SUPREME COURT OF NEW HAMPSHIRE

KEENE SCHOOL DISTRICT

v.

KEENE EDUCATION ASSOCIATION, NEA-NH

(Appeal from the Cheshire County Superior Court)

(Rule 7)

Case No. 2021-0061

BRIEF OF DEFENDANT/APPELLEE KEENE EDUCATION ASSOCIATION, NEA-NH

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II. Whether the Superior Court erred in determining the arbitrator made a plausible determination that there was a lack of mutuality between the parties to establish any past practice. *R. 341-344.*

III. Whether the Superior Court erred in affirming as plausible the arbitrator's analysis that the "should have known" language in the CBA grievance procedure applies to the grievants knowledge and not to an analysis of past practice. *Id.*

IV. Whether the Superior Court erred in determining that the arbitrator did not exceed his authority because the remedy awarded was within the scope of the issue posed by the parties and because the arbitrator "did not award anything." *R. 344*.

TEXT OF RELEVANT STATUTES

RSA 542:8 Jurisdiction of Court to Confirm, Modify, or Vacate Award. At any time within one year after the award is made any party to the arbitration may apply to the superior court

[1] R. refers to the Stipulated Record of the Cheshire County Superior Court filed with this Court on June 7, 2021.

for an order confirming the award, correcting or modifying the award for plain mistake, or vacating the award for fraud, corruption, or misconduct by the parties or by the arbitrators, or on the ground that the arbitrators have exceeded their powers.Where an award is vacated and the time within which the agreement required the award to be made has not expired, the court may in its discretion, direct a rehearing by the arbitrators or by new arbitrators appointed by the court.

RSA 542:10 Appeal. – An appeal may be taken from an order confirming, modifying, correcting, or vacating an award, or from a judgment entered upon an award as in the case of appeals from the superiorto the supreme court.

STATEMENT OF THE CASE

The Keene Education Association filed a grievance contesting the Keene School District's interpretation of Article 14 of the parties' collective bargaining agreement (the "CBA"). *R. 33.* The grievance proceeded to arbitration where the arbitrator agreed with the Association's interpretation of the CBA and sustained the grievance. *R. 239-248*.

The parties stipulated to the following questions for the arbitrator:

1. Is the dispute arbitrable due to the timeliness of the grievances?
2. If the dispute is arbitrable, did the School District violate the Agreement, Article 14, by paying the grievants their early retirement benefit beginning on November 1, 2019?
3. If so, what shall be the remedy?

The arbitrator made the following award:

1. The grievances are arbitrable.
2. The School District violated the Agreement, Article 14 by paying the grievants their early retirement benefit beginning on November 1, 2019.
3. The remedy is that the grievants may pursue their statutorily entitled retirement benefits with the New Hampshire Retirement System." *R. 248.*

The Keene School District (the "District") appealed the arbitrator's decision to the Cheshire County Superior Court under NH RSA 542 on May 14, 2020. *R. 1-8*. The Superior Court affirmed the arbitrator's decision as plausible and reasonable on all points. *R. 332-345*. The District's appeal to this Court followed on February 22, 2021.

STATEMENT OF FACTS

In December of 2018, Mr. Randall Burns and Mr. R. Scott Hyde learned that the District was planning to commence payment of the Early Full Retirement Benefit (the "EFRB") in November 2019, 120 days after their retirement, rather than upon their retirement date of July 1, 2019. *R. 75, 79*. The District conveyed this to the teachers via a letter wherein the District stated the delay in payment was "so you and the Board do not incur additional NHRS wage deductions from your stipend." *R. 75, 79*. Mr. Hyde and Mr. Burns were not satisfied with the District's explanation for the delay, and they sought information from the New Hampshire Retirement

System ("NHRS") about the legality of the delay and the impact of the delayed payment on their pensions. *R. 204, 207*.

The teachers learned from NHRS that not only was there nothing requiring the District to delay the payment, but the delay harmed them. *R. 246*. They learned if payments like the EFRB are made within 120 days of retirement, they are potentially included in the employee's Earnable Compensation calculation and can increase their lifetime monthly benefit.[2] *R. 204, 243*. By delaying the payment, the District reduced the teachers' *lifetime* pension benefit by about $110 *a month*. *R. 235.* In March of 2019, Mr. Burns and Mr. Hyde made the District aware that NHRS did not require them to delay the payment and that it was, in fact, not advantageous to the teachers to delay payment. *R. 234.* In response, the District doubled down on its misleading characterization by telling the teachers that NHRS contributions were "penalties" that "[t]he District, and you as the retired member, do not wish to incur." *R. 208*. Additionally, the District Human Resources representative stated the District's practice of delaying 120 days was a NHRS "requirement," which it is not. *Id.*

