

FILED: March 27, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

JOHN MILLER,
RANDY OLSON, HERBERT GOSS, DOUGLAS BABCOCK, HENRY JACKSON,
and MICHAEL PALIN,
Plaintiffs-Appellants,

v.

CITY OF PORTLAND,
an Oregon municipal corporation,
Defendant-Respondent.

Multnomah County Circuit Court
081014715

A145318

Richard Maizels, Judge pro tempore.

Argued and submitted on July 19, 2012.

Montgomery W. Cobb argued the cause for appellants. With him on the briefs was Montgomery W. Cobb, LLC.

Franco A. Lucchin argued the cause for respondent. With him on the brief was Harry Auerbach.

Before Ortega, Presiding Judge, and Sercombe, Judge, and Hadlock, Judge.

SERCOMBE, J.

Reversed and remanded in part; otherwise affirmed.

1 SERCOMBE, J.

2 This case arises out of the City of Portland's adoption and implementation
3 of a return-to-work program for disabled firefighters. Plaintiffs, disabled firefighters who
4 were required to return to work under the program, filed an action for breach of contract
5 against the city in circuit court. In addition, plaintiffs alleged that the city, in its
6 implementation of the return-to-work program, had breached its duty of good faith and
7 fair dealing in the administration of their employment contracts. The city moved for
8 summary judgment, asserting, among other things, that plaintiffs had failed to exhaust
9 available administrative remedies and that plaintiffs' allegations, if proved, would not
10 amount to a breach of contract. The court agreed with the city and granted summary
11 judgment on both of those grounds. Plaintiffs now appeal, asserting that the court erred
12 in concluding that they were required to exhaust administrative remedies and that their
13 allegations did not amount to a breach of contract. For the reasons explained below, we
14 affirm the trial court's judgment in part and reverse and remand in part.

15 The basic background facts on summary judgment are as follows. Chapter
16 5 of the charter for the City of Portland establishes the Fire and Police Disability,
17 Retirement and Death Benefit Plan. The charter provides for creation of a Fire and Police
18 Disability and Retirement Fund (FPDR) and a board of trustees to supervise and control
19 the fund. As permitted by the charter, administration of the fund is delegated to a "Fund
20 Administrator." Section 5-306 of the plan provides for service-connected and
21 occupational disability benefits for members.

1 Plaintiffs were employees of Portland Fire & Rescue. As plan members
2 who suffered disabling injuries in the course of their duties, plaintiffs each received
3 disability benefits pursuant to the plan. Plaintiffs each received those benefits over a
4 number of years.

5 In 2006, plaintiffs received written notice that, as part of the city's return-to-
6 work program, they were required to attend mandatory EMT training. Furthermore,
7 plaintiffs were notified that FPDR would continue their disability benefits during training
8 but that, in the event that they failed to attend the training, "the Fund w[ould] begin the
9 process of suspension or termination of [their] benefits." Thereafter, as part of the return-
10 to-work program, plaintiffs were required to return to work in light-duty positions (such
11 as "low hazard fire inspector") that had not existed when they became disabled.
12 Although their job assignments were different when they returned to work, plaintiffs'
13 positions were in the same job classifications as the positions that they had held when
14 they became disabled.¹ The city sought and obtained approval from plaintiffs' physicians
15 for plaintiffs to work in those positions. In addition, FPDR subsidized the wages paid to
16 plaintiffs once they returned to work.

17 One plaintiff, Olson, did not comply with the requirements of the return-to-
18 work program. Accordingly, he received written notice dated April 12, 2007, that his
19 disability benefits were terminated effective April 5, 2007, because he was "no longer

¹ One plaintiff ultimately returned to work in a different job classification as the result of a promotion.

1 disabled or eligible." The notice advised Olson:

2 "You have 14 days from the date of this letter to provide a written response
3 for the Director's consideration.

4 "If the Director does not hear from you within the 14-day time frame, this
5 denial is affirmed and you then have 60 days from April 26, 2007 to appeal
6 to a hearings officer. * * * An untimely request for hearing may be
7 accepted by the Director, upon a finding of good cause."

8 (Boldface omitted.) In a letter dated April 26, 2007, Olson sought reconsideration of the
9 termination of his benefits. However, he received no response to that request for
10 reconsideration. Aside from Olson, plaintiffs complied with the requirement that they
11 return to work in the assigned light-duty positions.

