

**VOLUNTARY LABOR ARBITRATION TRIBUNAL
FEDERAL MEDIATION AND CONCILIATION SERVICE**

In the Matter of:

____,

Union, **Class Action/Layoff-Recall**

and

FMCS ____

____,

Employer. **Arbitrator Lee Hornberger**

DECISION AND AWARD

1. APPEARANCES

For the City:

For the Union:

2. INTRODUCTION

This arbitration arises pursuant to a Collective Bargaining Agreement (CBA) between ____ (Union) and ____ (City). The Union contends that two Officers on lay-off did not quit or terminate their employment when they applied for and received their pension contributions back from the City Pension Plan. The City maintains that the Officers on lay-off did quit or terminate their employment when they applied for and received their pension contributions back from the City Pension Plan.

Pursuant to the procedures of the Federal Mediation and Conciliation Service, I was selected by the parties to conduct a hearing and render a final and binding arbitration

award. The hearing was held on January 16, 2013, in ____, Michigan. At the hearing, the parties were afforded the opportunity for examination and cross-examination of witnesses, and for introduction of relevant exhibits. The dispute was deemed submitted on March 25, 2013, the date the post-hearing submissions were received.

The parties stipulated that the grievance and arbitration were timely and properly before me, and that I could determine the issues to be resolved in the instant arbitration after receiving the evidence and arguments presented.

The advocates did an excellent job of presenting their respective cases.

3. ISSUE

The parties stipulated that the issue to be resolved in the instant arbitration is whether the City violated recall rights of certain Officers laid off in October 2010 when it hired in July 2012 two new full-time Officers and did not first recall any of the laid-off officers?

4. RELEVANT CONTRACTUAL LANGUAGE

Section 3.0. Management Rights The City, on its own and on behalf of its electors, hereby retains and reserves unto itself without limitations, all powers, rights, authority, duties, and responsibilities conferred upon and vested in by the laws and the constitution of the State of Michigan and of the United States, further all rights which are ordinarily vested in and are exercised by City except such as are specifically relinquished herein are reserved to and remain vested in the City, including but without limiting the generality of the foregoing the right:

* * *

- To determine the size of the workforce and increase or decrease its size.

* * *

- To hire, assign and lay-off employees, to reduce the work week or the work day or effect reduction in hours worked by combining lay-off and reductions in work week or work day.

Section 10.5(a) Pension

Pension System: The City shall provide to each employee covered by this agreement a

pension as provided for in the Charter of ____, Michigan as adopted June 12, 1921, and as amended and revised thereafter, and as may be subsequently amended.

Section 13.4 Arbitrator's Powers

(A) The arbitrator's powers shall be limited to the application and interpretation of this Agreement as written. He shall at all times be governed wholly by the terms of this Agreement. The arbitrator shall have no power or authority to amend, alter or modify this Agreement either directly or indirectly. If the issue of arbitrability is raised, the arbitrator shall only decide the merits of the grievance if arbitrability is affirmatively decided. It is the intent of the parties that arbitration shall only be used during the life of the Agreement to resolve disputes which arise concerning the express provisions of this Agreement.

* * *

(C) The arbitration award shall not be retroactive earlier than the beginning of the pay period immediately prior to the filing of the grievance in writing. Further, no claim for back wages under this Agreement shall exceed the amount that the employee would have otherwise earned by working for the Employer, less any and all compensation, including unemployment compensation, the employee received from all interim employment.

Section 14.0. Departmental. Departmental seniority shall be defined as a bargaining unit employee's length of continuous service with the Employer since the last hiring date. Position seniority shall commence upon a bargaining unit employee's date of entry into a position and shall include seniority in a higher position in which the employee has served a satisfactory period. Last hiring date shall mean the date upon which a bargaining unit employee first reported for work at the instruction of the employer since which the employee has not quit, retired, or been justifiably discharged. No time shall be deducted from a bargaining unit employee's seniority due to absences occasioned by authorized leaves or absences, vacation sick or accident leaves or for layoffs except as herein provided.

Section 14.4. Loss of Seniority. A bargaining unit employee's seniority shall terminate:

(A) If the Employee quits, retires, or is justifiably discharged.

Section 14.5. Layoff and Recall. Both parties agree that employees will be laid off and recalled by the following process.

