STATE OF NEW HAMPSHIRE
SUPREME COURT

NO. 2021-0061

KEENE SCHOOL DISTRICT

V.

KEENE EDUCATION ASSOCIATION, NEA-NH

APPEAL OF A DECISION BY THE
CHESHIRE COUNTY SUPERIOR COURT
(RULE 7)

BRIEF OF THE APPELLANT

KEENE SCHOOL DISTRICT

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B. Whether the Superior Court erred as a matter of law in finding that the arbitrator did not commit plain mistake under RSA 542:8 in failing to correctly consider the course of dealings and past practice between the parties with respect to the District's administration of the early full retirement benefit for members of the Keene Education Association ("the Association") bargaining unit over many years. *See* SR at 6, 261-264.

C. Whether the Superior Court erred as a matter of law in finding that the arbitrator did not exceed his powers or commit plain mistake under RSA 542:8 in finding that that the Association did not know about or agree to the District's practice in administering the early full retirement benefit over many years, despite the fact that the parties' CBA also includes a "should have known" standard and the arbitrator amended the parties

[1] Citations to the records in this matter are as follows: "SR" refers to the parties' stipulated record of the Cheshire County Superior Court case filed with the Supreme Court on June 7, 2021; "Add." refers to the addendum filed with this brief.

agreement by failing to consider it with respect to the Association. *See* SR at 6, 264-267.

D. Whether the Superior Court erred as a matter of law in finding that the arbitrator did not exceed his powers under RSA 542:8 by directing, among other things, that the NHRS should make the grievants, Randall Burns and R. Scott Hyde, financially whole as a result of the District's delay in paying them the early full retirement benefit. *See* SR at 7, 267-268.

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 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 superior to the supreme court.

STATEMENT OF THE CASE

The case arises from grievances filed under the terms of the grievance procedure contained in a collective bargaining agreement ("CBA") between the Keene Board of Education and the Keene Education Association ("the Association"). SR at 33. The grievances in question, filed by teachers Randall Burns ("Burns") and R. Scott Hyde ("Hyde'), alleged that the District's plan to delay certain payments relating to a so-called "Early Full Retirement" benefit under Article XIV of the CBA until the first pay period in November 2019 violated Sections 14.1, 14.3 and 14.9 of that article. SR at 90-91, 94-95. The grievances proceeded to arbitration and on April 14, 2020, the arbitrator issued an award upholding the grievances. SR at 239-248, Add. at 38-47.

The CBA, and specifically Article XI, Section 11.3, provides, in relevant part, that "either party may appeal the arbitrator's decision...in accordance with the provisions of RSA 542." SR at 13. On May 14, 2020, the Appellant, Keene School District ("the District"), petitioned the Cheshire County Superior Court under RSA 542:8 to vacate, modify or correct the arbitrator's award pursuant to RSA 542. SR at 1-8. On January 22, 2021, the Cheshire County Superior Court (Hon. David W. Ruoff) denied the District's petition (SR at 332-350, Add. at 48-61), thus giving rise to the instant appeal, filed per RSA 542:10.

STATEMENT OF FACTS

The Keene Board of Education and the Association were parties to a CBA for the period of July 1, 2014 to June 30, 2018. SR at 33. The bargaining unit represented by the Association consists of teachers, guidance counselors, librarians, and school nurses, among other positions. SR at 36. Because a successor agreement was not reached for the July 1,

2018 - June 30, 2019 school year, the terms and conditions of the parties CBA remained in effect for that time period.[2]

Article XI of the CBA contains the parties' contractual grievance procedure. SR at 47. Section 11.3, Formal Procedure, provides, in part, as follows:

> The grievance shall state the specific violation or condition with proper reference to this Agreement. It shall also set forth names, dates, and any other related facts which will provide a sound basis for a complete understanding of any such grievance. A grievance must be filed within forty-five (45) consecutive days of the time the grievant knew or should have known of the facts giving rise to the grievance.

SR at 47. In accordance with Section 11.6, "grievances of a general nature may be submitted by the Association to Level B." SR at 48.

Section 11.3, Level D, provides, among other things, that "if the grievance remains unsettled, then the matter may be referred by the Association to binding arbitration..." SR at 48. Section 11.3, Level D further states that "[e]ither party may appeal the arbitrator's decision to Supreme Court in accordance with the provisions of RSA 542." SR at 48. Level D also reads as follows:

> In arbitrating a grievance, the arbitrator shall have no power or authority to do other than interpret and apply the provisions of this agreement. The arbitrator shall have no power to add or subtract from, alter, or modify any of the said provisions. The arbitrator shall, thereafter, submit a decision to both parties. Either party may appeal the arbitrator's decision to Supreme Court in accordance with the provisions of RSA 542.

SR at 48.

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[2] This fact is undisputed per the Association's answer to the facts alleged in the District's RSA 542 petition. See SR at 10.

Article XIV of the CBA establishes an "Early Full Retirement" benefit for members of the Association's bargaining unit. SR at 52. More specifically, Section 14.1 reads, in relevant part, that:

> Any full-time member 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.

SR at 52. Section 14.3 of Article XIV provides, in relevant part, that "[s]aid 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%

SR at 52. Section 14.4 of Article XIV further provides that

> [a]ny 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 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..."

SR at 52, 53.

