NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of the Arbitration Between

CITY OF WATERVLIET

And

IAFF LOCAL 590 (WATERVLIET UNIFORMED FIREFIGHTERS ASSOCIATION)-(MEDICARE PART B REIMBURSEMENT-CLASS ACTION)

OPINION AND AWARD

PERB CASE NO. 2017-012

APPEARANCES

For the Employer:

Yordan C. Huban, Corporation Counsel

Jeremy Smith, General Manager

For the Union:

Thomas Jordan, Attorney

Arbitrator:

John F. Hudacs

The City of Watervliet ("Employer") and IAFF Local 590 --Watervliet United Firefighters Association ("Union") are parties to a Collective Bargaining Agreement ("CBA") which provides for the arbitration of unresolved grievances which may arise from the terms of the Agreement. Pursuant to this Agreement and Part 207 of the Rules of Procedure of the New York State Public Employment Relations Board (PERB) the undersigned was designated as the arbitrator on or about May 30, 2017 to hear and decide the issue stated below.

A hearing was held at 10:00 AM on August 2, 2017 at the Watervliet City Hall, Third Floor at which time both parties appeared with their witnesses and proof. A full opportunity was afforded to the parties to be heard, offer evidence and argument and to examine and cross examine witnesses. Witnesses were duly sworn. Both parties submitted written letter briefs as closing statements which were received by the Arbitrator on September 25, 2017

ISSUE

The Issue to be decided is:

Did City of Watervliet violate Article II, Section 11 of the Firefighter's contract when it discontinued reimbursing Part B premiums?

EXHIBITS

The following exhibits were introduced into evidence by the parties

Joint Exhibits:

1. Collective Bargaining Agreement

Union Exhibits:

1. Grievance Form submitted to Fire Chief and Acting City Manager by UFA Officer Jody Legault, dated March 13, 2017
2. Response by Fire Chief to Grievance sent to President Local 590, dated March 16, 2017
3. Denial by Acting City Manager of Grievance sent to Watervliet UFA President, dated March 30, 2017
3. Letter by Acting General Manger to Medicare Enrollee enclosing Medicare Part D (sic) check and informing Enrollee that as of July 1, 2017 the City of Watervliet will no longer reimburse this cost
5. Resume of Union expert witness Dr. Joseph Monahan

Employer Exhibits:

1. Grievance Form submitted to Fire Chief and Acting City Manager by UFA Officer Jody Legault, dated March 24, 2017

WITNESSES

The following witnesses were duly sworn and presented testimony

For the Union:

Jody Legault, Unon President
Donald Panichi, Union member retiree, former Union officer
Brian Carroll, Union member retiree, former Union officer
Joseph Monahan, Expert Witness

For the Employer:
Jeremy Smith, City of Watervliet General Manager

APPLICABLE CONTRACT PROVISION

Collective Bargaining Agreement by and between the City of Watervliet and the Watervliet Uniformed Firefighters Association Local 590, IAFF, AFL-CIO

ARTICLE V

GRIEVANCE PROCEDURES

1. GENERAL

A. When a member of the Association collectively, has a grievance against the City, it shall be processed in accordance with the Grievance Procedure hereinafter provided.

B. The parties will make a sincere and determined effort to settle meritorious grievances in the voluntary steps of the Grievance Procedure and to keep the procedure free of unmeritorious grievances.

C. Any grievance that either is not processed within a reasonable time or is disposed of in accordance with this Grievance Procedure shall be considered settled, and such settlement shall be final and binding upon the City, the member or members involved, the Association and its members.

D. Except with respect to the right to present an individual grievance, as expressly set forth in this Article, the Association shall, in the redress of grievances, be the exclusive representative of the interests of each member or group of members covered by this Agreement, and only the Association shall have the right to assert and press against the City any such grievance

2. FIRST STAGE GRIEVANCES

A. A member believing he has cause for grievance may, at this option, discuss the matter directly with his immediate supervisor or may take it up with his associations Grievance Committee, which shall discuss the grievance with the member's immediate supervisor. Recognizing the value and importance of full discussion in clearing up misunderstandings and preserving harmonious relations, every reasonable effort shall be made to settle problems promptly at this point through discussion.