(A) Definitions:

(1) Layoff shall mean the separation of a Police Officer from the active work force due to lack of work or funds;

(2) Recall shall mean the return of a Police Officer after a layoff to the active work force due to the availability of funds or work.

(B) Order of Layoff. Layoff of a bargaining unit employee shall be in inverse order of seniority. This means the least senior employee shall be laid off first, and the most senior employee shall be laid off last.

(C) Order of Recall. The recall of bargaining unit employees shall be in the order of seniority. This means that the most senior employee will be recalled first and the last senior employee shall be recalled last.

(D) Notice of Layoff. Employees to be laid off indefinitely shall be given at least two weeks prior notice.

(E) After 15 days. If a bargaining unit employee is on a layoff in excess of 15 days, such time shall be deducted, from but shall not interrupt, continuity of service.

The Police and Fireman's Pension and Retirement Act to ____, Michigan (Act), provides, in pertinent part:

PENSION BENEFITS:

Section 2.10. Pensions and benefits payable under this plan shall be as follows:

* * *

TERMINATION BENEFITS:

Section 2.14. SHOULD A FIREMAN OR POLICEMAN TERMINATE his services for any reason, he, if living, or his named beneficiary, if he be deceased, shall be entitled to the following benefits:

a. <u>Years of Service</u>	<u>Retirement benefits accruing to date of termination</u>
Prior to 15 years	None
15 years to 18 years	60%
18 years to 20 years	70%
20 years to 23 years	80%
23 years to 25 years	90%
25 years or more	100%

b. Any employee leaving the service of the Police and/or Fire Department prior to 15 years of creditable service will be entitled to receive the return of his contributions, together with 2½% interest. After 15 years of service, he may, in lieu of "a" above, receive the return of his contributions, together with 2½% interest.

c. If an employee's service be terminated for any reason and such employee re-enters the service of the Police and/or Fire Department, he shall be considered as a new employee for creditable service under the Retirement Plan. If such terminated employee be receiving monthly benefits such monthly benefits shall cease when he re-enters the service of the Police

and/or Fire Department; then when he again terminates his services or retires, the former monthly benefit shall again be paid, but such payments will be increased by the increased age of the employee, and these payments will be in addition to the ones earned under the last employment.

d. All termination, or earlier retirement benefits will be adjusted, using the following table:

RETIREMENT TABLE

<u>Age</u>	<u>% of Benefits Earned to Date</u>
55	100
54	97.7
53	95.5
52	93.4
51	91.4
50	89.5
49	87.7
48	86
47	84.4
46	82.8
45	81.3
44	79.9
43	78.6
42	77.3
41	76.1
40	74.9
39	73.8
38	72.7
37	71.7
36	70.7
35	69.8

The Rules and By-Laws Regulating the Police and Fireman's Pension Act to ____, Michigan (By-Laws), provide, in pertinent part:

SECTION 7

Pension Provisions of the City Charter

In no case shall the Board depart from the provisions of the Pension Act as set forth in the City Charter of the ____, Michigan, providing for the payment of pensions to participate eligible for retirement.

SECTION 13

Reinstatement

Should any member leave the service by resignation or dismissal or for any reason whatsoever and thereafter be reinstated into service, such member shall be subject to the provisions as outlined in Section 10 of these By-Laws, and shall be subject to the same physical examination as therein provided, the same as though he was appointed for the first time. No member who has been reinstated to active service shall be permitted to participate in the Pension and Retirement Fund until such examination and such reinstatement has been had and included in the minutes of such meeting of the Board. If such member so reinstated shall have drawn out of the pension fund the 75% of his salary deductions, or any part of amount he has paid into the Pension and Retirement Fund at the time he became separated from the Service or during the period of his separation from the service, such member so reinstated shall pay, by salary deductions or by some other satisfactory financial arrangement with the Board, into the Pension Fund the full amount he has withdrawn before he may be eligible to again participate in the Pension Fund or any benefits thereof.

Previous service as an employee of the City shall be computed to the service record of any reinstated employee and added to his service record bearing on twenty-five (25) years for retirement pension. Provided, in the event a member who has been out of service for one year or more after February 1, 1952 is reinstated, he shall lose all rights to previous service.