12 Ultimately, plaintiffs filed an action against the city seeking damages and
13 injunctive relief. In their second amended complaint, they alleged that they were entitled
14 to receive disability benefits under the plan "because they were unable to perform the
15 required duties of their chosen occupation--Firefighter--as the particular Disabled
16 Firefighter's duties and qualification requirements were defined at the date of injury or
17 disability." Furthermore, they were entitled "to receive a minimum benefit of 25% of
18 normal full time wages regardless of medical status or subsequent earnings from other
19 employment." Plaintiffs asserted that the plan (and particularly section 5-306 of the
20 charter), along with the city's course of dealing and oral and written promises, constituted
21 a contract and that the city "promised and was contractually obligated to continue the
22 Disabled Firefighters' entitlement to disability benefits until each of the Disabled
23 Firefighters' death or retirement" and was "prohibited by law from unilaterally changing

1 the terms of the Plan." The complaint alleged that the city had promised each plaintiff
2 that "he would not be required to return to work for the City," and that each plaintiff had
3 relied on that promise to his detriment. In plaintiffs' view, the city had breached its
4 contractual obligations to them through implementation of the return-to-work program.²
5 They also alleged that the city had breached its duty of good faith and fair dealing in
6 various ways. Plaintiffs asserted that, as a result of the city's breaches, each of them had
7 been damaged in the sum of \$800,000; they sought a judgment of a total of \$4.8 million,
8 and "an order requiring the City to reinstate the Disabled Firefighters' rights to disability
9 benefits under the Plan, vacating the 'return to work program,' permanently enjoining the
10 City from terminating the disability benefits of the Disabled Firefighters, and from
11 requiring them to return to work in non-Firefighter positions," along with attorney fees.

12 The city moved for summary judgment on a number of grounds. In
13 particular, it asserted that it was entitled to summary judgment because (1) the breach of
14 contract claim was based on representations not contained in the charter or authorized by
15 ordinance and the city "cannot be contractually bound by oral promises or writings that
16 were not adopted by ordinance"; (2) the charter did not create a contract with plaintiffs;
17 (3) even if Chapter 5 of the charter did create a contract, the city did not breach the

² According to plaintiffs, the city (1) informed them that they were required to "return to work as an employee of the City in a position other than Firefighter, or face termination of * * * disability benefits," (2) disseminated a "Return to Work Policy - Pilot Program," (3) required them to go to particular medical providers and "interfered with [their] medical care by pressuring the treating physicians and forcing the Disabled Firefighters to discontinue care with certain physicians," and (4) withheld benefits "in order to coerce treating physicians to issue reports or comply with City requests."

1 contract; (4) it could not breach the contract or breach the duty of good faith and fair
2 dealing by taking actions that were expressly authorized by the terms of the contract; (5)
3 the court did not have subject matter jurisdiction over the dispute because plaintiffs failed
4 to exhaust their administrative remedies; and (6) plaintiffs had waived all other remedies
5 by applying for and accepting disability benefits.

6 The trial court agreed with the city that plaintiffs "had the obligation to
7 exhaust their administrative remedies before turning to the court for relief." Because it
8 concluded that plaintiffs had "failed to exhaust their administrative remedies as required
9 by law," it granted summary judgment. In the alternative, the court noted that it "could
10 not relate the breach to anything in the actual contract" and, therefore, concluded that
11 defendant had not breached its contract with plaintiffs and that summary judgment on
12 that basis was appropriate. However, the court determined that there were genuine issues
13 of material fact regarding whether there was a contract between the parties and whether
14 defendant had breached its duty of good faith and fair dealing and, therefore, would have
15 denied summary judgment on those bases. Furthermore, the court declined to reach the
16 issue of waiver or any of the other issues raised on summary judgment. Based on its
17 rulings, the court entered a general judgment in favor of the city. Plaintiffs now appeal
18 that judgment, raising two assignments of error.

19 On appeal, we review the trial court's grant of summary judgment to
20 determine whether we agree that "there is no genuine issue as to any material fact and
21 that the moving party is entitled to prevail as a matter of law." ORCP 47 C; *O'Dee v. Tri-*

1 *County Metropolitan Trans. Dist.*, 212 Or App 456, 460, 157 P3d 1272 (2007). There is
2 no genuine issue of material fact if, "based upon the record before the court viewed in a
3 manner most favorable to the adverse party, no objectively reasonable juror could return
4 a verdict for the adverse party on the matter that is the subject of the motion for summary
5 judgment." ORCP 47 C. Furthermore, "[t]he adverse party has the burden of producing
6 evidence on any issue raised in the motion as to which the adverse party would have the
7 burden of persuasion at trial." *Id.*