B. If the matter is not disposed of in this discussion with the supervisor within forty-eight (48) hours the grievance shall be reduced to writing, and shall set forth all the facts relied on and shall be presented in triplicate to the Fire Chief. The written grievance shall be presented to the Fire Chief within ten (10) calendar days of when the grievance occurred or when the Association President or his designee had actual knowledge of the occurrence of the grievance, whichever occurred last.

C. The Fire Chief's determination shall be in writing, setting forth in detail all the facts relied upon in support of his disposition, and shall be made as expeditiously as possible, consistent with proper investigation, but in no event more than seven (7) working days from the time of written presentation, and shall be returned by the Fire Chief to the Association Grievance Committee which presented it.

D. If the Fire Chief's determination on a grievance is not given within the time limits herein provided, the grievance may be appealed directly to the Third Stage of grievance Procedure.

E. If the determination of the Fire Chief is not satisfactory to the Association Grievance Committee, it shall prepare a written report setting forth its complete investigation of the facts, in rebuttal to the Fire Chiefs statement of facts and determination and shall refer this report with the grievance in writing to Second Stage Grievance.

2. SECOND STAGE GRIEVANCES

A The Association Committee shall, within one week of the preceding determination, present the report and grievance in writing to the General Manager

B. The General Manger shall give his decision in writing not later than seven (7) days after the grievance had been submitted to him.

3. THIRD STAGE GRIEVANCES

A. If the decision of the General Manager is not satisfactory to the Association Grievance Committee, it shall, within seven (7) days after receipt thereof, submit a Demand for Voluntary Arbitrations to the Public Employment Relations Board (PERB).

B An Arbitrator shall be selected in accordance with PERB's rules

C. The Arbitrator shall have the power to hold hearings, take evidence and issue a decision which shall be binding on the parties; said decision may include a direction as to the payment of costs, by a party. If so, such payment shall be made in the amount thereof.

D. The cost of the services of the Arbitrator shall be borne equally by the City and the Association

A. Transcripts of hearings conducted by the Arbitrator shall be purchased and paid by the party desiring same.

ARTICLE II

ECONOMIC BENEFITS AND WORKING CONDITIONS

11. **Health Insurance:** The present health insurance shall continue in force. Current health insurance options include: The Capital District Physicians Health Plan (CDPHP). The City shall continue to pay one hundred percent (100%) of the cost for each member of the bargaining unit and his dependents who were employed prior to January 1, 1995. Any member of the bargaining unit appointed as a firefighter after January 1, 1995 shall, pay part of their health insurance costs through payroll deduction pursuant to the following schedule:

First Year of Service	1st-12th month	30% of costs
Second Year of service	13th-24th month	30% of costs
Third Year of Service	25th-36th month	30% of costs
Fourth Year of Service	37th-48th month	30% of costs
Fifth Year of Service	49th-60th month	30% of costs

After 60th month of service City pays 100% of Health Insurance costs

Employees hired on or after July 1, 2004 shall, together with their dependents, have the same benefits under this section as present employees except they shall contribute ten percent (10%) of the premium costs for individual and for dependent coverage throughout their employment with the City and throughout their retirement.

For the employees currently employed by he fire department prior to July 1, 2004, the City will pay 100% of their health insurance costs during their employment and retirement provided they have fulfilled the 30% health insurance contribution as described in the existing contract

Employees hired on or after January 1, 2013 shall, together with their dependents, have the same benefits under this section as present employees except that they shall contribute fifteen (15%) of the premium costs for either individual or dependent coverage for the first five (5) years of their employment. After five (5) years of employment, the employee shall contribute ten (10%) of the premium costs for either individual or dependent coverage throughout their employment with the City and through their retirement.