From 2005 through 2011, fifty-seven (57) teachers took advantage of the early full retirement benefit and the District commenced payment of the stipend described therein at the end of August or the beginning of September in those years. [3] SR at 101-103, 242, Add. at 41. The District did not treat these post-retirement payments as being subject to New Hampshire Retirement System ("NHRS") deductions,[4] and no retiree complained about the timing of the payments. SR at 242, 245, Add. at 41, 44.

Commencing in 2012, the District moved the first stipend payment to the first pay period in November. SR at 243, Add. at 42. "In 2011, the New Hampshire Legislature enacted a revised retirement statute for public employees which redefined 'earnable compensation' so that effective on January 1, 2012: 'members [entitled to benefits from the NHRS] who have not attained vested status prior to January 1, 2012 could no longer include 'incentives' to encourage members to retire early.'" SR at 243, Add. at 42. "For members vested prior to January 1, 2012, the new statute provided that such incentives were to be included as earnable compensation, something the School District had not done since 2005 and for which the School District had never budgeted." SR at 243, Add. at 42. "However, for all members, no matter when vested, payments made 120 days after termination from employment would not be included as earnable compensation." SR at 243, Add. at 42.

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[3] Section 9.9 of the CBA provides in relevant part that "Teachers will be paid on the basis of twenty-six pay periods. All employees shall receive a lump sum payment….at the end of the school year, but in no event later than June thirtieth (30th)…" SR at 44.

[4] Under RSA 100-A:1, XVII, certain payments made to eligible public employees constitute "earnable compensation" for purposes of calculating pension benefits and are therefore subject to NHRS withholdings/contributions.

"The School District, based on its prior practice and having never budgeted for including the early retirement incentive as "earnable compensation," fixed this problem by delaying the retiree's initial incentive check an additional sixty days from approximately September 1 to November 1." SR at 243, Add. at 42. Payments made 120 days after retirement generally do not count towards "earnable compensation," whether or not the retiree was vested prior to January 1, 2012. SR at 243; see also RSA 100-A:1, XVII (a). Thereafter, per District Exhibit 9, the arbitrator found that "between 2012 and 2018, forty-three teachers retired and received their first incentive check in the first payroll period of November and none questioned the School District's practice." SR at 103-104, 243, Add. at 42.

In letters dated December 12, 2018, the District approved early full retirement applications for teachers Burns and Hyde, with effective dates as of July 1, 2019. SR at 79, 86, 241. Both letters included the following paragraph:

> 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 2019 through June 30, 2020. This is so you and the Board do not incur additional NHRS wage deductions from your stipend...

SR at 79, 86, 241, Add. at 40. Letters previously issued to retiring teachers in 2011, 2012, 2013, 2014, 2015, 2016 and 2017, whose application for early full retirement had also been approved, contained the same paragraph, but for different years being referenced. SR at 145-152.

On March 12, 2019, Hyde wrote to the School District's Director of Human Resources, Nancy Deutsch, and Human Resources Generalist, Samantha Fletcher, questioning why his first early retirement payment was being delayed for 120 days. SR at 207, 241, Add. at 40. He indicated in the letter that he had contacted the NHRS and "they do not support the past

practice of holding back a teachers benefit for 120 days to avoid NHRS wage deductions"[5] (SR at 207) and that he could not find support for such delay in the CBA. SR at 207, 241, Add. at 40. Fletcher wrote back to Hyde that the District had also been in contact with NHRS and quoted the New Hampshire Retirement statute, RSA 100-A:1 that "earnable compensation shall not include compensation in any form paid later than 120 days after the member's termination of employment from a retirement eligible position..." SR at 208, 241, 242, Add. at 40, 41. Fletcher reiterated what had been communicated in the School District's December 12, 2018 letter that "...[t]he District, and you as the retired member, do not want to incur any earnable compensation penalties."[6] SR at 208, 242, Add. at 41.

On April 17, 2019, Hyde wrote an e-mail to Association President Bill Gillard and Association Representative Rachel Hawkinson asking about the District's holding his early retirement stipend for 120 days and not contributing to the NHRS. SR at 207. He further wrote "[t]his has been an ongoing question for teachers retiring for many years and needs to be clarified and resolved in a timely fashion." SR at 207. On April 29, 2019, Burns and Hyde filed identical grievances with the District alleging that the District's plan to withhold the payments of the early retirement benefits until the first pay period in November 2019 violated Article XIV, Sections 14.1, 14.3, and 14.9 of the CBA. SR at 90, 94. The District denied the grievances at Level B of the grievance procedure on May 21, 2019, as untimely, pursuant to Article XI, Section 11.3. SR at 92, 96. The

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[5] The arbitrator's description of this evidence is that Hyde contacted someone at the NHRS "who told him that NHRS regulations do not require an employer withhold early retirement benefits for 120 days…" SR at 241.

[6] This portion of the December 12, 2018 letter to Hyde reads, verbatim, as follows: "This is so you and the Board do not incur additional NHRS wage deductions from your stipend." SR at 79.

matters were thereafter referred to arbitration under Level D of Section 11.3. SR at 98, 100.

The arbitration hearing was conducted on February 14, 2020. SR at 239. The parties stipulated to the following issues to be decided by 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?

SR at 239, Add. at 38. Both parties submitted post-hearing briefs for consideration by the arbitrator. SR at 213-238.