8 In their first assignment of error, plaintiffs contend that the trial court erred
9 in granting summary judgment on the ground that plaintiffs had failed to exhaust their
10 administrative remedies. Plaintiff Olson makes separate arguments on the exhaustion
11 issue from the remaining plaintiffs. We begin by addressing the assertions of plaintiffs
12 other than Olson. Those plaintiffs contend that there was never a decision that they could
13 have challenged through the administrative process. Specifically, plaintiffs argue that the
14 adoption and implementation of the return-to-work program was not an appealable event
15 and that, because they complied with the requirements of the program, there was never a
16 decision regarding their benefits that they could have appealed through the city's
17 administrative process. In addition, plaintiffs point out that the city did not provide them
18 with any notice of a decision "to suspend, reduce or terminate benefits" (as would be
19 required pursuant to the city's rules) and, therefore, the administrative appeal process was
20 not triggered or, in the alternative, the city "waived its right to assert that the plaintiffs
21 failed to exhaust their administrative remedies."

1 The city, for its part, asserts that plaintiffs "had adequate notice of a
2 decision of the Fund Administrator adversely affecting their FPDR benefits when their
3 FPDR benefit checks stopped arriving, when they began receiving retirement benefits
4 based on the service credited, or when they began receiving wages (and, therefore, no
5 more disability benefits) for the return-to-work positions." Furthermore, the city notes
6 that plaintiffs received letters from the city regarding the return-to-work program and
7 those letters advised plaintiffs of the consequences of failure to comply with the
8 requirements of the program. The city also asserts that the administrative scheme is
9 "fixed by the City Charter" and that the charter put plaintiffs on notice of the
10 administrative remedies necessary to challenge "an adverse decision of the Fund
11 Administrator." (Underscoring omitted.)³

12 As explained below, we agree with plaintiffs that, under the circumstances
13 presented in this case and, given the provisions of the charter and the city's administrative
14 rules, there was not an administrative review procedure available to plaintiffs. On that
15 basis, we conclude that the trial court was incorrect in its determination that plaintiffs
16 were required to exhaust administrative remedies before seeking relief in circuit court.

17 "It is a general principle of administrative law that a party must exhaust
18 available administrative remedies before seeking [judicial] review of an agency's action."
19 *Reforestation General v. Natl. Council on Comp. Ins.*, 127 Or App 153, 158, 872 P2d

³ The city also reprises its contention before the trial court that plaintiffs "waived all other remedies by applying for and accepting FPDR disability benefits." (Underscoring omitted.) We reject that argument without published discussion.

1 423, *adh'd to on recons*, 130 Or App 615, 883 P2d 865 (1994), *rev den*, 320 Or 749
2 (1995). Thus, when "any charter or statute sets out a procedure whereby an
3 administrative agency must review its own prior determination, that procedure must be
4 followed." *Miller v. Schrunk*, 232 Or 383, 388, 375 P2d 823 (1962). Only after available
5 procedures within the administrative body have been followed may a party seek judicial
6 review of the administrative body's action. *Id.*

7 The "doctrine of exhaustion * * * is somewhat 'flexible' and is judicially
8 employed to further 'orderly procedure and good administration.'" *Ayres v. Board of*
9 *Parole*, 194 Or App 429, 436, 97 P3d 1 (2004) (quoting *Marbet v. Portland Gen. Elect.*,
10 277 Or 447, 456, 561 P2d 154 (1977)). Thus, an administrative remedy must be
11 available, and it "must be adequate to redress the aggrieved party's interests." *Id.* (citing
12 *Nutbrown v. Munn*, 311 Or 328, 344-46, 811 P2d 131 (1991), *cert den*, 502 US 1030
13 (1992)).

14 Here, the charter provision referenced by the city in support of its
15 argument, section 5-202(h), addresses the processing of claims for disability benefits. It
16 provides:

17 "(h) Disability Claims Processing.

18 "1. Restoring injured workers physically and economically to a self-
19 sufficient status in an expeditious manner and to the greatest extent
20 practicable is an important aspect of any disability system.

21 "2. All claims by FPDR Two and FPDR Three Members for service
22 connected and occupational disability benefits under Sections 5-306 and 5-
23 308, for nonservice connected disability benefits under Sections 5-307 and
24 5-309, benefits on service connected or occupational death before

1 retirement under Section 5-308 and benefits for nonservice connected death
2 before retirement under Section 5-309 shall be adjusted, administered and
3 decided by the Fund Administrator. The decision of the Administrator shall
4 be made in accordance with this Charter and the rules and regulations
5 adopted by the Board.