If an employee, who has retired, moves out of the State of New York and establishes permanent residence outside of the State of New York, and said employee elects to obtain out of state health insurance coverage, the City shall only pay the premium costs for individual or dependent coverage of the out of state health insurance plan up to the amount of the premium costs minus the employees percentage of contribution for either individual or dependent coverage of the Capital district Health Insurance Plan in effect at that time. If the premium costs for either individual or dependent coverage of the out of state health insurance plan are greater than the premium costs for either individual or dependent coverage of the capital District Health Insurance Plan, the employee is responsible for and shall pay the difference. (Example: If the NYS CDPHP family plan premium is $12,000.00 in a particular year and an employee, who has retired, moves to Florida and obtains family coverage in said State, the cost of which is $15,000.00, The City shall pay only $12,000.00 for the cost of said premium minus the employee's percentage of contribution. The additional monies shall be paid by the employee). If the out of state premium or either individual or dependent coverage is less than the NYS CDPHP premium, the City will not deduct the employee's percentage of contribution.

Health Insurance Buyout: Before beginning each calendar year, an employee may elect to discontinue Family Health Insurance Coverage for said year and elect to be covered by his/her spouse's Health Insurance Coverage. If the employee chooses to participate in the Health Insurance Buyout Program, the following will occur

On or before December 7th of each year, the employee shall receive a payment equal to 40% of the cost of either individual or dependent coverage, as appropriate, of the CDPHP health insurance plan in a lump sum payment. The employee shall have the option of reactivating his Health Insurance Coverage for the forthcoming year by notifying the City in writing on or before September 15th of each year. The reactivation will begin on January 1st. If the Health Insurance Coverage of the employee's spouse terminates or fails to cover the employee for any reason during a year in which the employee elects to participate in the Health Insurance Buyout Program, the employee will notify the City in writing immediately and the City will reactivate the employee's City Health Insurance Coverage. Health Insurance Buyout payments will be made on a prorated basis during December.

STATEMENT OF FACTS

The City of Watervliet and the Watervliet Uniformed Firefighters Association representing all City firefighters, except the Fire Chief, entered into a collective bargaining agreement covering term and conditions of employment (Joint Exhibit I). The Agreement entered into on January 1, 2013 runs through December 31, 2016 and remains in effect pursuant to New York state law. The contract's Article II Section 11 essentially provides that Fire Department employees employed before July 1, 2004 will have the City pay 100% of their health insurance costs during their employment and retirement. Employees hired on or after July 1, 2004 shall, with their dependents have the same benefits except they shall contribute 10% of the premium costs for individual and dependent coverage throughout their employment and retirement. Employees hired on or after July 1, 2013 shall have the same benefits with their dependents except they must contribute 15% of the premium costs of the individual or dependent coverage for the first 5 years of employment and 10% thereafter throughout their City employment and their retirement.

For a considerable number of years the City had been reimbursing retired firefighters for their premium payments for Medicare Part B upon their enrolling at age 65 pursuant to the federal program and proving that premium payments were made. The Acting City General Manager sent a letter dated January 31, 2017 to all Medicare enrolled retirees informing them that as of July 1,

2017 the City of Watervliet will no longer reimburse them the cost for the premium payments for Medicare Part B, with the July reimbursement being the final reimbursement for these costs (Union Exhibit IV). [The letter makes reference to "Medicare Part D reimbursement" which both parties agree is a typographical error and should read "Medicare Part B reimbursement"]

The Union was not sent a copy of the notice. The Union stated that it learned of the City's action from a third party on or about March 10, 2017. On March 13, 2017 the Union notes it filed a grievance pursuant to Article V of the collective bargaining agreement stating that the unilateral discontinuance of the Medicare Part B premium reimbursement after July 1, 2017 violated Section 11 of Article II wherein the City is obliged to pay 100% of retired members' health cost less stipulated contributions during their retirement. (Union Exhibit I) The City submits that the Grievance Form was dated March 24, 2017 (City Exhibit I). In its grievance the Union called for remedy that the City rescind its decision to discontinue reimbursement and that any affected union members be made whole. This Stage One grievance was denied by the Fire Chief in a March 16, 2017 letter stating that "The ability to rescind this decision is beyond the scope and authority of this office, therefore I will deny this grievance". (Union Exhibit II)