Frustrated with the District's refusal to adjust the payment date, Mr. Burns and Mr. Hyde informed the Keene Education Association (the "Association") about the delay in payment. *R. 207*. This was the first the Association knew of the practice of delaying the EFRB payments as no

[2] Earnable Compensation is defined in NH RSA 100-A, XVII as: "the full base rate of compensation paid, as determined by the employer, plus any …severance pay, …but excluding other compensation except cash incentives paid by an employer to encourage members to retire…" The Association believes, but the NHRS has yet to determine in a separate proceeding, that the EFRB payments, if made within 120 days, meet this definition.

other teacher had ever brought this to the Association's attention. *R. 247*. In fact, the District had never made the Association aware of the practice despite countless opportunities to do so in written communications to the teachers where the Association could have been copied. *R. 232, 235*. The District also never verbally informed the Association of the practice, nor did it discuss it in bargaining.

Mr. Hyde and Mr. Burns filed grievances with the Association's support because the delayed payment violated the CBA. *R. 90-91, 94-95*. The CBA states in relevant part:

Article XIV: Early Full Retirement

Article 14.1

> Any full-time members of the Keene Teacher's Bargaining Unit who is at least fifty-five (55) years of age and who has had at least twenty (20) years of full-time service… as a teacher in the Keene School District may apply for early retirement under this plan… Said application to retire early shall be made no later than December first (1st) prior to the **intended July first (1st) retirement date** on a form approved by the Board. The application will be approved by the Board on or before its February meeting. The determination of the Board of approval or disapproval shall be final. (Emphasis added).

Article 14.3:

> "Said early full retirement participants **shall receive from said date** an annual stipend in accordance with the following schedule:

YEARS OF SERVICE	EARLY RETIREMENT STIPEND AS A PERCENTAGE OF THE AVERAGE OF THE PRECEDING 5 YEARS ANNUAL SALARY
35	39%
.	.
.	.
.	.
20	31.5%

> (Emphasis added).

The grievances were denied by the Assistant Superintendent at Level B and moved to arbitration (Level D) by the School Board. *R. 92, 96, 98, 100*. As a result of the grievance process, the Association learned two things for the first time: (1) the District used to pay the stipend without a 120-day delay before unilaterally changing their practice in 2011[3]; and (2) despite making payments within the 120-day window prior to 2011, the District never paid NHRS contributions on the EFRB payments even

[3] Prior to 2011 payments commenced in August or September. *R. 252*. This appears to be because it follows the regular payroll dates for active employees. However, Article 14 requires a July 1 payment regardless of the treatment of others on the District payroll.

though legally required pursuant to NH RSA 100-A. The District claims it was a change to RSA 100-A to include severance and/or early retirement benefits as Earnable Compensation in 2011 that prompted it to start delaying payments 120 days so as to avoid the contributions and therefore to conform with their interpretation of Article 14.4 of the CBA. However, that explanation is not consistent with the legislative history. Remitting contributions on severance and/or early retirement incentives has been required since 1995. RSA 100-A:1, XVII legislative history; *R. 219*. The 120-day rule has been in place since 1997. *R. 285-86*.

Notably, the record reflects there is no evidence the District consulted NHRS between 2005 and 2011 as to whether contributions should or should not be remitted based on the EFRB payments. *R. 219-20, 242-43*. Additionally, the District did not consult with or inform NHRS in 2011 when it decided to take advantage of the decades old 120-day rule and move payments outside the window that required NHRS contributions. The record also reflects that the chosen practice of not remitting required contributions was unilateral on the part of the District. *Id.* Not only was NHRS left blind as to this alteration in practice, the District never consulted with the Association.

SUMMARY OF THE ARGUMENT

This Honorable Supreme Court should affirm the Superior Court's decision finding the arbitrator's decision to be plausible and reasonable on all points. The standard of review requires the Courts to give the arbitrator's decision great deference provided his decision is "to any extent plausible." *In re Merrimack Cty. (New Hampshire Pub. Emp. Lab. Rels.*

Bd.), 156 N.H. 35, 40 (2007). Here, the arbitrator's finding that the plain language of the collective bargaining agreement requires the EFRB payments to be made on July 1st, with all required deductions and withholdings included, is a plausible reading of the collective bargaining agreement. Further, the arbitrator's decision that there was no evidence the Association had any knowledge of the harmful practice of delaying the payment prior to Mr. Hyde and Mr. Burns' retirement was also plausible because the District provided absolutely no evidence that it ever informed the Association of the practice. The arbitrator also properly applied the "should have known" language of CBA Article 11.3 to the grievants, Burns and Hyde, and the law of past practice to the Association. Lastly, the Court should ignore the District's plea of unfairness as it is the District's own bad acts that put them in this situation. By violating the CBA, not informing the Association of the practice, and by purposefully misleading retirees as to the impact of moving the payment 120 days, it is the District that has caused grave unfairness to the Association and its members, not the other way around.