4. FACTS

Chief of Police/Director of Public Safety of ____ [____] testified that the October 2010 layoffs occurred during the beginning stages of a “financial crisis.”

Two new Officers were hired on July 1 and 2, 2012. The City did not recall laid off Officers.

Neither Grievant submitted formal resignations to the City. They only submitted the application form. Chief [____] was not present when the forms were submitted. Chief [____] did not discuss the forms with Grievants.

According to Chief [____], with a withdrawal of pension contributions there was a resignation. Chief [____] relies on “application documents” for his viewpoint. Chief [____] does not know how the application documents originated. He does not know if they are connected with the CBA. Chief [____] believes Grievants forfeited their recall rights when they submitted their forms for pension contributions refund. If Grievants had not

withdrawn money, there are no time limits in the CBA for recall from lay-off. He does not believe Grievants are receiving a pension.

Chief [____]'s understanding is that it is recognized by the Pension Board that Grievants could not have received their funds if they had not signed the application documents. He understands this from language in the application documents but does not know the language.

Other Officers have been laid-off but have not withdrawn their contribution money so they could keep their recall rights. They got this understanding from the Pension Board or other employees.

Chief [____] believes that the Pension Act, rules, and by-laws took precedence over the CBA.

It is the position of the City that the intent of the language is that the withdrawal of pension contributions requires a resignation. According to Chief [____], the Personnel Department did not obtain a "resignation" document. That was an error on their part.

Grievant [2____] was hired on April 3, 2009. He was laid off on September 30, 2010, because of "lack of funds." In January 12, 2012, he applied to withdraw his pension contributions. He did not discuss this withdrawal application with the Department. He was on the Pension Board from 2006 to 2008. While on the Board, he looked at the Pension Act.

Grievant [2____] filled out the form to withdraw his pension contributions. He was not seeking a retirement allowance. He testified that he did not check the "Termination Benefits" box. He does not know who checked the "Termination Benefits" box. The

application form said "... REQUEST FOR REFUND (WITH A RESIGNATION)"

Emphasis in original.

He did not intend to submit a resignation with the January 2012 form. No one from the City discussed the form with him. He did not understand that the refund request equaled a resignation. Grievant [2___] did not submit anything else. He did not understand that withdrawal would result in resignation.

The Employer stipulated that, if an Officer leaves and is rehired as a new-hire, the Officer can repay previously withdrawn pension payments.

Grievant [2___] heard that the City had hired two additional Officers. He was not recalled. He filed a Grievance. He believed he was still on lay-off status.

It was Grievant [2___]' understanding that withdrawing contributions does not remove recall rights. According to Grievant [2___], the "City's been doing this since beginning of time." A prior Officer voluntarily quit and was then rehired. Another Officer was terminated, withdrew his pension contributions, was reinstated by an Arbitrator, and then the Officer paid the contributions back.

Grievant [2___] does not know of any language that says a laid-off Officer can withdraw the Officer's contributions and still be entitled to recall.

Grievant [3___] was hired on November 6, 2006. He was President of the Union at the time of his September 30, 2010, lay-off.

After the lay-off, Grievant [3___] filled in an application to obtain his contributions to the pension fund. He did not discuss the form with anyone from the City. He went to the Personnel person and she handed him the packet. He filled it out, signed it, and turned the form in. He received no instructions on how to fill out the forms.

According to Grievant [3____], there was no notice that this would be a resignation. He submitted nothing else to the City. He signed the form on June 28, 2011, requesting the refund. He did not understand that he had to resign to get a refund. He understood that if he were called back he could return the refund.

He checked the “Termination Benefits” box. The application form said “... REQUEST FOR REFUND (WITH A RESIGNATION)” Emphasis in original.

With Grievant [3____]’ prior employer, the ____ Police Department, he was laid off, got his contribution refund, and was subsequently recalled. There was a procedure for pay-back.

The City hired two new Officers. The City did not recall Grievant [3____]. It was his “understanding that still on lay-off status in July 2012.” He filed a Grievance.

He does not know of any Union involvement with the preparation of the forms.

An Officer or two are on Pension Board.