6 "3. A[n] FPDR Two or FPDR Three Member * * * adversely affected
7 by a determination of the Fund Administrator may appeal that decision to a
8 hearings officer within 60 days of the date of the decision of the Fund
9 Administrator. The hearings officer shall conduct an evidentiary hearing
10 under the rules of procedure and evidence established by the Board. The
11 hearings officer shall have the power to administer oaths, subpoena and
12 examine witnesses, and require the production and examination of papers
13 and documents. The decision of the hearings officer shall be in writing and
14 shall be issued within 30 days after the close of the evidentiary record. The
15 decision shall be based on the evidence presented at the hearing.

16 "4. The decision of the hearings officer shall be final unless an appeal to
17 the independent panel is filed by the Member * * * or the Fund
18 Administrator * * * within 30 days of the hearings officer's decision. The
19 decision of the independent panel shall be de novo and shall be the final
20 decision of the Fund and may be appealed to the circuit court as provided
21 by state law."

22 The administrative rules associated with the plan provide that, for disability benefits,

23 "if the Director obtains evidence that * * * the Member is no longer
24 disabled or eligible * * * the Director shall notify the Member of the
25 Director's decision to suspend, reduce or terminate benefits. A summary of
26 the evidence and the decision shall be provided to the Member. * * * The
27 Member will have 14 days to provide a written response for the Director's
28 consideration. The Member shall also be notified of the rights under
29 Charter Section 5-202(h) and the right to appeal for a Hearing as provided
30 for in Section IV [of the administrative rules]. Any such written request
31 must be filed with the Director within 60 days after the date of the decision
32 being appealed."

33 Fire and Police Disability, Retirement and Death Benefit Plan, Administrative Rules §

34 III(G)(7).⁴ Section IV of the rules, in turn, sets forth hearing procedures for disability

⁴ We quote the version of the rules pertaining to administrative remedies that were

1 claims.⁵

2 Thus, under the charter provision at issue, disability claims are decided by
3 the fund administrator, and a member who receives an adverse decision from the
4 administrator may appeal "that decision * * * within 60 days of the date of the decision."
5 Similarly, under the administrative rules, the director of the fund may decide claims; the
6 director may also determine (among other things) that a member is no longer disabled or
7 eligible for benefits. In that event, the director notifies the member of a decision to
8 "suspend, reduce or terminate benefits" and the member has "60 days after the date of the
9 decision being appealed" to seek administrative review of that decision.

10 The problem with the city's contention that those provisions apply to the
11 circumstances presented here is that plaintiffs are not seeking review of a "decision" of
12 the director that is among those addressed in the charter or rules. Plaintiffs challenge the

in effect in 2007 and were attached as an exhibit to the summary judgment motion.

⁵ That section of the rules also contains a specific appeal provision. Under that
provision,

"[t]he Director may approve or deny an initial claim. The Member will be notified of the Director's decision. If the Director denies a claim, the Member will be notified in writing of the decision along with the notice of the right to request a fact-finding hearing. If a Member wishes to proceed with a hearing, a request for hearing signed by or on behalf of the Member must be made, in writing, and received by the Director within 60 days of the mailing date of the denial. An untimely request for hearing may be accepted by the Director, upon a finding of good cause for the untimely request. Good cause for an untimely request shall be determined by the Director and may be established as provided for in Oregon Rule of Civil Procedure 71B."

Section IV(B)(1).

1 city's program that required them to return to work after they had been considered
2 permanently disabled for a number of years. Their breach of contract claim centers on
3 that return-to-work program--it alleges that the city's adoption and implementation of the
4 program was unlawful and that plaintiffs were damaged as the result of the
5 implementation of the program. According to plaintiffs, the city, among other things,
6 required them to return to work "in a position other than Firefighter" and threatened that
7 failure to comply with the program would result in termination of their benefits. The
8 direction from the city requiring plaintiffs to return to work is not a determination of the
9 fund administrator under charter section 5-202(h) based on a claim for disability benefits.
10 Furthermore, although the administrative rule contemplates that the director may
11 determine that a member is no longer "disabled or eligible" and, accordingly, suspend,
12 reduce, or terminate benefits, the rule requires that the director notify a member of any
13 decision to do so. It further requires that the director provide the member with a
14 "summary of the evidence and the decision" and notice of hearing and other appeal rights.
15 Here, it is undisputed that plaintiffs were not provided with a notice that the director had
16 decided to suspend, reduce, or terminate their benefits under the rule, nor were they given
17 a summary of the evidence or information regarding appeal rights. Because plaintiffs
18 complied with the return-to-work program as required, although their disability and
19 retirement benefits were affected, they were not subject to a decision by the director of
20 the fund as is contemplated by either the charter or the applicable administrative rule to
21 begin the running of the 60 days to file an administrative appeal. Under the

1 circumstances presented here, plaintiffs did not have available administrative remedies
2 that they were required to exhaust before seeking relief in circuit court. For that reason,
3 with respect to plaintiffs other than Olson, the circuit court incorrectly granted the city
4 summary judgment based on the failure of those plaintiffs to exhaust administrative
5 remedies.