THE ARGUMENT

I. THE DISTRICT CANNOT OVERCOME THE "GREAT DEFERENCE" AFFORDED TO THE ARBITRATOR'S REASONED AND PLAUSIBLE DECISIONS

While the District may disagree with the arbitrator's reasoned and plausible findings, there is nothing to suggest the arbitrator committed any manifest errors that would require abandoning the deference the Court must afford his decision. *See Finn v. Ballentine Partners, LLC*, 169 N.H. 128,

132 (2016) (citation omitted). The Court may confirm, correct or modify the award only for "for plain mistake, or vacat[e] the award…on the ground that the arbitrators have exceeded their powers." N.H. Rev. Stat. Ann. RSA 542:8 (2007). The court may also vacate an award for "plain mistake if it 'determine[s] that an arbitrator misapplied the law to the facts.'" *Finn* 169 N.H. at 132 (citation omitted). But, to find plain mistake "[i]t must be shown that the arbitrators manifestly fell into such error concerning the facts or law, and that the error prevented their free and fair exercise of judgment on the subject." *Id.* at 145.

The Court must "examine the face of the record to determine if there is validity to the claim of 'plain mistake,' and defer to the arbitrator's decision if the record reveals evidence supporting it. *John A. Cookson Co. v. New Hampshire Ball Bearings, Inc.*, 147 N.H. 352, 356–57, (2001) (citation omitted). "[A]n arbitrator's view of the scope of the issue is entitled to the same deference normally accorded to the arbitrator's interpretation of the collective bargaining agreement." *In re Merrimack Cty.,* 156 N.H. at 40 (citation omitted).

As set forth in detail below, the Superior Court affirmed the arbitrator's decision as plausible and supported by the evidence on all points. This is because the arbitrator's decision was a rational, well-reasoned reading of the collective bargaining agreement and application of the law. But, even if this Court may not have made the same decision or used the same reasoning, the Court may not, "reject the arbitrator's interpretation of the CBA simply because the court disagrees with it….as long as the arbitrator is **even arguably** construing or applying the contract and acting within the scope of his authority, that a court is convinced he

committed serious error does not suffice to overturn his decision." *In re Merrimack Cty.*, 156 N.H. 40, (citations and quotations omitted) (emphasis added). In fact, "the court's task is thus ordinarily … limited to determining whether the arbitrator's construction of the [CBA] is to any extent plausible." *Id. See also Larocque v. R.W.F., Inc.,* 8 F.3d 95, 96 (1st Cir. 1993) ("[A] court should uphold an award that depends on an arbitrator's interpretation of a collective bargaining agreement if it can find, within the four corners of the agreement, *any plausible basis for that interpretation.*" (emphasis in original; citations omitted)).

This is an extremely stringent standard which the District cannot meet given the well-reasoned decision the arbitrator made, which the Superior Court upheld. The District points to no manifest error that would necessitate vacating the award and instead relies on the perceived "unfairness" of the decision. However, such unfairness is not one of the justifications for vacating the award under RSA 542:8. Moreover, the District's own actions brought about the alleged unfairness. Therefore, this Court should not entertain the District's plea.

II. THE SUPERIOR COURT CORRECTLY AFFIRMED, AS A PLAUSIBLE INTERPRETATION OF THE CBA, THAT THE EFRB CONTAINED "ALL SUMS DUE FOR PAYING THE STIPEND, INCLUDING REQUIRED CONTRIBUTIONS TO NHRS" AND THAT DOING SO WAS WITHIN THE AUTHORITY CONFERRED TO THE ARBITRATOR BY THE PARTIES

The District's entire argument is that the EFRB payments cannot be made on July 1st because that would require the District to make NHRS contributions on the payments. The Superior Court was rightly incredulous

at the District claiming, as it does now, that the arbitrator's decision on that same point exceeded his authority. The Superior Court noted: "The Court is strained to see how the arbitrator could make a full finding without addressing whether the stipend could include the contribution" and "the Court does not understand how [the District] can center its brief around an argument only to later argue that it never agreed to a finding on that argument." *R. 339*.