Public Safety Officer [4____] was hired in 2002. Currently he is President of the Union. He was with the Firefighters Union before 2011. In Officer [4____]’s opinion a contribution refund is a termination. It was “past practice” with “other employees.” The employees who withdrew money did not come back. This situation has never occurred with a Police Officer.

It was stipulated that Officer [5____] would testify substantially similar as Officer [4____].

Officer [5____] has also been a Firefighter. He took refund money out from the Pension Fund, resigned, and went to another job. He also “wrote a letter.”

Captain [6___] has been an employee of the City since 1998. He is a Firefighter. He has not served on the Pension Board. He has served as President of the Firefighters Union. Captain [6___] testified that, if an employee wants to remain eligible for recall, the employee has to leave his contribution money in the pension system. He has no knowledge of the Union CBA. He has read no language that says an employee has to resign in order to receive the employee's contributions.

Lieutenant Doug [7___] has been employed by the Fire Department since 2002. He has been on the Pension Board since 2008. He has been told since his hire that employees always leave the contribution money in, and, if the employee takes the contribution money is out, "don't expect to be recalled." He knows of no situation where an employee withdrew contributions and was then recalled from layoff. He knows of no written authority for his forfeiture of recall position. He is not familiar with the current Union CBA.

4. CONTENTIONS OF THE PARTIES

1. For the Union

The Union contends that neither Grievant submitted a resignation with their application nor were they told that voluntary resignation was a pre-requisite for receipt of contributions. There was no explanation by the City attending to the submission of the form. The wording of the form does not place an Officer on notice that the submission would result in a resignation. A document unilaterally created by the City cannot control over the seniority provisions of the CBA or the Pension Act and its rules which are incorporated by reference as part of the CBA. The CBA recall language states that laid off officers shall be recalled in order of seniority. There is no provision in the CBA or the

Plan that disallows the receipt of pension contributions for laid off officers or conditions receipt of such funds on voluntary resignation. The Pension Rules provide that when a member leaves the service "for any reason," including lay off, he may draw out contributions from the retirement system but upon reinstatement shall pay back the full amount withdrawn by salary deductions or by some other arrangement with the Pension Board before the member may be eligible to again participate in the pension plan.

The Union also contends that the evidence does not establish that Grievants' use of the City form to obtain receipt of their contributions resulted in a knowing waiver of seniority rights. It was not explained to them that resignation was a prerequisite. Unilaterally imposing resignation as a pre-condition violated the CBA. At no time did either Grievant who received their contributions submit a resignation to the City.

Neither the CBA nor the circumstances of this case favor a forfeiture of seniority rights for the two Grievants.

According to the Union, Internal Revenue Service Code §401 does not have anything to do with this case.

The Union contends that after a complete review of the facts, the CBA and the pension plan rules the laid off Grievants who received their employee contributions were entitled to be recalled to employment before the City employed new Officers. The senior Grievants should have been recalled and offered the opportunity to repay their contributions in accordance with the Pension Rules.

The Union requests that I grant the Grievance.

2. For the City

The City contends that the Grievance should be denied because the CBA

provides that pension and benefits are paid pursuant to the Act, which includes the By-Laws, both of which limit payment of pension and benefits to certain defined circumstances. In this case the only circumstance that applies is “termination benefits.” There is no evidence of a mutual mistake regarding the meaning of the “Termination Benefits” language of the Act. The parties have clearly demonstrated in the CBA an ability to provide guaranteed benefits and other terms of employment for specified positions; and the Union’s failure to expressly guarantee a right to apply for and receive pension or benefits while on lay-off excludes such a right.

The City also contends that the City properly determined that Grievants had resigned or terminated their employment and extinguished any right to recall from lay-off. The Union failed to meet its burden to establish Grievants’ right to an interpretation of relevant language that entitled them to be recalled after they applied for and accepted termination benefits.

The City also contends that I should deny Grievants’ demand for reinstatement, and I should also deny Grievants’ demand for back-pay for the additional reasons that back-pay is not permitted or warranted under these circumstances.

The City requests that I deny the Grievance.

7 DISCUSSION AND DECISION

The instant case involves a contract interpretation in which I am called upon to determine the meaning of some portion of the CBA between the parties. I may refer to sources other than the CBA for enlightenment as to the meaning of various provisions of the contract. My essential role, however, is to interpret the language of the CBA with a view to determining what the parties intended when they bargained for the disputed

provisions of the CBA. Indeed, the validity of the award is dependent upon my drawing the essence of the award from the plain language of the CBA. It is not for me to fashion my own brand of workplace justice nor to add to or delete language from the CBA.