6 The analysis differs for Olson. Unlike other plaintiffs, the director did
7 make a benefits decision as to Olson. In particular, as noted, Olson failed to comply with
8 the requirements of the return-to-work program and, for that reason, the director notified
9 Olson that his disability benefits would be terminated. Thus, Olson does not assert that
10 there was no decision as to him but, instead, contends that the decision was not final. In
11 particular, citing *Harrington v. Board of Trustees*, 100 Or App 733, 788 P2d 1019, *rev*
12 *den*, 310 Or 133 (1990), Olson argues that the letter notifying him of the termination of
13 his disability benefits was "conditional, not final" and that it "became final only if no
14 request for reconsideration was received." Because Olson submitted a request for
15 reconsideration and received no response, he asserts that he never received a final
16 decision. Furthermore, Olson contends that his administrative remedies should have been
17 "deemed denied" after the city failed to take any further action in response to his request
18 for reconsideration.

19 The city responds that the notice sent to Olson was not "provisional."
20 Rather, according to the city, the notice, "in effect, allowed Olson more than 60 days to
21 request a hearing," but he has not done so. Furthermore, with respect to the assertion that

1 Olson's administrative remedies were "deemed denied," the city asserts that the cases
2 relied on by Olson demonstrate that he would be permitted to "skip the independent
3 hearings officer and independent review panel remedies" only if he had "requested a
4 hearing or review of the independent hearing officer's decision and FPDR failed to refer
5 the matter for a hearing." As explained below, we conclude that, under the
6 circumstances, Olson was required to complete the administrative process before seeking
7 judicial review.

8 We begin by addressing the contention that the director's decision to
9 terminate Olson's benefits was not "final." Again, the charter and rules provide that the
10 director decides claims for benefits and whether to suspend, reduce, or terminate benefits
11 based on evidence that a member is no longer disabled or eligible. The charter and rules
12 provide that a member has 60 days from the date of a decision to seek a hearing regarding
13 the decision. In addition, under the rules, a member is permitted "14 days to provide a
14 written response" to the decision for the director's consideration. As set forth above,
15 Olson was notified that his disability benefits were being terminated:

16 "After careful review and based on factual evidence, we must respectfully
17 advise you that your disability benefits have been terminated effective April
18 5, 2007, for the following reasons:

19 "Administrative Rule III (G)(7)(d) states that if the Director obtains
20 evidence that the Member is no longer disabled or eligible, the
21 Director shall notify the Member of the Director's decision to
22 suspend, reduce or terminate benefits."

23 In addition, Olson was advised that he had "14 days from the date of this letter to provide
24 a written response for the Director's consideration." (Boldface omitted.) If he failed to

1 respond within the 14 days, "this denial is affirmed and you then have 60 days from April
2 26, 2007 to appeal to a hearings officer." Thus, both the administrative rule and the
3 notice sent to Olson provide for a step in the administrative review process in addition to
4 that set forth in the charter; they provide an interim review step by which a member may
5 seek reconsideration by the director of the director's decision to suspend, reduce, or
6 terminate benefits.

7 In *Harrington*, we considered the issue of when a decision to terminate a
8 member's disability benefits as a result of the member's recovery could be considered
9 final in circumstances where a member had requested that the decision be reviewed by a
10 medical panel. We examined the text of the charter provision at issue and concluded that
11 "[w]hen recovery occurs depends on when the Board makes its final determination. If the
12 member does not request a review panel after the Board's initial determination that the
13 member is no longer entitled to benefits, that determination is final and the member is
14 deemed recovered." 100 Or App at 737. On the other hand, "if the member does request
15 review, the member cannot be deemed recovered until the Board finally determines that
16 the member is no longer entitled to benefits based on the panel's findings." *Id.* Thus, we
17 concluded that, before a requested interim review step was completed, the decision to
18 terminate the member's benefits had not become final.