The Superior Court correctly affirmed the arbitrator's view of the scope of the issue, taking note that the standard of review requires great deference to the arbitrator as to the scope of the issue. "The arbitrator's interpretation of the scope of the issue submitted to him is to be treated with great deference, and must be upheld so long as it is rationally derived from the parties' submission." *Lebanon Hangar Assocs., Ltd. v. City of Lebanon*, 163 N.H. 670, 677, (2012). (citations and quotations omitted)). The parties agreed to frame the issue as follows:

> "2. If the dispute is arbitrable, did the School District violate the Agreement, Article 14, by paying the grievants their early retirement benefit beginning on November 1, 2019?"

As the Superior Court recognized, the arbitrator could not make a finding on that issue without addressing the District's own arguments under Article 14.4 that it prohibited payment of the NHRS contribution at all.

The District seeks to muddy the waters by arguing that the "all sums due" finding somehow trampled on the separate question of whether the EFRB payments are in fact Earnable Compensation under NH RSA 100-

A:1, XVII.[4] The arbitrator made no finding as to whether the EFRB will ultimately be determined to be Earnable Compensation, only that Article 14.4 does not preclude the District from making NHRS contribution payments on the EFRB. This was a determination that was within the issue presented to him because it was germane to interpreting Article 14. The District cannot credibly argue that it did not intend for the arbitrator to interpret Article 14.4 nor that it did not intend for the arbitrator to consider whether the meaning of "benefits" included NHRS contributions, when it specifically asked the arbitrator to do so. The Superior Court correctly noted "[the arbitrator's] conclusion that 'the stipend…includes all sums due for paying the stipend, including required contributions to NHRS' was a direct response to the District's argument." *R. 339-40.*

A. The Superior Court Correctly Affirmed that the CBA did not Preclude NHRS Contributions Being Made on the EFRB

The Superior Court agreed that it was "entirely reasonable" for the arbitrator to conclude that NHRS deductions are not "other benefits" additional to the stipend, but rather required deductions or "sums" that must be included as a result of paying the stipend. This is true of other payments throughout the CBA such as salary, sick leave cash-outs and extra-curricular stipends, which are understood to require payment of any "sums" due in order to effectuate the contractual obligation to pay them. *R. 44, 49-50*. The EFRB is no different in that regard. Determining otherwise would

[4] At present, Mr. Hyde, Mr. Burns and 24 other retirees have filed Petitions for Contribution Adjustment with the NHRS asking this very question as it is the NHRS and not the arbitrator or the Superior Court which has primary jurisdiction to determine what is Earnable Compensation.

require the arbitrator to add meaning to the agreement where the parties did not negotiate it. The parties clearly negotiated a July 1st payment date and the District has conceded as much. *R. 52.* If New Hampshire state law requires that NHRS employer contributions be made on payments made on that date, the District has no choice but to pay such contributions, just as it must make payroll contributions for wage checks. The parties cannot negotiate out from under those legally-required payments. *Farmington Teacher's Ass'n, NEA-NH, In re,* 158 N.H. 453 (2009).

Because the contract is crystal clear as to the July 1st payment date, the District has no choice but to make a convoluted argument with no basis in law or reality. The District poses the argument that because Article 14.4 "conflicts" with the statutory requirement to remit contributions to NHRS, the parties really intended that the District could ignore the specifically-negotiated payment date in order to circumvent its statutory obligations. Such an interpretation violates the plain and unambiguous terms of the agreement, thereby flying in the face of a basic tenet of New Hampshire contract construction: "Absent ambiguity, the parties' intent will be determined from the plain meaning of the language used in the agreement." *Behrens v. S.P. Const. Co.*, 153 N.H. 498, 503 (2006).

Even if the District could succeed in arguing that the CBA's terms are ambiguous, which it cannot, the District has produced no bargaining history or evidence of the parties' intent that supports its interpretation - because there is none.

The District's erroneous interpretation also renders negotiated terms meaningless and superfluous by assuming that the parties first agreed to a payment date in Articles 14.1 and 14.3, but then immediately negated the

prior Articles with Article 14.4. Contracts in New Hampshire are interpreted in the manner in which terms will not be rendered superfluous. *See Hoyle, Tanner & Assocs., Inc. v. 150 Realty, LLC,* 172 N.H. 455, 466 (2019). The District's argument falls on its face. The CBA clearly depicts that the parties agreed to a July 1st payment date.