On March 24, 2017 the grievance appeal to the Second Stage was hand delivered by the Union to the Acting City Manager. On March 30, 2017 the Acting City Manager responded in writing that "I have reviewed in detail the subject and summary of the Grievance that you have filed on behalf of the Watervliet Unified Firefighters Association. Please be advised that I am hereby denying the grievance". On April 10, 2017 a Demand for Arbitration was made by the Union to the New York State Public Employment Relations Board.

The arbitration hearing was held on August 2, 2017 with the issue agreed upon by the parties stating "Did the City of Watervliet violate Article II Section 11 of the firefighter's contract when it discontinued reimbursing Medicare Part B premiums?"

The parties jointly agree that the present arbitration does not apply to existing retirees. The Union states that the issue relates to present bargaining unit members once they retire and become Medicare eligible. The City states in its brief that as a result of a Notice of Petition and Petition filed by the City to stay the arbitration the parties stipulated that the Union will not seek to pursue arbitration on behalf of persons retired from the Fire Department as of January 31, 2017, the date the City notified Medicare eligible retirees that it would no longer reimburse Medicare part B premiums.

Union Position

The Union argues that the City is in violation of the collective bargaining agreement when it unilaterally ceased reimbursing retired firefighters for their Medicare Part B premium payments. They assert that although the payments are not specifically mentioned in the contract the payment has been an ongoing practice for 40 years and is an interpretive practice covered by the contractual provision requiring the City to pay 100% of the health insurance costs during retirement (varying to 90% for firefighters hired after 2004). In support of this position the Union presented witnesses Don Panichi and Brian Carroll, both former Union Presidents with more

than 20 years of negotiating contracts with the City on behalf of the firefighters. Both testified that they understood the 100% payment of health costs by the City during retirement was to include the Medicare premium reimbursements. Neither believed it was necessary to introduce specific language to this regard into the contract since such payments were made and never contested. The Union maintains that there was no understanding that in order for such payments to be made that a specific health plan should require it. The Union notes that Mr. Carroll's testimony indicated that he received reimbursement as a CDPHP enrollee, a plan that did not require reimbursement of Medicare B and thus indicates the City's acceptance of the obligation to continue reimbursement even if it is not specifically stated within the contract.

The current Union President, Jody Legault, testified that he had been involved in the contract negotiations for the past 12 years and that it was his understanding that the reimbursement was clearly included within the meaning of the contact language requiring payment of 100% of the health insurance costs by the City in retirement.

The Union also presented Dr. Joseph Monahan as an expert witness providing testimony that the City's current insurance plan offered to active and retired firefighters has a second component of Medicare Advantage. He stated that retirees must sign up for Medicare and Medicare B when eligible and the Medicare Advantage is supplemental to it. He testified that although the Medicare Part B premium reimbursement is not specifically mentioned in the contract, in his opinion, based on the more than 40 years of City payment and the contract's language, the firefighters should reasonably expect that this payment continue as coverage of their health insurance costs in retirement. It was his opinion that the Acting City Manager's letter notifying eligible retirees of the reimbursements discontinuance on July 1, 2017 violates the collective bargaining agreement.

In further support of its argument the Union submits three arbitration awards (PERB Case A2009-485, City of Albany and Albany Permanent Professional Firefighters Association, IAFF Local 2007, Sheila S. Cole, Arbitrator (December 15, 2010); PERB Case A2010-498, City of Albany and Albany Permanent Professional Firefighters Association, Local 2007, IAFF, AFL-CIO, Sheila S. Cole, Arbitrator (February 15, 2012); PERB Case A099-544, Ogdensburg City and Ogdensburg Firefighters Local #1799, Judith A LaManna, Arbitrator, (October 16, 2000)) and a State Supreme Court, Appellate Division Memorandum and Judgement (In the Matter of Albany Police Officers Union, Local 2841, Law Enforcement Officers Union District Council 82, AFSCME, AFL-CIO v New York Public Employment Relations Board (April 6, 2017))