In summary, the District argued that the grievances were untimely, in that they were not filed within forty-five (45) consecutive days of the time the grievants knew or should have known the facts giving rise to the grievance, contrary to the deadline set forth in the CBA's grievance procedure. SR at 213, 222-224. Even if deemed to be filed in a timely manner, the District asserted that the grievances lacked merit because paying the early retirement stipend in July would result in an additional benefit in direct violation of Section 14.4 because the stipend would then be treated as "earnable compensation" requiring the District to contribute 17% of the stipend to the New Hampshire Retirement System on behalf of Burns and Hyde. SR at 214-220. Moreover, the District asserted that the grievances should be denied based upon its long and consistent past practice since 2012 of paying early full retirement stipends starting with the first pay period in November following a teacher's retirement and never treating early retirement stipends as earnable compensation. SR at 224-229. Accordingly, the District argued that the grievances are without merit

and that the District's decisions denying the grievances should be upheld. SR at 229. Conversely, the Association argued that the grievances were timely and arbitrable because they were filed within 45 days of when Burns and Hyde first became aware, in April 2019, of the alleged contract violation. SR at 237. The Association further argued, among other things, that the District violated Article 14 of the CBA by not paying the early full retirement stipend as of July 1. SR at 231-238.

On April 14, 2020, the arbitrator issued an award finding the grievances to be timely (and therefore arbitrable) and that the District violated Article 14 by paying Burns and Hyde their early retirement benefit beginning on November 1, 2019. SR at 239-248, Add. at 38-47. Among other things, the arbitrator determined that "Section 14.3 makes it crystal clear that a teacher taking advantage of the early retirement 'shall receive from said date an annual stipend…' The 'said date' unequivocally refers to July 1st. Thereby making the stipend date July 1st." SR at 245, Add. at 44. However, he further determined that:

> Between 2005 (as far as the School District's records exist) and 2011, 57 teachers took part in the early retirement incentive program and the School District compensated by a payment at the end of August or the beginning of September. No retiree complained of this 60 day delay and the School District neither deducted from incentive checks nor contributed to NHRS. Between 2012 and 2018, another 43 teachers took advantage of this problem and the School District moved its first payment date to early November. Again, no teacher complained of this delay and no deductions or contributions were made to NHRS.

SR at 245, Add. at 44. The arbitrator further opined that "the School District….decided to take advantage of the exclusion from earnable compensation for all retirees, no matter when vested, and to do this the School District took advantage of another provision within the statute which excluded any compensation paid to a member more than 120 days after the date of retirement." SR at 246, Add. at 45. The arbitrator held

that "the School District was avoiding its contribution and diminishing the retiree's retirement benefit. The statute did not require this delay and Article XIV of the [CBA] did not permit it." SR at 246, Add. at 45.

The arbitrator rejected the District's argument that Section 14.4 specifically excludes the School District's obligation to make the 17% contribution for the four months of payment from July 1st to November 1st. SR at 246, Add. at 45. He wrote that "Section 14.4 provides that the retiree 'shall not be entitled to any benefits whatsoever *except the stipend set forth herein*.' (Emphasis added). The stipend however includes all sums due for paying the stipend, including required contributions to NHRS." SR at 246-247, Add. at 45-46.

The arbitrator considered the District's alternative argument "that there has been an established practice of making these payments 60 or 120 days after the July 1st retirement date for many years and it has consistently budgeted assuming this practice." SR at 247, Add. at 46.

> The interpretation of a past practice under a labor agreement does not bend to one party's interpretation of the agreement. A key element of a past practice is "mutuality;" that is the Association must have accepted the School District's interpretation or modification of the agreement. There is no evidence that the Association knew about the 120 day delay in the School District's making these payments, much less that it agreed with such a practice. The Agreement must be interpreted as written and therefore the grievance must be sustained.

SR at 247, Add. at 46.

As remedies, the arbitrator ordered, "that the grievants may pursue their statutorily entitled retirement benefits with the [NHRS]." SR at 248, Add. at 47. He also included the following:

> 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.

SR at 247-248, Add. at 46-47.

The District appealed the arbitrator's decision under Section 11.3 of the CBA (SR at 48) by filing a petition to vacate, correct or modify the award pursuant to RSA 542:8 in Cheshire County Superior Court on May 14, 2020. SR at 1. The District and Association filed respective Memorandums of Law (SR at 249-289) and the Superior Court conducted a hearing on November 6, 2020. SR at 292.

In a decision dated January 22, 2021, the Superior Court denied the District's petition. SR at 332, Add. at 48. Among other things, the Superior Court determined that the arbitrator did not exceed his authority in deciding that the early full retirement stipend should include NHRS contributions. SR at 338, Add. at 54. Further, the Superior Court held that the arbitrator did not commit plain mistake in his interpretation of the CBA and specifically Article XIV. SR at 339-341, Add. at 55-57. As to the District's claim of a binding past practice regarding its payment of the early full retirement benefit, the Superior Court found that the arbitrator reasonably found a lack of mutuality between the parties. SR at 341-343, Add. at 57-59. The Superior Court further rejected the District's claims that the arbitrator acted beyond his authority and committed plain mistake by failing to apply the "or should have known" standard with respect to the Association's knowledge of the practice. SR at 341, Add. at 57. Finally, the Superior Court ruled that the arbitrator did not exceed his authority by ordering that the grievants can pursue their statutorily entitled benefits. SR at 344, Add. at 60. The Superior Court noted that the arbitrator mentioned that it was impossible for him to make NHRS retroactively collect contributions from the parties, and so in the end the arbitrator "did not award anything." SR at 344, Add. at 60.