The District's argument is also flawed because it requires the first sentence of Article 14.4 to be read in isolation without regard to the remaining language in the very same article. The District wants the Court to read the Article to entirely exclude the bolded portion:

> Any employee who participates in this early retirement plan shall not be entitled to any benefits whatsoever except the stipend set forth herein. Nor shall the annual salary computation include the value of such fringe benefits. **Meaning and intending that the early retirement participant shall not be entitled to medical/dental insurance, life insurance or other benefits provided to members of the bargaining unit; nor shall the stipend percentage be applied to the value of such benefits.**

The Superior Court correctly affirmed the arbitrator's interpretation of the Article when read in its entirety. *R. 340*. Article 14.4 relates to the calculation of the stipend and prohibits receiving contractual fringe benefits such as medical insurance, dental insurance, or life insurance after retirement. It does not prohibit the payment of monies due to NHRS to effectuate paying the EFRB stipend itself.

Moreover, when the term "benefits" is used in the first sentence, it clearly is not meant to include NHRS contributions. "When parties follow a list of specific items with a more general or inclusive term, it is assumed

that they intend to include under the latter only items that are like the specific ones… unless it is shown that a broader scope was intended." *Elkouri & Elkouri, How Arbitration Works*, Ch. 9-40.xii, (8th Ed., 2016). *See also Town of Pembroke v. Town of Allenstown*, 171 N.H. 65, 72–73, (2018). NHRS contributions are a statutorily required deduction from any payment which meets the definition of Earnable Compensation; they are not benefits in and of themselves and are not optional like the negotiated CBA fringe benefits in the Article. The arbitrator's interpretation is therefore plausible and frankly, correct.

The District is mistaken that "if NHRS deductions/contributions are made from the stipend, retirees would then receive enhanced pension benefits over and above the stipend, contrary to the clear and express language in Section 14.4." *Appellant Brief at 23*[5]. Again, this overcomplicates and strains the plain meaning of the CBA. The District has no economic interest in the total amount of a teacher's pension and would have no reason to negotiate such a subject. Its only interest is the cost to the District through the employer contribution (at the relevant time 17% of whatever qualifying payments are made). It is illogical that the parties would have bargained a limitation on the total pension earnings of employees through the method of agreeing on a date for payment but then negating that date through a prohibition on benefits immediately after **without mentioning the NHRS specifically**. It is clear the District worked backwards from their breach of the CBA to find an explanation for their actions once the grievance was filed. Its Article 14.4 argument is a tenuous

[5] *Appellant Brief* refers to the School District's brief filed with this Court.

excuse, not a purposeful reading of the CBA. The District's practice of delaying payment was, by their own admission, to avoid paying required contributions by taking advantage of the 120-day window. *R. 86, 88, 246*. It had nothing to do with the CBA.

III. THE SUPERIOR COURT CORRECTLY AFFIRMED THE ARBITRATOR'S DETERMINATION THERE WAS NO MUTUAL UNDERSTANDING OF THE DISTRICT'S PRACTICE OF DELAYING PAYMENT BECAUSE THROUGH THE DISTRICT'S OWN ACTIONS, THE ASSOCIATION REMAINED UNAWARE OF THE PRACTICE

Both the arbitrator and the Superior Court correctly recognized that the District failed to enter into the record *any* evidence that the Association had any knowledge of the District's practice prior to the Burns/Hyde grievances. *R. 343*; *See In re NH Dept. Corrections* 164 N.H. 307, 309 (2012) (noting written records "may be the best possible evidence of what took place in the past.") Given the state of the record, the arbitrator and the Superior Court correctly applied the law of past practice to those facts and made an entirely plausible finding to which this Court should defer.

The Appellant's Brief disregards the element of mutuality and argues that its unilateral institution of the payment deferral practice, over a long period of time, is sufficient to create a binding past practice. In fact, the District believes that the practice became precedential without the Association even being informed that it was occurring. That is not the law. Collective bargaining does not permit the District to institute precedent by unilateral fiat. This Honorable Court has stated clearly that "it is implicit in

establishing a past practice that the party which is being asked to honor it…**be aware of its existence**." *In re NH Dept. Corrections* 164 N.H. 307, 309 (2012) (emphasis added); *See also AFSCME Local 3657 v. Hillsborough Cty Sheriff's Office*, PELRB Dec. 2015-160 at 5 stating: "in order to establish a past practice, the action must be "consistent, repeated, **mutually understood and accepted.**" (emphasis added).