The Union maintains that the Ogdensburg Arbitration decision holds the most direct comparison to the present situation in contract language, discontinuance of Medicare Part B reimbursement and the witnesses for both sides acknowledging the existence of a long standing practice of reimbursement and that the rationale of the arbitrator in deciding this case is appropriate to its application to this case as well. The Union asserts that, as was the case in the Ogdensburg arbitration and the Albany cases, the proof is evident that the City is obligated by contract language and longstanding practice to continue Medicare part B reimbursement for firefighters who ae presently union members once they retire and become Medicare eligible.

The Union further argues that although there is no immediate financial detriment to its bargaining unit members due to the discontinuance of the reimbursement to retirees, there is in

fact a real harm due to the loss of a future benefit, as is shown in the Ogdensburg and Albany arbitration decisions. This harm must be addressed in the arbitration's remedy by ensuring that when an active member retires and becomes Medicare eligible and pays the Part B premium he receives reimbursement from the City. The Union states that it can accept either of the two remedy approaches used by the arbitrators in the Ogdensburg or Albany decisions

The Union further contends that if the City is in financial stress as it asserts and wants to address the subject of reimbursement then the proper action is to negotiate with the Union. It states that there is nothing in the contract that relieves the City of its contractual responsibilities due to the financial hardships asserted by the City. Further the Union notes that no testimony or evidence was given establishing how much savings would even be achieved by discontinuance of the reimbursement for retired firefighters.

Employer Position

In its brief the City calls for denial of the grievance in its entirety on the assertion that the Union failed to follow required procedures pursuant to Article V Section 2 (E) of the contract. The City submits that pursuant to that section of Article V the Union was required to prepare and submit a written report setting forth its complete investigation of the facts related to the Fire Chief's statement of facts and determination in moving the grievance to the second stage grievance stage. Additionally at the hearing the City questioned the timeliness of the grievance submitted by the Union.

The City states that the decision to discontinue reimbursement of Medicare Part B payments to retirees does not violate Article II Section 11 of the collective bargaining agreement. It maintains that there is no language in the contract which mentions Medicare Part B premiums or obligates the City to reimburse Medicare Part B premiums. In fact, it noted, the Medicare and Medicare Part B programs are not City programs but federal programs. The City General Manager, Jeremy A. Smith, testified that the City was required to reimburse Part B premiums as long as it offered NYSHIPs Empire Plan. The Empire Plan, he noted, pays secondary to Medicare and participating agencies and plan participants were required by the plan to reimburse Medicare enrollees for the Part B premiums. Mr. Smith noted that since the City no longer offers the Empire Plan, which required reimbursement, the City has the right to discontinue reimbursement.

The City maintains that there was no binding past practice of reimbursement of Medicare Part B premiums since the test for establishing past practice has not been met. The City's criteria framing a definition for past practice under the Taylor Law is drawn from arbitrations and court decisions cited in their brief (Matter of County of Nassau, 24 PERB 3029 (1991); Matter of Manhasset Union Free School District vs. New York State Public Employment Relations Board, (61 AD3d 1231 (2009); Matter of Chenango forks school District vs. New York State Public Employment Relations Board, 21 NY3d 2155 (2012); and Matter of Town of Islip vs. New York State Public Employment Relations Board, 23 NY3d 482 (2014))

The City states that the test for establishing past practice is if the "practice was unequivocal and was continued uninterrupted for a period of time sufficient under the

circumstances to create *reasonable expectation* among affected bargaining unit employees that the practice would continue". *[Emphasis added].* It further adds that the circumstance requires that "the expectation of the continuation of the practice is something that may be presumed from its duration with consideration of the *specific circumstances* under which the practice exists" *[Emphasis added]*

The City submits that the Union failed to establish that there was "reasonable expectation" claiming evidence submitted at the hearing by the Union was inadequate, ambiguous and insufficient to establish that the active union members and the Union knew of the City's reimbursement payments to retirees. The City maintains that since there is no demonstrable evidence that the Union or its active members had sufficient knowledge of the reimbursement payments at the time of discontinuance, there would be no reasonable expectation that it would continue.