19 Here, assuming that the letter to Olson is binding on the city in terms of the
20 administrative process outlined therein, *see Wiggins v. Barrett & Associates, Inc.*, 295 Or
21 679, 683, 669 P2d 1132 (1983) (outlining circumstances where a municipality can be

1 bound by representations of its agent), its text suggests that the decision may not yet be
2 final if a written response is filed for the director's consideration. However, the fact that,
3 by virtue of Olson's written response, the director's decision may not have been final does
4 not suggest that Olson was excused from the need to follow the administrative review
5 process. Instead, it means that he began the administrative review process when he
6 sought reconsideration.

7 That brings us to Olson's next assertion. He contends that, because he did
8 not receive anything further after submitting his written response to the director's
9 decision, we should apply the rationale of certain federal ERISA cases to conclude that
10 his administrative relief is "deemed denied" and consider his administrative remedies
11 exhausted.⁶ Olson does not cite an Oregon authority in support of that theory. However,
12 we touched on the concept in the context of Oregon administrative law in *Taylor v. Board*
13 *of Parole*, 200 Or App 514, 115 P3d 256, *rev den*, 339 Or 475 (2005). In that case, the
14 petitioner asserted that "we should treat a request for administrative review as denied--
15 and, therefore, the exhaustion requirement as met--if the [administrative body] does not
16 dispose of the request within a 'reasonable' time." *Id.* at 519. We declined to apply that
17 approach in that case because, compared with other statutes treating unresolved requests
18 for relief as deemed denied after a certain time had passed, the statute imposing the
19 exhaustion requirement in that case imposed "no such time limit." *Id.* Here, like in

⁶ In support of his "deemed denied" argument, Olson cites *Nichols v. Prudential Ins. Co. of America*, 406 F3d 98 (2d Cir 2005), and *Gatti v. Reliance Standard Life Ins. Co.*, 415 F3d 978 (9th Cir 2005).

1 *Taylor*, neither the charter nor the administrative rules set forth circumstances in which a
2 party's request for relief will be "deemed denied."⁷ Furthermore, we observe that neither
3 the notice nor the charter or administrative rule at issue here suggested that Olson *could*
4 *not* seek a hearing in the absence of a response from the director to Olson's written
5 response to the decision. Rather, the text in the letter merely indicated that he had
6 additional time before he would need to file a request for a hearing to come within the
7 60-day time limit. Thus, we conclude that the trial court did not err in granting summary
8 judgment with respect to Olson's claim based on his failure to exhaust administrative
9 remedies.

10 In their second assignment of error, plaintiffs contend that the trial court
11 "erred in granting summary judgment on the ground that there was no breach of the
12 contract." A part of plaintiffs' analysis under that assignment of error is based on the
13 express terms of the charter.⁸ According to plaintiffs, as long as they remained eligible,

⁷ In *Taylor*, we accepted "the general proposition" that, consistently with the exhaustion requirement, this court could have jurisdiction over an administrative order where the administrative body "through protracted inaction, has unreasonably failed to resolve a request for administrative review of that order." 200 Or App at 521. Under those circumstances, "administrative review might be so frustrated by neglect or inaction as to be futile." *Id.* We concluded that the facts of that case did not rise to a level that would indicate that administrative review was futile. Here, Olson does not argue that the failure of the director to provide a response to the request for reconsideration frustrated the administrative process and made it futile; he only contends that, under the circumstances, he should be treated as having exhausted his administrative remedies. Furthermore, we do not understand plaintiffs' argument that the city "waived" its argument regarding exhaustion of remedies to refer to Olson. To the extent that Olson intends that contention to extend to him, we reject it.

⁸ As noted, the trial court concluded that there were issues regarding whether there

1 the city was obligated to continue paying them at least "25% of normal full time wages."
2 However, as part of its implementation of the return-to-work program, the city required
3 plaintiffs to work in positions other than the job they held at the time they became injured
4 and then, once they began to work in those jobs, reduced their monthly disability benefits
5 below that 25 percent floor even though, in plaintiffs' view, they remained eligible for
6 benefits.

7 Section 5-306(a) of the charter provides that a member is eligible for
8 disability benefits "when unable to perform the Member's *required duties* because of an
9 injury or illness arising out of and in the course of the Member's employment."⁹

10 (Emphasis added.) It is plaintiffs' position that the term "required duties," as used in that
11 section, means the particular job duties they were assigned "at the time of injury or onset
12 of disability." Their argument that the city breached the express terms of the charter is
13 dependent on the premise that the term "required duties" in section 5-306 of the charter
14 means the member's job before the member became disabled. Based on the text of the
15 term at issue, in context, *see Watkins v. Josephine County*, 243 Or App 52, 57-59, 259
16 P3d 79 (2011) (setting forth method for interpreting legislative and quasi-legislative
17 contracts), we are unpersuaded by plaintiffs' contentions regarding the meaning of the

was a contract and would not have granted summary judgment on that basis. For that reason, for purposes of discussion, we assume that the charter provisions constituted a contract between plaintiffs and the city.