Mutuality is a most critical element of the past practice analysis because, when established, a past practice is treated as a condition of employment with the same effect as a negotiated term of the CBA. "[M]utuality refers to the requirement that a past practice is binding on the parties only when the circumstances ensure that it has been understood and accepted by both as an implied term of the contract." *Elkouri & Elkouri, How Arbitration Works*, Ch. 12-6, (8th Ed., 2016), (internal quotations omitted). Past practice cannot be established by unilateral action of one party because that would unfairly allow one party to add terms to the CBA without negotiating. That is antithetical to the collective bargaining process or mutual give and take to reach agreement. It is the District's analysis on this point which is in error, not the arbitrator's nor the Superior Court's.

The District purposefully did not inform the Association of the practice but now dubiously claims that the practice was so "open" as to create a past practice. The District makes much out of the consistency of administering the benefit to over 100 retirees yet glosses over the fact that it misrepresented the scheme as a mutual benefit to retirees while intentionally failing to copy the Association on the multiple letters the District sent to each of those retirees. It is likely that the District's misrepresentation to retirees effectuated its strategic purpose of

discouraging complaining about the delay or bringing it to the Association's attention. It was not until Mr. Burns and Mr. Hyde got wise to the harm caused by the District's delay that the Association was informed of the practice. Given the lack of evidence in the record of mutuality, and facts supporting the District's concealment of the practice, the arbitrator and the Superior Court correctly applied those facts to the law of past practice.

The District further gets the law wrong when it argues that if there is a course of dealings by the parties outside of the CBA, the arbitrator *must* defer to it and ignore the clear contract language. The Superior Court correctly recognized that examining the practices of the parties is not a required piece of interpreting the collective bargaining agreement but instead optional based on the particular facts and circumstances of the case. *R. 342-43*. The Court cites *Williston on Contracts* for the proposition that this extrinsic evidence may be examined, but it is not required if the contract language is clear. *Id.; See also Exeter Police Association, NEPBA Town of Exeter, PELRB Dec. 2015-021 at 9,* citing *Elkouri & Elkouri, How Arbitration Works,* 434 (Ruben ed., 6th ed. 2003).

A. The Knowledge or Inaction of Individual Teachers to Address the District's Delayed Payments Cannot be Imputed to the Association

As the Association and the District are the parties to the CBA, only they can create a past practice, not individual bargaining unit members. NH RSA 273-A:11. The District attempts to argue that mutuality should have

been found because 100 individual teachers did not raise an issue with their delayed payments. However, this argument fails. While individual teachers are members of the bargaining unit, their ad hoc actions do not waive the Association's rights, particularly if the Association never knew there was a problem. The District cannot be rewarded for engaging in prohibited direct-dealing with Association members and hiding it from the Association.

Additionally, the District asserts that the lack of complaints about the practice means the bargaining unit approved of it. There is absolutely no evidence in the record to support such an argument. The District provided no testimony from any retiree let alone testimony of any retiree's knowing approval or disapproval of it. Such an anecdotal argument is not a recognized exception to the enforcement of a collective bargaining agreement's terms. Regardless, it is the Association that is the exclusive representative for the bargaining unit members, and therefore only those acting on behalf of the Association can waive its rights, not individual teachers acting without that authority.

The District provided no evidence that any of these 100 teachers knew that they were being harmed by the delay or the lack of payment of NHRS contributions. Instead, it is most likely that the employees trusted the District to administer the benefit in keeping with the CBA, the law, and in their best interests. In a letter to the retirees, the District mislead the teachers and counted on the teachers to not raise an issue based on the misrepresentations stating:

> "The first year you are retired, the District will pay your annual stipend amount in equal, bi-weekly payments starting with the first pay period in November [year] through June 30, [year]. **This is so you and the Board do not incur additional NHRS**

> **wage deductions from your stipend.** In succeeding years following your first year of retirement, you will be paid during the normal payroll cycles for all active Keene teachers." *R. 86*. (emphasis added).

Retirees had no reason to doubt the District's representations as it is reasonable to assume your employer is correctly administering your pay and applicable withholdings. Given this, the District has no basis to claim that the teachers must have approved of the practice when they were receiving false information from a District that was pulling the wool over their eyes. Regardless, while there is no evidence that any teacher had knowledge of the way in which the District was systematically reducing their pensions, even if they had the knowledge, if they do not make the Association aware of the problem, the Association cannot grieve it as an "Association grievance."