In determining the meaning of the instant CBA, then, I draw the essence of the meaning of the agreement from the terms of the CBA of the parties.

Central to the resolution of any contract application dispute is a determination of the parties' intent as to specific contract provisions. In undertaking this analysis, I will first examine the language used by the parties. If the language is ambiguous, I will assess comments made when the bargain was reached, assuming there is evidence on the subject. In addition, I will examine previous practice by the parties related to the subject. When direct evidence is not available, circumstantial evidence may be determinative.

For the following reasons, I conclude that the City did not violate the recall rights of the Grievants laid off in October 2010 when the City hired in July 2012 two new full-time Officers and did not first recall the laid-off Grievants.

This case concerns the contractual effect of the two Grievants withdrawing their pension contributions while they were on lay-off status. The Union argues that the withdrawal of contributions does not result in a "quit" or surrendering of seniority or lay-off recall rights. The City argues that Grievants' withdrawing their pension contributions constituted a "termination" or "leaving" under the Pension Act and hence a "quit" under the CBA.

Resolving this situation involves interpreting the CBA and the Pension Act. Although it is my job to interpret the CBA and my authority derives from the CBA, the

CBA incorporates the Pension Act. In effect, concerning pension issues, the Pension Act, for the purposes of this case, is part of the CBA.

There is no evidence of negotiating history. The parties have not argued that there is any relevant negotiating history.

The parties agree that there is no binding past practice. There is no evidence of any other situation where an Officer on lay-off status withdrew the Officer's pension contribution and there was a subsequent hiring of new Officer. In short, the situation in this case has never happened before within this bargaining unit.

The following CBA and Pension Act provisions are directly involved in this case.

CBA, Section 14.4(A), discusses loss of seniority when there is a "quit." "Loss of Seniority A bargaining unit employee's seniority shall terminate: (A) If the Employee quits, retires, or is justifiably discharged." Underlining in original.

CBA, Sec 10.5(a), provides for the "Pension System." "Pension System: The City shall provide to each employee covered by this agreement a pension as provided for in the Charter of ___, Michigan as adopted June 12, 1921, and as amended and revised thereafter, and as may be subsequently amended." Underlining in original. According to the City "[t]he ... CBA ... incorporates the City's Charter Act ("Act") by reference and requires the City provide pension and benefits pursuant to the Act." According to the UNION "the [CBA] incorporates by reference the pension plan provided for in the Charter of ___, as amended from time to time through negotiations authorized by the Michigan Public Employment Relations Act, MCL 423.201, *et seq.* Hence for purposes of the issue in this case the Act is part of the CBA. "[T]he terms of the [pension plan] contract have been held binding on both the employer and the union where the contract

was incorporated into the [CBA] by reference” Elkouri & Elkouri, How Arbitration Works (7th ed), p 9-38.

The Pension Act, Sec 2.14, discusses “Termination Benefits” and “leave.”

“**TERMINATION BENEFITS** Section 2.14. SHOULD A ... POLICEMAN **TERMINATE his services for any reason**, he, if living, or his named beneficiary, if he be deceased, shall be entitled to the following benefits: ... b. Any **employee leaving the service** of the Police ... Department prior to 15 years of creditable service will be entitled to receive the return of his contributions, together with 2½% interest. After 15 years of service, he may, in lieu of “a” above, receive the return of his contributions, together with 2½% interest.” Capitalization in original. Bolding added.

The Act is unambiguous that an Officer who is withdrawing the Officer’s pension contributions has to be an Officer who has “TERMINATE[D] his services” and is “leaving the service of the Police ... Department...” Pension Act, Sec 2.14.

After the submission of Grievants’ application documents, the City paid both Grievants in full pursuant to the “termination benefits” Section 2.14 of the Pension Act. Both Grievants had less than 15 years of service and would therefore only qualify for benefits paid pursuant to Section 2.14(b), which provides that “[a]ny employee leaving the service of the Police ... Department prior to 15 years of creditable service will be entitled to receive the return of his contributions, together with 2½% interest.”