This appeal follows.

SUMMARY OF THE ARGUMENT

While recognizing the strong deference that courts afford arbitration decisions under RSA 542, the District pursues the instant petition and appeal because the outcome ordered by the arbitrator in this instance is fundamentally unfair. It contradicts the manner in which the District has administered the contractual early full retirement benefit for many years without objection by the Association. Just based upon available records, since 2005 one-hundred teachers applied for and were granted this collectively bargained benefit, and none filed any concern or complaint as to the timing and manner of the District's payments. Despite this history, the arbitrator nonetheless found that "the Agreement must be interpreted as written" and sustained the subject grievances filed by teachers Burns and Hyde.

The Superior Court should have vacated the award for "plain mistake," as set forth in RSA 542:8, because of the arbitrator's implausible interpretation of Section 14.4, failure to weigh the evidence of the longstanding practice in place for administration of the early full retirement benefit, and failure to correctly apply the "or should have known" standard to the Association's awareness of this practice that had been in place for many years. The "Association" is the bargaining unit of teachers employed by the District, not elected or paid representatives. One-hundred of them did not contest the manner in which the District issued the early full retirement stipend.

As further grounds to vacate the award under RSA 542:8, the Superior Court should have also determined that the arbitrator exceeded his authority in finding that the early full retirement benefit is subject to NHRS contributions, ordering that the NHRS should make Burns and Hyde whole, and rewriting the parties grievance procedure by effectively eliminating the "or should have

known" standard as applied to the Association. For all of the foregoing reasons, this Court should reverse the decision of the Superior Court and order that the award of the arbitrator be vacated in accordance with the provisions of RSA 542:8.

ARGUMENT

I. STANDARD OF REVIEW.

RSA 542:8 vests the Superior Court with jurisdiction to correct, modify or vacate an arbitrator's award for plain mistake or on the ground of exceeding his/her powers. N.H. Rev. Stat. Ann. 542:8 (2007).

This Court construes RSA 542:8 as granting the Superior Court with the authority to vacate an award for plain mistake if it "determine[s] that an arbitrator misapplied the law to the facts," or upon a "plain mistake" of law or fact." *Finn v. Ballentine Partners, LLC & a.*, 169 N.H. 128, 136, 145 (2016) (citation omitted). When undertaking a "plain mistake" analysis, [the Court] afford[s] great deference to the arbitrator's decision. *John A. Cookson Company v. New Hampshire Ball Bearings*, 147 N.H. 352, 356 (2001) (citation omitted). The Court "examine[s] the face of the record to determine if there is validity to the claim of 'plain mistake,' and defer[s] to the arbitrator's decision if the record reveals evidence supporting it." *Id*. at 356, 357.

A "plain mistake of law occurs when [the arbitrator] clearly misapplies the law to the facts." *Finn* at 146. (citation omitted). Plain mistake has been found "in circumstances where the correct legal analysis was presented to the arbitrator(s) but was rejected." *Id.* at 145. In asserting that a "plain mistake has occurred, '[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 (citation omitted).

"A judicial challenge to arbitrable authority requires the reviewing court to consider both the CBA and the arbitrable submission." *University System of New Hampshire Board of Trustees & a. v. Marco Dorfsman & a.*, 168 N.H. 450, 457 (2015) (citation omitted). "A court may not reject the arbitrator's interpretation of the CBA simply because it disagrees with it." *Id*. at 457. (citation omitted). "Provided that an arbitrator's decision 'draws its essence' from the CBA and the arbitrator is not fashioning 'his own brand of industrial justice,' the award will stand." *Id*. at 457. (citation omitted).

"A court's task thus is 'ordinarily limited to determining whether the arbitrator's construction of the CBA is to any extent plausible.'" *Id*. at 457. (citation omitted). "'[W]hen the arbitrator's words manifest an infidelity to th[e] obligation' to draw the essence of his award from the collective bargaining agreement, 'courts have no choice but to refuse enforcement of the award.'" *Id*. at 457. (citation omitted).

II. THE SUPERIOR COURT ERRED AS A MATTER OF LAW IN FINDING THAT THE ARBITRATOR DID NOT EXCEED HIS AUTHORITY OR COMMIT PLAIN MISTAKE UNDER RSA 542:8 BY FINDING THAT THE EARLY FULL RETIREMENT BENEFIT ESTABLISHED UNDER ARTICLE XIV OF THE PARTIES' COLLECTIVE BARGAINING AGREEMENT SHOULD INCLUDE CONTRIBUTIONS TO THE NEW HAMPSHIRE RETIREMENT SYSTEM.

The Superior Court incorrectly held that the arbitrator did not exceed his authority in deciding that the early full retirement stipend should include NHRS contributions and that such conclusion was a reasonable interpretation of the CBA. On the contrary, this is an issue that the arbitrator was never asked to decide, and the record can only support the conclusion that the stipend paid under Article XIV is <u>not</u> subject to NHRS contributions. Indeed, the arbitrator was never asked by the parties to

determine "how" the early full retirement benefits were supposed to be paid under Article XIV, only whether the District was violating the CBA by paying the Burns and Hyde their early retirement stipend beginning on November 1, 2019. Moreover, the plain wording of Section 14.4 expressly excludes such enhancement of the early full retirement benefit, and it was plain mistake for the arbitrator to hold otherwise.