On appeal to the Superior Court, the District raised an email from Mr. Hyde that states "[the delayed payment] ha[d] been an ongoing question for teachers retiring for many years." The District attempted to argue this was clear evidence of the individual teachers having knowledge about the delay. However, the District never raised this issue at arbitration and did not mention it in its post-arbitration brief. *R. 284*. Since the District never examined the issue at arbitration apart from submitting the document into evidence without explanation, its post-arbitration arguments are not properly preserved. Further, because the District failed to examine the issue in arbitration, Mr. Hyde was never given the opportunity to explain the email's meaning or context. The Superior Court rightfully recognized there was no mistake on the part of the arbitrator not factoring this email

into his decision. *R. 343*. The Court was correct in this finding because for a plain mistake to occur: "it must be shown that the arbitrator manifestly fell into such error concerning the facts or law, and that the error prevented his free and fair exercise of judgment on the subject." *Cookson Co.,* 147 NH 356. Failing to factor in one fleeting and unsubstantiated comment that the District failed to analyze at the arbitration is not such an error. The District had the burden of proof on arbitrability but never asked Mr. Hyde more specifically about the email to understand what his comment meant and whether it was accurate.

Lastly, the District raises the absurd idea that the Association "has the obligation to 'police' its agreement with the District." *R. 267*. It appears the District is suggesting the Association should check in periodically with the District to ask if it has been violating the CBA or end-running legal obligations. The Association does not have an affirmative duty to seek out grievances or make sure the District is not violating the law. It has a responsibility to respond in a timely manner when it is informed of contractual violations, which is exactly what the Association did in 2018.

IV. THE SUPERIOR COURT CORRECTLY AFFIRMED THE ARBITRATOR'S DETERMINATION THAT THE "SHOULD HAVE KNOWN" STANDARD IN THIS CBA IS RESERVED FOR QUESTIONS OF ARBITRABILITY, NOT PAST PRACTICE

The arbitrator set forth, and the Superior Court affirmed, a plausible and reasoned analysis on whether the Association "should have known" about the District's payment delay. As a threshold matter, the "should have

known" language comes from Article 11.3 of the CBA and refers to the requirement that a grievance must be filed within 45 days "of the time the grievant knew or should have known of the facts giving rise to the grievance." (emphasis added).

Mr. Hyde and Mr. Burns, the grievants, did not know about the facts giving rise to the grievance until they met with NHRS in May of 2019. It is only the knowledge of these grievants which is to be analyzed under what they "should have known" 45 days prior to filing the grievance.[6] It was the timeliness of these two grievances which were the subject of the stipulated issue to the arbitrator: "Is the dispute arbitrable due to the timeliness of the grievances?" and what he made his arbitrability finding on. *R. 239.*

His finding that the grievance was arbitrable was plausible because the harm done by delaying the payment was not obvious or readily apparent. In fact, Mr. Hyde and Mr. Burns needed to engage the NHRS Member Benefits Specialists in order to calculate what, if any, harm would result. As the arbitrator reasonably determined, up until the time the District delayed the payment, the District could have cured the impending CBA breach and therefore the grievance did not toll until the breach actually occurred with the delaying of payment. *See Robin Mongeon et al. v. Thomas S. Burack. DES Commissioner and Gary Smith. President, SEA/SEIU Local 1984*, PELRB Decision No. 2009-018 (finding triggering event for purposes of calculating unfair labor practice statute of limitations was the actual deduction of agency fee appearing in complainants'

[6] Under this particular CBA an individual grievant can pursue a grievance through Level C (school board level). Only the Association can refer the grievance to Level D (binding arbitration) but arguably, an individual teacher could go through the initial steps without the Association's support.

paychecks and not effective date of fee contribution or date when complainants learned of agency fee collection). Nevertheless, the District appears to have conceded the point that Mr. Burns and Mr. Hyde's grievances were timely filed in April of 2019, as it does not contest arbitrability to this Court.

Interestingly, while the District now argues that the arbitrator should have used the "should have known" language from the CBA to analyze to the Association's knowledge, it made a different and opposite argument to the arbitrator in the first instance. At arbitration, the District insisted that Article 11.3 applied to Burns and Hyde only and not the Association. *R. 222*. Therefore, the District should not have been surprised when the arbitrator made a reasoned analysis of the article only as it applied to Burns and Hyde at their request. The arbitrator is not required to raise and answer questions *sua sponte. In re Merrimack Cty.*, 156 N.H. 39 (Stating arbitrator's authority is determined by the CBA and the parties' submission of the issue for determination.) The District cannot claim plain error on the part of the arbitrator when it never even brought the argument to his attention.

And yet, the arbitrator did, in fact, analyze what the Association should have known, but he did so as part of his past practice/mutuality analysis which the Superior Court agreed was the correct application of the law. That is because implicit in the analysis of past practice, and more particularly the element of mutuality, is analyzing what one party should have known.