The City further submits that the reimbursement existed only because the City was required to reimburse by participating in the NYSHIP's Empire Plan and that this was the "special circumstances" upon which the reimbursement was made. Thus it concludes the Union failed to prove the existence of a past practice pursuant to the Taylor Law

The City Manager testified that the City is a financially stressed city. In its current state of financial stress and hardship, the loss of the cost savings associated with the discontinuance of the reimbursement to the retirees for the Medicare Part B premiums will contribute to the fiscal and financial distress of the City.

The City further maintains that the Union has no right to continued reimbursement and absent the contractual or legal requirement it would be unconstitutional to make such payments since it would violate Article VIII, Section 1 of the State Constitution which prohibits a gift of public funds.

OPINION

Grievance Contract Compliance

The City challenges the validity of the grievance and calls for the denial of the grievance in its entirety asserting that the Union did not make timely submission and did not follow the contractual procedures in the second step of the grievance as found in Article V. The arbitrator finds that based on the arguments, evidence and facts there is insufficient grounds to support a denial of the grievance on these grounds.

A. Timeliness

The City's concerns over timeliness of the grievance was not fully developed at the hearing. The issue of timeliness of the filing at the initial stage of the grievance was introduced by the City and in this regard it submitted as its sole exhibit a copy of the grievance document (Employer Exhibit I). The Union stresses that timeliness was never raised by the City during the entire grievance process in this matter. It is only now at the time of the arbitration that the City

introduced it as an issue. The Union further maintains that there is no "time is of the essence" clause in the grievance procedure and that in fact the grievance was filed in a timely manner. It cites Article V, Section 2 (b) of the contract which states that "The written grievance shall be presented to the Fire Chief within ten (10) calendar days of when the grievance occurred or when the Association President or his designee had actual knowledge of the occurrence of the grievance, which ever occurred last"

The Union asserts that it was never given a copy of or notified of the January 31st notice issued by the City manager but once they were made aware of it, by a third party retiree, they sought legal guidance and within days of receiving legal guidance filed the grievance. In its Grievance at the First Stage the Union states that it "... learned of this contract violation on or about March 10, 2017." and filed the Grievance on March 13, 2017. (Union Exhibit 1). The City submitted a copy of the same Union Grievance but with the date March 24, 2017 handwritten in the space where the Union's Grievance copy had the typed date of March 13, 2017 (City Exhibit I). The arbitrator finds the dating of the City's Exhibit I to be questionable noting that the Fire Chief's denial of the grievance is dated March 16, 2017--- which would make his denial 8 days *prior* to the date of its submission per the City's Exhibit.

The arbitrator also takes note of the fact that the Union was not notified by the City but rather by a third party. Their subsequent actions i.e. seeking legal advice, is accepted and recognized as prudent and necessary. The outcome of that action established actual knowledge of the occurrence of a grievance for the Union. Although there is no specific date established at which the Union received notice of this matter (since they were not given a copy by the City), given the timeline from the January 31 notice date and the March 10 discussion with legal counsel, it is this arbitrator's conclusion there is no credible evidence offered nor reasonable basis to determine that the grievance was not pursued in a timely manner and thus violated the contract Grievance Procedure. The timeliness of the grievance filing is not established as a point for consideration.

B. Procedure

The City's second, and most direct point of contention, asserts that the Union violated Article V Section 2E of the collective bargaining agreement by not preparing a written report setting forth its complete investigation of the facts in rebuttal of the Fire Chiefs statement of facts and determination (in the First Stage) and referring the report with the grievance in writing to the Second Stage Grievance. The Union responds in witness testimony by Union President Jody Legault, who has served for 10 years as President and Vice President for two years previous. Mr. Legault testified that the manner in which this grievance was addressed from the First to the Second Stage with submission of the written Grievance Form was the same manner in which grievances had been addressed in the past and that the Union had never before had to prepare a written report in the First Stage setting forth its complete investigation of the facts in rebuttal of the Fire Chiefs statement of facts and determination.