As the record reflects, the parties stipulated to the following issue, among others, for the arbitrator's consideration: "Did the School District violate the Agreement, Article 14, by paying the grievants their early retirement benefit beginning on November 1, 2019?" SR at 239, Add. at 38. While the arbitrator did find that the District's payment of the benefit should begin as of July 1st (See SR at 245, Add. at 44), he went a step further. He ruled that "the stipend…includes all sums due for paying the stipend, including required contributions to NHRS." SR at 246-247, Add. at 45-46. This determination was not reasonably contemplated within the scope of the issue that was presented by the parties and he exceeded his authority, as conferred by the parties, in making it. It is therefore unenforceable and must be vacated.

"The overriding concern is 'whether the contracting parties have agreed to arbitrate a particular dispute,'" *Appeal of Police Commission of the City of Rochester*, 149 N.H. 528, 534 (2003), quoting *Appeal of Westmoreland School Bd.*, 132 N.H. 103, 109 (1989). While the District agreed to arbitrate the timing of the first early full retirement payment, as it relates to Article XIV of the CBA, there was no agreement to submit to the arbitrator the question of whether such payment is subject to NHRS contributions. This question was never within his power and authority to decide, because the parties never agreed to submit it to him.

The Superior Court found that the arbitrator's ruling in this regard was in direct response to the District's argument in its brief that in

accordance with Section 14.4 of the CBA, NHRS contributions must be excluded from the stipend, so "it came as no surprise when the arbitrator addressed that argument in his finding." SR at 339, Add. at 55. There is a difference though between an arbitrator addressing an argument, even rejecting it, and going beyond the scope of one's authority in reaching the decision. The arbitrator has no standing to determine whether certain funds are subject to withholding as "earnable compensation" under the NHRS statute and regulations, and the parties surely never conferred it upon him. This is solely within the jurisdiction of the NHRS. See *Petition of Farmington Teachers Association, NEA-New Hampshire*, 158 N.H. 453 (2009).

In its arbitration brief, the District was merely explaining how its administration of the early full retirement benefit is compliant with the language of Article XIV, and specifically Section 14.4. This, in and of itself, does not render upon the arbitrator the authority to rule on <u>how</u> the District should make the early full retirement payment. In fact, it was agreed at the arbitration hearing that the arbitrator did not have authority to order the District to pay NHRS contributions on the retirement stipend. SR at 228. The arbitrator's ruling remains outside the scope of the issues he was specifically asked to address at the arbitration hearing. As a result, the arbitrator went beyond his authority as conferred by the parties and his decision must be vacated. See *University System of New Hampshire Board of Trustees* at 457.

Even assuming, *arguendo*, that the arbitrator had jurisdiction to decide whether the retirement stipend is subject to NHRS contributions, the Superior Court erred in concluding that the arbitrator did not commit plain mistake in his interpretation of the CBA. Section 14.4 of the CBA specifically requires that the retiree "shall not be entitled to any benefits whatsoever *except the stipend set forth herein*." (Emphasis added). SR at

52. 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, and the manner in which the District has always administered the benefit.

Section 14.4 further provides that: "Nor shall the annual salary computation include the value of 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..." SR at 52, 53. The arbitrator goes on to find that these sentences are only applicable in calculating the amount of the stipend for each retiree under Section 14.3 and do not "obviate the School District's compliance with making retirement incentive payments on July 1st including all of the NHRS contributions" (SR at 247), but both he, and now the Superior Court, have missed the District's point.

First of all, on what basis can the arbitrator find that NHRS contributions must be included with the early retirement stipend, if it has never previously occurred, even before 2012? Based upon the record and issues before him, there is none. This is an error of both fact and law that constitutes plain mistake. Second, gaining credit towards the calculation of one's state pension is a "benefit" of employment, separate from regular wages/salary. "Fringe benefits" are defined as "a benefit (other than direct salary or compensation) received by an employee from an employer." BLACK'S LAW DICTIONARY, 167 (8th ed. 2004). Per the language of Section 14.4, the parties to the CBA agreed that the stipend paid to retirees would not include any benefits currently enjoyed by active employees. Since retirement contributions clearly constitute a "benefit" of current employment, in accordance with the first sentence of Section 14.4 the

District was not required to make NHRS contributions from the stipend, and it never did.

Rather than find that the District's practice was consistent with the language of Sections 14.1, 14.3 and 14.4, the arbitrator fashioned his own desired result by only applying part of the evidence. This, and the arbitrator's apparent conclusion that enhanced retirement/pension benefits do not constitute a "benefit" under Section 14.4, are simply not plausible and constitute unenforceable "plain mistakes." It is also why the Superior Court's decision in finding that "the arbitrator's interpretation was entirely reasonable" (SR at 340, Add. at 56) is incorrect and should be reversed.

III. THE SUPERIOR COURT ERRED AS A MATTER OF LAW IN FINDING THAT THE ARBITRATOR DID NOT COMMIT PLAIN MISTAKE UNDER RSA 542:8 IN FAILING TO CORRECTLY CONSIDER THE COURSE OF DEALINGS AND PAST PRACTICE BETWEEN THE PARTIES WITH RESPECT TO THE DISTRICT'S ADMINISTRATION OF THE EARLY FULL RETIREMENT BENEFIT.