> "Even when there is no direct evidence that one party was aware of the practice, mutuality ***may*** be inferred. While arbitrators ***sometimes***

> refuse to charge a party with knowledge of what is going on..., claims of lack of knowledge ***often*** carry relatively little weight and a party ***may*** be 'assumed' to know what is transpiring, or that the party 'knew or should have reasonably known' of the asserted practice." How Arbitration Works, Ch. 12-8, p. 22 (Elkouri & Elkouri, 7th Ed., 2012) (emphasis added).

Just because the arbitrator did not use the words "the Association should not have known" does not mean he overlooked the law and erred in his analysis. The arbitrator made a reasoned finding on mutuality based on the record in front of him due to the lack of any evidence of the Association's knowledge and did so correctly as applied to the law of past practice, not the grievance procedure language.

Lastly, despite what the District would have the Court believe, there is no bright line rule that a party "should have known" about a practice simply because one party implemented it unilaterally over a sustained period of time. As evidenced in the above passage of *Elkouri & Elkouri*, the often-cited treatise for labor relations arbitrators, whether mutuality is inferred by the arbitrator is an *optional* rule depended on the particular facts in front of the arbitrator. In these particular facts, the arbitrator made a reasoned determination that the Association should not have known given the record presented by the parties and particularly because the District never raised it to their attention.

V. THE SUPERIOR COURT CORRECTLY RECOGNIZED THAT THE ARBITRATOR DID NOT ORDER NHRS TO DO ANYTHING

The District's argument that the arbitrator ordered NHRS to take action is as weak as it is absurd. Such an argument ignores the plain text of the arbitrator's decision. As the Superior Court recognized: "the only remedy awarded was giving the teachers a green light to pursue their statutorily entitled retirement benefits." The arbitrator wrote:

> "It is **impossible to order** the NHRS to retroactively collect from Burns and Hyde their share of the required contribution for the four months in question; to do the same for the School District's share and then correct the calculation of their retirement benefit and make retroactive payment of the sums which the NHRS should have made to them to date and to continue the increased pension amount as required by law, but that is what NHRS **should do**, namely, make the grievants whole." (Emphasis added).

The decision quite obviously does not "direct" the grievants or NHRS to do anything. *R. 267*.

An arbitrator's authority is governed by the CBA and the parties' agreed upon submission of the issue. *In re Merrimack Cty.*, 156 N.H. 39. The parties stipulated to a broad question on remedy: "3. If so, what shall be the remedy?" which actually empowered the arbitrator to go further than he did. "Ample authority supports the general proposition that "arbitrators are free to fashion forms of relief to suit the facts and equities of the case regardless of whether the remedy could [be] ordered by a court in law or equity." *Lebanon Hangar*, 163 N.H. 677 (citation omitted). But, even though equity may have demanded it, the arbitrator showed restraint in not

ordering an equitable remedy beyond his authority. As the Superior Court affirmed, the arbitrator "did not 'award' anything."

CONCLUSION

The District has admitted its motivation for delaying the EFRB payment. It seeks to avoid paying NHRS contributions, even when legally required to do so. It follows that the District does not want to risk being ordered by NHRS to pay contributions that it should have paid since 2005. However, what the District owes to NHRS, or whether the EFRB will be deemed to be Earnable Compensation, is not the question for this Court. This Honorable Court is tasked with determining if the arbitrator's decision was to any extent plausible. The arbitrator's reasoning withstands the appropriate level of scrutiny because his decision was plausible, drew its essence from the CBA, stayed within his scope of authority, and appropriately applied facts to law as described above. Therefore, the Association asks this Honorable Court to deny the District's appeal and affirm the Superior Court's decision.

Respectfully submitted,
Keene Education Association,
NEA-NH

By its attorney,

Dated: July 28, 2021

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that I have complied with Supreme Court Rule 16(10) and 26(2) by forwarding a copy of the foregoing BRIEF OF DEFENDANT/APPELLEE – KEENE EDUCATION ASSOCIATION through the e-filing system of this Court on this 28th day of July 2021, to Attorney Peter Phillips, Esq., attorney for Appellant (phillips@soulefirm.com).

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REQUEST FOR ORAL ARGUMENT

The Appellee, Keene Education Association, requests 15 minutes of oral argument before the full Court, argument to be presented by Attorney Esther Kane Dickinson.

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STATEMENT OF COMPLIANCE

Counsel hereby certifies that pursuant to New Hampshire Supreme Court Rule 26(7) that this brief complies with New Hampshire Supreme Court Rules 26(2)–(4) and 16(11). Counsel also certifies that the portion of the brief from "Counter Statement of Questions Presented" to "Request for Oral Argument" does not exceed 9,500 words.

Dated: July 28, 2021

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