STATE OF MICHIGAN

COURT OF APPEALS

RAYMOND SMITH,

Plaintiff-Appellee,

v

CITY of INKSTER, a Michigan municipal corporation,

Non-participating Defendant,

and

BOARD OF TRUSTEES OF THE INKSTER POLICEMEN AND FIREMEN RETIREMENT SYSTEM,

Defendant-Appellant.

UNPUBLISHED
August 26, 1997

No. 189829
Wayne Circuit Court
LC No. 94-429746 CK

Before: White, P.J., and Cavanagh and J.B. Bruff,* JJ.

PER CURIAM.

Defendant Board of Trustees of the Inkster Policemen and Firemen Retirement System[1] appeals as of right from the trial court order granting its motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand for proceedings consistent with this opinion.

Plaintiff filed an action alleging that defendant failed to include all items of his compensation, including fringe benefits and worker's compensation benefits, in its calculation of plaintiff's final monthly compensation for purposes of determining plaintiff's pension benefits under the City's Retirement System. Defendant moved for summary disposition. The trial court held that defendant had properly included all items of compensation except the value of plaintiff's worker's compensation benefits. The trial court therefore ordered defendant to recalculate plaintiff's pension based on a final monthly compensation that included the value of his worker's compensation benefits. The court also required

* Circuit judge, sitting on the Court of Appeals by assignment.

defendant to deduct seven percent from plaintiff's worker's compensation benefits as contributions to the retirement system. Defendant appeals from this portion of the trial court order.[2]

On appeal, an order granting or denying summary disposition is reviewed de novo. A motion for summary disposition may be granted pursuant to MCR 2.116(C)(10) when, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Giving the benefit of reasonable doubt to the nonmovant, the trial court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Plieth v St Raymond Church*, 210 Mich App 568, 571; 534 NW2d 164 (1995).

The relevant sections of the City of Inkster's charter provide:

> 18.2(i) 'Final monthly compensation' wherever used in this chapter shall mean the average monthly pay of the best 60 consecutive months of pay as an employee member from the city (and/or Village of Inkster for employee members with less than 60 months service with the city) during the member's last 120 consecutive months of service with the city (and/or Village of Inkster for members with less than 60 months service with the city). In the event an employee member has less than 60 months service with the City and/or Village of Inkster at his date of disability retirement or death, 'final monthly compensation' shall mean his average monthly pay during his entire period of continuous service;
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> 18.6(b) Disability retirement benefits. -- Any employee member eligible for retirement under Section 18.4 hereof shall receive a monthly pension equal to one-half of his final monthly compensation. Any benefits payable under this paragraph (b) shall be subject to the provisions of Section 18.10 hereof.
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> 18.10 Deductions. -- Any amounts which may be paid or payable under the provisions of any workmen's compensation act, or pension act, or similar law, to a member, or to the dependents of a member on account of any disability or death, shall be offset against and payable in lieu of any benefits payable out of funds provided by the city under the provisions of this retirement system on account of the same disability or death. In case the present value of the total benefits under said workmen's compensation act, pension act or similar law, is less than the present value of the pension otherwise payable from the firemen's and policemen's pension fund, then the present value of the pension and the remaining present value of the pension so reduced shall be payable in reduced actuarial equivalent amounts under the provisions of this retirement system.

The rules of statutory interpretation apply to city charters. *Detroit v Walker*, 445 Mich 682, 691; 520 NW2d 135 (1994). A long-standing, consistent, administrative interpretation of a statute by

those charged with its execution is entitled to considerable weight and ought not be overruled without cogent reasons. *Ludington Service Corp v Acting Comm'r of Ins*, 444 Mich 481, 491; 511 NW2d 661 (1994); *Michigan ex rel Oakland Co Prosecutor v Dep't of Corrections*, 199 Mich App 681, 691-692; 503 NW2d 465 (1993). Nevertheless, an administrative interpretation cannot overcome a statute's plain meaning. *Ludington Service Corp*, *supra* at 503-504.