The Superior Court incorrectly held that the evidence reasonably supported the arbitrator's finding on past practice. On the contrary, the arbitrator committed plain mistake of law in his analysis of Article XIV by failing to correctly consider and weigh the uncontested evidence that from at least 2005 until 2018 the early full retirement stipend was never treated as an enhancement to a retiree's retirement benefits, but instead served as a negotiated post-retirement payment not subject to NHRS deductions and contributions. While the arbitrator claims that "the agreement must be interpreted as written" (SR at 247, Add. at 46), it cannot be read in a vacuum. CBAs are living, working documents intended to govern the parties' relationship over a very long time, and that history should be afforded proper weight and consideration. If no teacher or the Association

saw fit to question the District's payment of the benefit for thirteen plus years, then the practice must stand as mutually acceptable by the parties.

The overwhelming evidence of the District's practice in its administering the early full retirement benefit, undisputed by the Association and found as fact by the arbitrator, was nonetheless given no significance by the arbitrator in reaching his decision. The arbitrator found that the annual stipend payment date "unequivocally refers to July 1st." SR at 245, Add. at 44. However, he also determined that:

> Between 2005 (as far as the School District's records exist) and 2011, 57 teachers took part in the early retirement incentive program and the School District compensated by a payment at the end of August or the beginning of September. No retiree complained of this 60 day delay and the School District neither deducted from incentive checks nor contributed to NHRS. Between 2012 and 2018, another 43 teachers took advantage of this problem and the School District moved its first payment date to early November. Again, no teacher complained of this delay and no deductions or contributions were made to NHRS.

(SR at 245, Add. at 44). Thus, while on the one hand the arbitrator ruled that clear language in Sections 14.1 and 14.3 require the District to pay the early full retirement stipend as of July 1st (SR at 245, Add. at 44), on the other hand, in the same paragraph, he found that 100 teachers retired from the District between 2005 and 2018 and were paid Section 14.3 benefits by the District, commencing either 60 or 120 days after retiring without complaint. (SR at 245, Add. at 44). Where a court's task under RSA 542 is "ordinarily limited to determining whether the arbitrator's construction of the CBA is to any extent plausible," See *University System of New Hampshire Board of Trustees* at 457 (citation omitted), here it is simply not plausible that the District violated Article XIV in light of this history.

This Court has held that "[a]n employer's practices,…which are regular and long-standing, rather than random and intermittent, become terms and conditions of [union] employees' employment...the practice need

not be universal to constitute a term or condition of employment, as long as it is regular and long-standing. *Appeal of N.H. Dept. of Corrections,* 164 N.H. 307, 309 (2012). As part of this analysis, courts examine whether "the practice continued openly," was "never modified by multiple collective bargaining agreements," whether the practice was "district-wide" or concerned a single employee's experience." *Appeal of the Tamworth Support Personnel Association,* N.H. Supreme Court, Docket No. 2007-0339 (March 24, 2008).

There can be no doubt that a consistent, open and uniform process for administering the early full retirement benefit, over a period of many years, is reflected in the record of this case. The District treated 100 retiring teachers in the same manner over a period of thirteen years. Yet the arbitrator finds that the CBA must be "interpreted as written," regardless if it conflicts with the established practice. This is plain mistake. His decision does not draw its essence from the CBA if it fails to adequately weigh the manner in which the parties have applied the language. In this manner the arbitrator is fashioning "his own brand of industrial justice" and it should not stand. See *University System of New Hampshire Board of Trustees* at 457. (citation omitted).

It is well-settled that "[a] course of dealing is a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." RESTATEMENT (SECOND) OF CONTRACTS, §223 (1981). "There is no requirement that an agreement be ambiguous before evidence of a course of dealing can be shown, nor is it required that the course of dealing be consistent with the meaning the agreement would have apart from the course of dealing." Id. Comment (b). See also *Appeal of Portsmouth Police Commission*, N.H. Supreme Court, Docket No. 99-670 (June 20, 2001). Thus, the arbitrator's ruling that the "the agreement

must be interpreted as written" is incorrect as a matter of law and constitutes plain mistake under RSA 542:8.

Both the Superior Court and arbitrator found that there was no evidence in the record of the Association having knowledge of the practice, and therefore concluded that the key element of "mutuality" for a binding past practice is not satisfied. However, as stated in *Elkouri & Elkouri*,

> [e]ven 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). The District submits that the arbitrator's failure to infer "mutuality" based upon thirteen years of practice constitutes plain mistake under RSA 542:8.

Further, as to the Association's knowledge, or lack thereof, of the practice, the Superior Court held that the District provided no evidence of any teachers prior to Burns and Hyde formally complaining of a delay in the payment of early full retirement stipend or lack of NHRS contributions, and notes that the "arbitrator even specifically mentioned the lack of complaints." SR at 343. Rather than reflecting a lack of awareness, this shows that the bargaining unit had no objection with the manner in which the District was administering the benefit. Certainly any one of the one-hundred teachers listed in District Exhibit 9 (See SR at 103-104) had standing under the CBA to raise a concern or grievance regarding the District's timing and payment of the retirement stipend and none were forthcoming. "[C]ontinued failure of one party to object to the other party's interpretation is sometimes held to constitute acceptance of such interpretation so as, in effect, to make it mutual." *Id*. at Ch. 12-8, p. 21.

