, are consistent with the clear weight of scholarly and arbitral opinion that the mutual acceptance of day-to-day practices may be inferred

from the parties' conduct over time. Arbitrator Richard Mittenthal has explained how a course of conduct ripens into a binding past practice (italics in original):

> First, there should be *clarity* and *consistency.* A course of conduct which is vague and ambiguous or which has been contradicted as often as it has been followed can hardly qualify as a practice....
>
> Second, there should be *longevity* and *repetition.* A period of time has to elapse during which a consistent pattern of behavior emerges. Hence, one or two isolated instances of a certain conduct do not establish a practice. Just how frequently and over how long a period something must be done before it can be characterized as a practice is a matter of good judgment for which no formula can be devised.
>
> Third, there should be *acceptability.* The employees and the supervisors alike must have knowledge of the particular conduct and regard it as the correct and customary means of handling a situation. Such acceptability may frequently be implied from long acquiescence in a known course of conduct....
>
> One must consider, too, the *underlying circumstances* which give a practice its true dimensions. A practice is no broader than the circumstances out of which it has arisen, although its scope can always be enlarged in the day-to-day administration of the agreement....
>
> And, finally, the significance to be attributed to a practice may possibly be affected by whether or not it is supported by *mutuality.* Some practices are the product, either in their inception or in their application, of a joint understanding; others develop from choices made by the employer in the exercise of its managerial dis-

> cretion without any intention of a future commitment.[23]

Here, since late 1995 more than 100 officers on occupational disability leave have assumed the payment of all required co-pays and deductibles—*just as if they were still on active duty.* In other words, an officer on occupational disability leave got the same benefits he'd enjoyed while on active duty—no more, no less. And while this practice was not as widespread as that upon which arbitrator Goldstein relied, it was sufficiently "unequivocal," "acted upon," "fixed," and "readily ascertainable over a reasonable period of time" *(Celanese Corp., supra)* to bind the parties.

3. Distinguishing Between Duty Disability and Occupational Disability

The Union argues that since Section 18.9 does not distinguish between duty and occupational disability benefits, officers on occupational disability leave, like officers on duty disability leave, should not have to pay deductibles and co-pays. As Currier pointed out, however, there is a distinction: "[T]he duty disabled is covered under a pen-

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[23] Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements," Proceedings of the 14th Annual Meeting of NAA (Washington: Bureau of National Affairs, 1961), at 32-3, cited by Marvin Hill, Jr. & Anthony V. Sinicropi, *Management Rights* (Washington: Bureau of National Affairs, 1986), at 23.

sion...ordinance" that requires the City to "refund deductibles or co-pays" (Currier 134, 139).

The Agreement is ratified by ordinance. However, a ratifying ordinance is not equivalent to an ordinance that supplements the terms of a collective bargaining agreement. A ratifying ordinance is a legal formality that adds nothing of substance to the ratified agreement. It is distinguishable from an ordinance that provides benefits not provided for in the agreement.

Award

The Employer waived its argument that the grievance was untimely.

The grievance is denied. The City did not violate the Agreement by declining to pay the health insurance deductibles and co-payments of Police Officers on occupational disability leave.

As I did not wholly sustain the position of either party—rejecting the Employer's untimeliness claim—in accordance with Section 9.7 of the Agreement, I direct each party to share equally in the payment of my fees and expenses.

Herbert M. Berman
Arbitrator

July 3, 2006