⁹ The charter has been amended since the events that gave rise to this case. The text in question is now set forth in section 5-306(b) of the charter. We cite the version in effect during the pertinent time period.

1 term "required duties."

2 As noted, under section 5-306(a) of the charter,

3 "[a]n Active Member shall be eligible for the service-connected disability
4 benefit when unable to perform the Member's required duties because of an
5 injury or illness arising out of and in the course of the Member's
6 employment in the Bureau of Police or Fire."

7 Thus, under the charter, eligibility for disability benefits is measured at the time an
8 employee is an "active member." An active member, in turn, is defined in section 5-
9 301(b) of the charter as "a person who is actively employed as a Member in the Bureau of
10 Fire or Police and does not include a Member receiving benefits under this Chapter."
11 Thus, eligibility for benefits, as measured pursuant to charter section 5-306(a), depends
12 on the ability of a person to perform "required duties" at the time when the person is
13 actively employed at the Bureau of Fire. In other words, the term "required duties"
14 contains a contemporaneous element whereby it relates to the time when the member is
15 an active employee. That temporal requirement is also evident in the grammatical
16 phrasing of the charter section: an active member is eligible "when unable to perform the
17 *Member's required duties.*" (Emphasis added.) Along with the reference to an active
18 member, the use of the term "the Member's required duties" references the member's
19 required duties prior to that person receiving disability benefits.

20 The term "required," in the context used in the charter, refers to something
21 compelled or commanded to be done. *See Webster's Third New Int'l Dictionary* 1929
22 (unabridged ed 2002). Likewise, "duty" refers to an obligatory task or conduct. *Id.* at
23 705. Thus, under its plain meaning, the term "required duties" refers to conduct or tasks

1 the employer could compel or command an employee to perform. That plain meaning,
2 taken together with the temporal aspect of the charter, leads us to conclude that "required
3 duties," as used in section 5-306(a) of the charter, refers to any tasks that the member
4 could have been commanded to do at the time the member was actively employed with
5 (in this case) the Bureau of Fire. Thus, we are not persuaded by plaintiffs' assertion that
6 the term "required duties" refers to the particular job that the member was actually doing
7 at the time he or she was injured. Instead, a member is eligible if unable to perform the
8 duties that could have been required of that member at the time he or she was actively
9 employed.

10 Here, as noted, plaintiffs assert that "required duties" means the particular
11 duties they performed as firefighters at the time they became injured or disabled.
12 However, as we have explained, the term refers not only to duties they actually
13 performed, but also to any conduct or tasks that the employee *could have been* required to
14 do by the employer at the time they were still actively employed. On summary judgment,
15 the city submitted evidence that, upon their return to work, "no plaintiffs in this case were
16 given job duties outside the range of job duties they *could have* been assigned prior to
17 their injuries." (Emphasis added.) The evidence submitted by plaintiffs did not
18 controvert that: They averred that they were required to return to work in light-duty jobs
19 other than the job of "firefighter," that those light-duty jobs had not existed at the time
20 they became disabled, and that the jobs were, in fact, "make-work" jobs. They did not
21 assert that, contrary to the city's evidence, they were given duties upon their return to

1 work that were outside the range of tasks they *could have* been assigned to do before they
2 became disabled. Given that, under section 5-306(c) of the charter, any requirement that
3 a member receive a "minimum benefit [of] 25 percent of the Member's rate of Base Pay"
4 is predicated on the member continuing to be eligible, along with the fact that member is
5 eligible when he or she cannot perform "required duties," based on the arguments before
6 us, we cannot conclude that the city breached the express terms of the charter by reducing
7 plaintiffs' benefits as alleged in this case. Thus, the trial court did not err to the extent
8 that it granted summary judgment on that basis.

9 In addition to their assertion regarding the meaning of "required duties"
10 under section 5-306 of the charter, plaintiffs also argue that the city engaged in a course
11 of conduct and made representations that became part of the contract. In particular, they
12 contend that the city treated disabled firefighters and police officers as permanently
13 separated from employment and not required to return to work for the city; they also
14 assert that employees of the city had promised plaintiffs that they would not be required
15 to return to work for the city and that they had relied on those promises to their detriment.
16 Thus, they alleged in their complaint and argued on summary judgment that the
17 requirement that plaintiffs return to work for the city was a breach of the contract based
18 on that existing course of conduct and on estoppel. Those assertions are unavailing.