Ultimately, the "Association" means the members of the bargaining unit that it represents, not elected or paid representatives. One-hundred of them did not contest the manner in which the District issued the early full retirement stipend. The fact that not one objection was lodged over a thirteen year period reflects acceptance and mutuality, and the arbitrator and Superior Court erred in concluding otherwise.

There is no dispute that ever since the District first began administering the early full retirement benefit, it never treated it as "earnable compensation," and never paid it in July.[7] Every teacher who retired early did not receive a NHRS contribution from the District drawn from the early full retirement stipend. As found by the arbitrator, no retiring teacher ever complained or disputed the manner in which the District was administering the benefit. Accordingly, the District may reasonably rely upon this course of dealings between the parties in its management of the early full retirement stipend. In light of this history, the Superior Court erred in upholding the arbitrator's decision that the annual stipend payment date "unequivocally refers to July 1" and that there was a lack of mutuality between the parties for the payment to occur later. These decisions constitute plain mistake of fact and law by the arbitrator and his award must be vacated as a result.

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[7] Since teachers are compensated over the summer by virtue of the lump sum provided under Section 9.9 of the CBA, it stands to reason that the District would not commence payment of the retirement stipend until the start of the next school year, so as to avoid a "double dip" in compensation. This likely explains why no retiring teacher (or Association representative) ever raised any concerns as to the timing of the initial retirement payment in late August, early September.

IV. THE SUPERIOR COURT ERRED AS A MATTER OF LAW IN FINDING THAT THE ARBITRATOR DID NOT EXCEED HIS POWERS OR COMMIT PLAIN MISTAKE UNDER RSA 542:8 IN FINDING THAT THE ASSOCIATION DID NOT KNOW ABOUT OR AGREE TO THE DISTRICT'S PRACTICE IN ADMINISTERING THE EARLY FULL RETIREMENT BENEFIT.

The Superior Court incorrectly rejected the District's claims in its petition and memorandum of law that the arbitrator acted beyond his authority and committed plain mistake by failing to apply the "or should have known" standard with respect to the Association's knowledge of the practice. SR at 341, Add. at 57. In essence the Superior Court concluded that the arbitrator was correct in finding that there was no evidence that the Association knew of the practice and that when the arbitrator addressed the past practice issue in his decision, he correctly applied the law of past practice rather than the "or should have known" standard contained in the grievance procedure, specifically Section 11.3, of the CBA. SR at 341, Add. at 57. This decision, as that of the arbitrator, is incorrect as a matter of law, serves to deprive the District of the benefit of its bargain with the Association, and should be reversed.

The District and Association have specifically agreed under Section 11.3, Formal Procedure, that "[a] grievance must be filed within forty-five (45) consecutive days of the time the grievant knew *or should have known* of the facts giving rise to the grievance." (SR at 47). The phrase "or should have known" was logically included so that a teacher, or the Association,[8] cannot bring a grievance years after the grievable event occurred simply because they claim they subjectively did not know or were

[8] Per Section 11.6, the Association may file grievances of a general nature. SR at 48.

unaware of the facts giving rise to the grievance until that later point in time.

The evidence presented to the arbitrator established that 100 teachers, including 43 since 2012, received the early full retirement benefit from 60 to 120 days following separation from employment without objection. Yet the arbitrator held that "there is no evidence that the Association knew about the 120 day delay in the School District's making these payments, much less that it agreed with such a practice." SR at 247, Add. at 46. Even though the District and Association have specifically agreed to the "knew or should have known" standard under Section 11.3, Formal Procedure, the arbitrator never applied it to the Association with respect to the District's practice. [9] However, once he opened the door to the Association's knowledge of the practice, he should have.

The Superior Court held that the arbitrator was not required to under the law of past practice but this is incorrect, especially where the parties have included in their CBA a provision that any disputes arising under it will be raised within a certain amount of time from when the alleged violation is known or should have been known. See above, HOW ARBITRATION WORKS, Ch. 12-8, p. 22 (Elkouri & Elkouri, 7th Ed., 2012). In this instance, where a practice concerning a contractual benefit is allowed to continue in the same fashion over many years, the necessary "mutuality" for a binding practice is achieved.

The arbitrator was obviously aware of the "or should have known" standard being in the parties agreement because he applied it in his consideration of the grievances filed by Burns and Hyde and whether they were timely. SR at 244, Add. at 43. Nonetheless, he did not apply it to the

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[9] The arbitrator did rule that Burns' and Hyde's grievances were timely filed under Section 11.3, Formal Procedure, and applied the "or should have known" standard to them as individuals. SR at 244, Add. at 43.

Association when considering past practice and this was plain mistake of law. Given the overwhelming evidence of the District's administration of the early full retirement benefit for many years, it is reasonable to conclude under the circumstances that teachers (i.e., "the Association") must have known what was transpiring or at least *should have known*. In point of fact, the grievant Hyde confirmed in an e-mail on April 17, 2019 to Association representatives that "[*t]his has been an ongoing question for teachers retiring for many years*…". (SR at 207). The arbitrator did not include or make reference to this fact at any point in reaching his decision.