Based on careful review of the testimony, evidence and the parties representations I find no persuasive evidence to deny the Grievance on this procedural grounds The unchallenged testimony by the Union President that in his experience, covering 12 years in Union office, that

this procedural format has not been followed and that an alternative process has been used and accepted, strongly represents that an established past practice has been in play that represents a mutually acceptable waiver. Additional concerns with the City's argument are evidenced in the brevity and format of the Fire Chief's denial of the grievance in First Stage wherein for his part he merely states that "The ability to rescind this decision is beyond the scope and authority of this office…" This briefest of statements is made despite the fact that Article V Section 2C. of the collective bargaining agreement states that "The Fire Chief's determination shall be in writing, *setting forth in detail all the facts relied upon in support of his disposition*, and shall be made as expeditiously as possible, consistent with *proper investigation... "[emphasis added]*. Moreover, the City never introduced this procedural concern during the grievance process. It accepted the grievance and advanced it to the next stage. It was only at the time of the hearing that it was introduced. The City's request for denial of the grievance due to procedural grounds is DENIED

Contractual Obligation and Past Practice

Attention is now drawn to the issue of whether the City violated Article II Section 11 of the firefighters' contract when it discontinued the reimbursement of Medicare Part B premiums paid by retirees. Central to the question is the status of the Medicare Part B reimbursement to retirees in relation to the contract. It is the Union that bears the burden of proof to establish the City's obligation for continued reimbursement payments to the retirees.

The general proof of a binding past practice is established by measuring the practice for clarity, consistency and acceptability. As stated in Elkouri & Elkouri "In the absence of a written agreement, 'past practice', to be binding on both Parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties" (Elkouri & Elkouri, *How Arbitration Works*, Sixth Edition (BNA) 2003, p.608) In its brief, the City enumerates these elements through the definition established by PERB and accepted by the courts to determine if a binding past practice exists. The question to be answered in determining if a binding past practice exists rests on whether the employer's practice was unequivocal and was continued uninterrupted for a period of time under the circumstances to create an expectation among the affected unit employees that the practice would continue. Moreover, the expectation of the continuation of the practice is something that may be presumed from its duration with consideration of the specific circumstances under which the practice existed.

The Union's principle position is that the employer's reimbursement payments to retirees for the Medicare Part B premiums is required by the contract language stating that the City will pay 100% (or adjusted contract stated amount) of the employees' health insurance costs during retirement. The Union maintains that although there is no specific mention of the Medicare Part B reimbursement, the reimbursement practice has been in existence for more than 40 years. The extended duration of payment and the contract language requiring the City to pay health insurance costs for retirees gave the Union and its members the expectation of receiving the reimbursement; and although the contract health insurance cost language had been substantively

amended in negotiations during this period the subject of diminishing, altering or eliminating reimbursement was never broached by the City during that time.

The City has asserted that the contract does not mention Medicare Part B nor contain language obligating the City to reimburse for the Part B premiums indefinitely. It argues that with the City no longer participating in the Empire Plan which required reimbursement, it now had the right to discontinue the reimbursement. The City offers two points to establish that the reimbursement to the retirees fails to meet a test for past practice under the Taylor Law.

First, it argues that the reimbursement is not a past practice since the Empire Plan was the "special circumstances" under which the reimbursement was made and the City no longer participates in that plan. Secondly, the City asserts that the Union also failed to establish "reasonable expectations" that the active members or the Union were aware of or even expected to receive reimbursement.