19 Written and oral representations and assurances can become part of an
20 employment-related contract with a government entity. *Watkins*, 243 Or App at 61; *see*
21 *Brunick v. Clatsop County*, 204 Or App 326, 333, 129 P3d 738 (2006) (holding that

1 "personnel rules may create implied terms in a county employee's employment contract").
2 However, whether such representations "are contractual depends on the intentions of both
3 parties" and, when a "contract is created by statute or ordinance, that question reduces to
4 a question of legislative intent." *Watkins*, 243 Or App at 61. Here, plaintiffs point to no
5 ordinance that supports the proposition that the types of assurances and conduct of city
6 employees as are at issue in this case would become part of the express legislative
7 contract between plaintiffs and the city. To the contrary, section 8-104 of the city charter
8 provides that, with certain exceptions, the city "shall not be bound by any contract nor in
9 any way liable thereon, unless the same is authorized by an ordinance and made in
10 writing and signed by some person or persons duly authorized by the Council." That
11 ordinance section expresses a clear intent that the city *not* be bound by an agreement or
12 representation unless the agreement is (1) authorized by ordinance, (2) in writing, and (3)
13 signed by an authorized person. Given that clear expression of legislative intent, we
14 cannot infer that the city would have intended to permit terms to be added to the contract
15 at issue here either by a course of conduct or by assurances from city employees.

16 With respect to plaintiffs' estoppel theory, "[i]n Oregon, it is well
17 recognized that promissory estoppel * * * is a subset of and a theory of recovery in
18 breach of contract actions." *Neiss v. Ehlers*, 135 Or App 218, 227-28, 899 Pd 700
19 (1995). Furthermore, promissory estoppel can, in limited circumstances, be applied to
20 governmental entities. *See Wiggins*, 295 Or at 683 (a municipality may be bound by a
21 promise of its agent "if (a) the municipality clothes the agent with apparent authority, (b)

1 the promise is one which the municipality could lawfully make and perform, (c) there is
2 no statute, charter, ordinance, administrative rule, or public record that puts the agent's
3 act beyond his authority, (d) the person asserting the authority has no reason to know of
4 the want of actual authority, and (e) the municipality has accepted and retained the
5 benefit received by the municipality in return for the promise"); *see also Arken v City of*
6 *Portland*, 351 Or 113, 139, 263 P3d 975, *adh'd to on recons*, 351 Or 404, 268 P3d 567
7 (2011) (observing that "not every one of the circumstances noted in *Wiggins* will
8 necessarily be required in every case to conclude that promissory estoppel may
9 appropriately be applied to a governmental entity"). However, in this case, as set forth
10 above, section 8-104 of the city charter makes clear that the city does not intend to be
11 bound by promises or agreements by city employees when those promises are not
12 authorized by ordinance. In other words, under the city charter, it is outside the authority
13 of a city employee to bind the city to a promise that is not authorized by ordinance. Here,
14 there is no indication that any ordinance authorized the alleged representations that
15 plaintiffs would not be required to return to work for the city. Because the city charter
16 puts the alleged promises in this case outside the authority of the city employees who
17 made them, promissory estoppel does not support plaintiffs' claim for breach of contract
18 based on those promises. *See Arken*, 351 Or at 139-40 (declining to apply the doctrine of
19 promissory estoppel in the context of a statutory contract). For those reasons, the trial
20 court did not err in granting summary judgment as to those parts of plaintiffs' breach of
21 contract claims arising out of alleged contract terms based on course of conduct and

1 estoppel.

2 Plaintiffs also contend that summary judgment was inappropriate because
3 there were issues of fact regarding whether the city breached its duty of good faith and
4 fair dealing. *See Klamath Off-Project Water Users v. Pacificorp*, 237 Or App 434, 445,
5 240 P3d 94 (2010), *rev den*, 349 Or 602 (2011) (a "party may violate its duty of good
6 faith and fair dealing without also breaching the express provisions of the contract"
7 (internal quotation marks omitted)). As discussed, although the trial court granted
8 summary judgment with respect to the entire case based on failure to exhaust
9 administrative remedies, the court agreed with plaintiffs that genuine issues of material
10 fact regarding the city's breach of its duty of good faith and fair dealing would preclude
11 summary judgment on that issue. The city does not argue on appeal that that
12 determination was incorrect. Given those circumstances, we conclude that it is
13 appropriate to reverse the judgment with respect to the city's alleged breaches of its duty
14 of good faith and fair dealing and remand as to that issue.

15 Reversed and remanded in part; otherwise affirmed.