The basic issue then revolves around the meaning of the words termination and leaving.

All of the witnesses testified honestly and to the best of their recollections. The good faith testimony of the witnesses does not resolve the definition of the words

“termination” and “leaving” in the Pension Act. There is no negotiating history or past practice concerning the definition.

All words of the CBA and Pension Act have to be given meaning. “Ordinarily, all words used in an agreement should be given effect. The fact that a word is used indicates that the parties intended it to have some meaning” Elkouri & Elkouri, p 9-35. This situation involves an analysis of the meaning of the words “termination” and “leaving.” The words “termination” and “leave” must have been put in the Act for a reason.

In the absence of evidence of mutual understanding of the CBA, dictionary definitions of the words “termination” and “leave.” can be considered. Elkouri & Elkouri, p 9-23.

The common meaning of “termination” is “bring to an end” and “an act of dismissing someone from employment.” *New Oxford American Dictionary*, p 1791 (3rd ed)(2010). Leave means to “go away from ... depart from permanently ... cease working for” *Id*, p 994.

The Union makes several serious arguments concerning the situation. I have seriously considered each of them.

The Union argues that neither Grievant submitted a resignation along with the application nor were they told that voluntary resignation was a prerequisite for receipt of contributions. This argument does not control because (1) the Pension Act is incorporated by the CBA, (2) the Act only provides for contribution refunds where there has been a “TERMINATION,” (3) the Act provides that a contribution refund includes the “employee leaving the service,” (4) termination means “bring to an end,” (5) leaving means “go away from,” (6) the application form gives warning of “... REQUEST FOR

REFUND (WITH A RESIGNATION),” (7) the application language is consistent with the terms of the Act, and (8) there is no past practice or negotiating history to the contrary.

The Union argues that there was no explanation by the City attending to the submission of the form, the wording of the form does not sufficiently place an Officer on notice that the submission would result in resignation, a form unilaterally created by the City cannot control over the seniority provisions of the CBA or the Pension Act. This argument does not control because (1) the Act only provides for refunds where there has been a “TERMINATION,” (2) the Act provides that a contribution refund includes “employee leaving the service,” (3) the application states REQUEST FOR REFUND (WITH A RESIGNATION), and (4) the application is consistent with the terms of the Act. Furthermore, lack of knowledge of the actual contract terms, as a result of the contracting party’s failure to read the contract, does not excuse the party from complying with the terms of the contract. *Iron Workers’ Local No 25 Pension Fund v Allied Fence & Sec Sys, Inc*, 922 F Supp 1250, 1258-59 (ED Mich 1996); and *Lease Acceptance Corp v Adams*, 272 Mich App 209, 221; 724 NW2d 724 (2006).

The Union argues that there is no provision in the CBA or the Pension Plan that either disallows the receipt of pension contributions for laid off officers or conditions receipt of such funds on voluntary resignation. This argument does not control because the Pension Act is incorporated by the CBA and the Act provides that a contribution refund involves “TERMINATION” and “employee leaving the service.”

The Union argues that the pension rules provide that when a member leaves the service "for any reason," including lay off, the member may draw out member

contributions from the retirement system but upon reinstatement shall pay back the full amount withdrawn by salary deductions or by some other satisfactory financial arrangement with the Pension Board before the member may be eligible to again participate in the pension plan. This argument does not control because the Pension Act provides that a contribution refund involves “TERMINATION” and “employee leaving the service.” The payback requirement of contributions should there be a “reinstatement” covers situations such as being re-hired as a new employee after having quit or being reinstated pursuant to arbitration or court case.

The Union argues that there is no reference anywhere in the CBA or Pension Act rules that conditions receipt of employee pension contributions while on lay off on a voluntary resignation, and the City had no right to impose such an obligation unilaterally by an application form or otherwise without negotiations and mutual agreement between the City and the Union which did not occur in this case. This argument does not control because the City did not unilaterally implement the termination or ending of service requirements. The Act provides that a contribution refund involves TERMINATION and “employee leaving the service.”