An examination of the testimony and evidence presented does not support the City's arguments. The City's argument that the Union failed to establish "reasonable expectations" that the active members or the Union were aware of or even expected to receive reimbursement is effectively countered by the testimony of the Union President Jody Legault who testified that he was aware of the reimbursement and that it had been on-going during his entire period of employment which covered a decade and a half of service. Union witness Brian Carroll, a retiree who was a past Union President and active member with 34 years of service as a firefighter testified that the Medicare Part B reimbursement was around for as long as he remembers, noting that when he received notice of its discontinuance he thought it had been negotiated out of the contract.

Retired firefighter and former Union officer Donald Panichi also testified that the Medicare reimbursement for retired firefighters was made during his 29 years of employment and tenure as a Union officer. Although Mr. Panichi, like Mr. Carroll, is a retiree and unaffected by this arbitration his testimony as a past Union officer, active Union member and participant in more than 20 years of contract negotiations with the City on behalf of the firefighters offers important insight into the history of the practice and the expectations related to it.

Mr.Panichi, who to the best of his recollections attended every negotiating session during his more than 20 years as a Union officer, noted that although the City negotiated changes to the contract language to require contributions for newer employees in their employment and retirement, it never brought up the Medicare Part B reimbursements in negotiations. The reimbursements continued even when participation in the plans was changed by the City. When a practice of Medicare Part B health insurance reimbursement to retirees has been in effect for more than 40 years; is not diminished or eliminated; and is never introduced into collective bargaining, Union witnesses indicated through their testimony that they had a reasonable expectation of its continuance under the existing contract language stating that the City would pay 100% (or the adjusted negotiated amount) of employees health insurance costs in retirement.

The City insists that the reimbursement of Medicare Part B only existed because the City was required to do so since it offered the NYSHIP's Empire Plan. It argues that since it is the City's participation in the Empire Plan that is the specific circumstances under which the payments are

made therefore when it no longer offered the plan, it had the right to discontinue the reimbursement. However, no evidence or testimony, was submitted by the City sufficient to establish that the Empire Plan originated the initial payments and compelled their continuation for the duration of the entire period in which they have been made.

After careful evaluation of the arguments, evidence, exhibits, testimony and the briefs submitted by both parties and reviewing the reimbursement payments in the context of the contract language, contract negotiations and the actions of the parties I find that the Medicare Part B reimbursement of retirees is a binding past practice and covered under Article II Section 11 of the collectively bargained agreement and the grievant prevails.

Call for Denial on Grounds of Fairness and Equity

The City maintains that the grievance should be denied on the basis of fairness and equity due to the financial distress of the City. Mr. Jeremy Smith the City Manager testified to the fiscal difficulties and financial constraints confronting the City. He testified that the annual costs of reimbursement for Medicare enrollees is $75,000 but was unable to identify how much of that cost was actually attributable to retired firefighters. No contractual or legal basis to support the denial were offered. In addressing this matter the Union accurately notes that there are no grounds in the collective bargaining agreement that relieves the City of its responsibilities due to its fiscal situation or support for a call for denial.

It is not this arbitrator's role to make judgement on the circumstances challenging the City and its need for budgetary constraints. They are beyond the consideration of this arbitration. Absent legal or contractual authority there are no grounds upon which to entertain or support a request for denial. The City's request for grievance denial on the basis of financial distress is DENIED

Finally, the City argues that continued Medicare Part B premium reimbursements to retirees constitutes an unconstitutional gift of public funds in violation of Article VIII, Section 6 of the New York State Constitution. This argument is based on the conclusion for which it argues that there is no contractual or legal right under the Taylor law to make such payments. The determination in this instance that the reimbursements are contractually obligated by the City negates this argument.

DETERMINATION AND AWARD

Based upon the findings and conclusions reached in the preceding opinion the Arbitrator finds that the City of Watervliet did violate Article II Section 11 of the firefighter's contract when it discontinued reimbursing Medicare Part B premiums. The grievance is AFFIRMED

Accordingly in remedy the City shall provide Medicare Part B premium reimbursement to all active bargaining unit members who retire following January 31, 2017 upon submission of acceptable proof that payment of coverage is made.

I, JOHN F. HUDACS, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is an award.

Date: November 6, 2017

John F Hudacs, Arbitrator