After carefully reviewing the pertinent portions of the city charter, we conclude that the trial court erred in finding that plaintiff's worker's compensation benefits should be included as part of his final monthly compensation for purposes of pension calculations. Section 18.10 of the charter clearly indicates that any worker's compensation benefits received by an employee shall be in lieu of any benefits paid under the City's Retirement System. An exception occurs when the worker's compensation benefits are less than those which would have been received under the City's Retirement System, in which case the worker's compensation benefits are then offset against the amounts received under the City's Retirement System. Thus, the charter language renders worker's compensation benefits and pension benefits under the Retirement System mutually exclusive. A retired employee is entitled to the greater of the two, and if the pension benefits under the Retirement System are greater than the worker's compensation benefits, then the worker's compensation benefits are offset against the Retirement System benefits.

In addition to the specific language of the charter, we note that this Court has recently held that the clear language of the Public Employees Retirement Act, MCL 38.1301 *et seq*.; MSA 15.893(111) *et seq*., prior to its amendment, did not provide that members of the retirement system receiving worker's compensation benefits were entitled to retirement service credit. See *School District for the City of Adrian v Michigan Public School Employees' Retirement System*, 219 Mich App 456, 460-463; 556 NW2d 524 (1996). While *School District of Adrian* is not controlling in the instant case, we find its reasoning persuasive.

Moreover, we agree with defendant that its long-standing practice of excluding worker's compensation benefits from the final monthly compensation for purposes of pension calculations constitutes a past practice of the parties to the collective bargaining agreements. Where a subject has been classified as a mandatory subject of bargaining, a past practice may create a term or condition of employment that cannot be altered unilaterally absent negotiation. *Port Huron Education Ass'n v Port Huron Area School Dist*, 452 Mich 309, 325; 550 NW2d 228 (1996). Retirement benefits are a mandatory subject of collective bargaining. *Riverview v Lieutenants and Sergeants Ass'n*, 111 Mich App 158, 161; 314 NW2d 463 (1981). The parties stipulated that the city has never included worker's compensation benefits in the final monthly compensation of any retiring member of the retirement system. The collective bargaining agreement covering plaintiff did not alter the definition final monthly compensation in the charter. Where the collective bargaining agreement is silent or ambiguous on the subject for which a past practice has developed, proof of mutual acceptance may arise "by inference from the circumstances." *Port Huron Education Ass'n*, *supra* at 328, quoting Elkouri & Elkouri, *How Arbitration Works* (4th ed), p 439. We conclude that defendant's past practice of excluding worker's compensation benefits from the final monthly compensation for purposes of pension calculations has become a

term or condition of employment that is binding on the parties. See *Amalgamated Transit Union v Southeastern Michigan Transportation Authority*, 437 Mich 441, 454-455; 473 NW2d 249 (1991).

Reversed and remanded for entry of an order consistent with this opinion. We do not retain jurisdiction. Defendant being the prevailing party, it may tax costs pursuant to MCR 7.219.

/s/ Mark J. Cavanagh
/s/ John B. Bruff

I concur in result only.

/s/ Helene N. White

[1] The City of Inkster is not a party to this appeal. We will therefore only refer to the Board of Trustees as defendant.

[2] Plaintiff argues that defendant is estopped from asserting a different position on appeal than it did in the trial court because defendant entered the lower court order which required defendant to include worker's compensation benefits in final monthly compensation. However, the Supreme Court has held that merely approving a proposed order as to form and content does not constitute the establishment of a consent decree. *Ahrenberg Mechanical Contracting, Inc v Howlett*, 451 Mich 74, 77-79; 545 NW2d 4 (1996). Our review of the record indicates that defendant consistently excepted to any order requiring defendant to include worker's compensation benefits in its calculation of final monthly compensation. Accordingly, plaintiff's argument is without merit.