The Union argues that the evidence does not establish that Grievants' use of the City form to obtain receipt of their contributions resulted in a knowing waiver of seniority rights, no explanation or instruction was provided to Grievants when they received the form, it was not explained to them that resignation was a pre-requisite, unilaterally imposing resignation as a pre-condition was a violation of the CBA, and at no time did either Grievant submit a resignation to the City. This argument does not control because (1) the Pension Act provides that a contribution refund involves

TERMINATION and “employee leaving the service,” and (2) the application form gave notice of “last date of employment with the City,” “Termination Forms,” and “REQUEST FOR REFUND (WITH RESIGNATION)... .” Furthermore, where the facts and circumstances are such as to lead the City reasonably to conclude that intent to quit exists, the matter may be treated as a quit even though the employee never actually expresses an intention to quit. Elkouri and Elkouri, p 15-9; *General Tel Co of Ill*, 86 LA 726 (Carver, 1985).

The Union argues that "the law abhors a forfeiture," arbitrators are reluctant to adopt an interpretation of CBA language that results in a forfeiture if it can otherwise be prevented, and neither the CBA nor the circumstances of this case favor a forfeiture of seniority rights for the two Grievants. As with all of the Union’s arguments, I have seriously considered this argument. This argument does not control. The law abhors a forfeiture. If an agreement is susceptible of two constructions, one of which would work as a forfeiture and one of which would not, an arbitrator will be inclined to adopt the interpretation that will prevent the forfeiture. Elkouri and Elkouri, pp 9-54 to 9-55. The CBA and Pension Act provisions regarding the issue in this case are not ambiguous. The Act provides that a contribution refund involves “TERMINATION” and “employee leaving the service,” and the application form gives notice of “last date of employment with the City,” “Termination Forms,” and “REQUEST FOR REFUND (WITH RESIGNATION)... .” The Act, “TERMINATION ... leaving the service” and hence a CBA Art 14.4(A) “quit” provisions are not susceptible of two constructions.

The Union argues that the Grievances are not inconsistent with the Internal Revenue Code, specifically section 401. This argument does not control because I have

not considered the Code in making my decision and award. I am not ruling on whether a Michigan city can have a Pension Plan that does not require an employee to “terminate” or “leave” employment when the employee applies for and receives a return of contributions to the pension fund. I am ruling that the ____ Pension Act in this case does require termination and leaving from employment when contributions are returned. Elkouri & Elkouri, pp 9-44 to 9- 48.

The Union argues that the application form does not address lay offs, the form is not a source of rights, and is not an agreement between the parties with respect to wages, hours and conditions of employment. This argument does not control because (1) the Pension Act provides that a refund involves TERMINATION and “employee leaving the service,” (2) the application form gave notice of “last date of employment with the City,” “Termination Forms,” and “REQUEST FOR REFUND (WITH RESIGNATION)...,” and (3) the application form is consistent with the CBA and the Act.

The crucial points in this case include (1) the CBA incorporates the Pension Act, Sec 10.5(a); (2) the Act provides that an Officer can withdraw contributions when the Officer has “TERMINATE[D] his services ... [and the] employee leave[s] the service of the Police ... Department” Act, Sec 2.14; (3) the return of contributions is a “TERMINATION BENEFIT,” *id*; (4) ordinary meaning is given to words unless they are clearly used otherwise; (5) the ordinary meaning of termination is “bring to an end;” (6) the ordinary meaning of leave is “go away;” (6) there is no bargaining history or past practice to alter the ordinary meaning of termination and leaving; (7) the application form is consistent with the CBA and the Act; (8) the totality of the circumstances, (9) the wording of the Act, and (10) the wording of the CBA.

I find that Grievants terminated and left their service with the City when they applied for and accepted the termination benefit of receiving a return of their contributions. Act, Sec 2.14. Because of the termination and leaving, Grievants quit their employment with the City and their seniority was appropriately “terminate[d].” CBA, Sec 14.4.

The City did not violate the recall rights of Grievants laid off in October 2010 when the City hired in July 2012 two new full-time Officers and did not first recall the laid-off Grievant Officers.

This decision neither addresses nor decides issues not raised by the parties.

8. AWARD

Having heard or read and carefully reviewed the evidence and argumentative materials in this case and in light of the above discussion, I deny the Grievance.

Dated: April 10, 2013

/s/LEE HORNBERGER
Lee Hornberger
Arbitrator