As an "ongoing question" (as Hyde puts it) for teachers, it is only reasonable to conclude that conscious decisions were made by teachers not to contest the issue. As mentioned above, the "Association" consists of the members of the bargaining unit that it represents. One-hundred of them chose not to grieve the manner in which the District issued the early full retirement stipend, and were fully aware, and signed off on, what was occurring. Accordingly, the arbitrator's conclusion that there is "no evidence that the Association knew about the 120 day delay in the School District's making of these payments, much less that they agreed with such a practice" is plain mistake.

It is not a requirement under Section 11.3 for just "knowing" the facts giving rise to an alleged contract violation. Section 11.3 requires that the Association or its members raise the issue within forty-five days of when they know or should have known the facts giving rise to it. The "should have known" benchmark is clearly applicable and satisfied here for purposes of establishing past practice and mutuality. The District's payment of the early full retirement benefit as of the November 1st following the retiree's separation from employment was going on for seven years in plain sight, for all to see, and with no objection from Association members.

The arbitrator's decision, effectively serves to modify the parties' agreement, contrary to the express provisions of Section 11.3. Level D in this section reads, in part, "[i]n arbitrating a grievance, the arbitrator shall have no power or authority to do other than interpret and apply the provisions of this agreement. The arbitrator shall have no power to add or subtract from, alter, or modify any of the said provisions." (SR at 48). The arbitrator's decision serves rewrite the CBA by striking the "*or should have known"* language from Section 11.3, Formal Procedure, such that the District is deprived of its bargain. This act by the arbitrator violates Section 11.3, Level D, is beyond his power and authority, and therefore must be vacated.

The Association, as the exclusive representative of the bargaining unit, has the obligation to "police" its agreement with the District, as well as standing to file grievances per Section 11.6. Hyde's confirmation to Association representatives that "[t]his has been an ongoing question for teachers retiring for many years…" (SR at 207) reveals that this was not a new issue and that prior teachers within the Association, chose not to address it with the District. This is not the fault of the District, and it should not be forced to suffer the consequences of the Association's, and its members, declining to act even if they felt the CBA was being violated.

The arbitrator disregarded evidence in support of finding that the Association knew, or should have known, of the District's practice in administering the early full retirement stipend. In doing so, he exceeded his authority under the CBA by effectively removing the "*or should have known"* standard from the parties' agreement, such that the Superior Court decision must be reversed and his award vacated.

V. THE SUPERIOR COURT ERRED AS A MATTER OF LAW IN FINDING THAT THE ARBITRATOR DID NOT EXCEED HIS POWERS UNDER RSA 542:8 BY DIRECTING THAT THE NEW HAMPSHIRE RETIREMENT SYSTEM SHOULD MAKE THE GRIEVANTS, BURNS AND HYDE, FINANCIALLY WHOLE AS A RESULT OF THE DISTRICT'S DELAY IN PAYING THEM THE EARLY FULL RETIREMENT BENEFIT.

The Superior Court erred in concluding that the arbitrator did not exceed his authority with respect to the ordered remedy. While the Superior Court specifically found that "the arbitrator did not exceed his authority when he ordered that the grievants could pursue their statutorily entitled benefits" (SR at 344, Add. at 60), it failed to address the fact that the arbitrator's decision purports to interpret the New Hampshire Retirement statute, RSA 100-A. Indeed, the arbitrator's direction, among other things, that "the NHRS should make…[Burns and Hyde]…whole" (SR at 248) was beyond his authority under the terms of both the parties' CBA and the stipulated issues the parties asked him to decide.

The parties presented the arbitrator with the following questions: "Did the School District violate the Agreement, Article 14, by paying the grievants their early retirement benefit beginning on November 1, 2019? If so, what shall be the remedy?" SR at 239, 241. At no time did the parties seek a declaratory ruling from the arbitrator as to what benefits or relief, if any, Burns and Hyde are entitled to under the provisions of RSA 100-A. As stated above, this question is solely within the purview of the NHRS. See *Petition of Farmington Teachers Association, NEA-New Hampshire*, 158 N.H. 453 (2009). Moreover, the record indicates that the parties agreed at hearing that the arbitrator does not have authority to order the District or NHRS to pay money allegedly owed to Burns and Hyde through the NHRS. SR at 228.

Per Section 11.3, Level D, "in arbitrating a grievance, the arbitrator shall have no power or authority to do other than interpret and apply the provisions of this agreement. The arbitrator shall have no power to add or subtract from, alter, or modify any of the said provisions." SR at 48. The arbitrator's ruling that the NHRS should make the grievants whole by recalculating their retirement benefit and making retroactive payment of the sums which should have been made to them is not only a violation of his duty to only "interpret and apply the provisions of [the parties] agreement," but it is also serves to change or rewrite the provisions of the agreement, which allow for no interpretation of RSA 100-A or the granting of benefits thereunder.

The arbitrator states that it is impossible for him to order the NHRS to retroactively collect contributions in order to make Burns and Hyde whole, *but he still order the NHRS to do so.* SR at 248. Thus the Superior Court is incorrect in holding that "in the end..[the arbitrator].. did not 'award' anything." SR at 344. This stands as a declaratory ruling that is outside the scope of the arbitrator's authority. An arbitrator's acting beyond his/her authority in the CBA constitutes sufficient grounds to vacate an award pursuant to RSA 542:8. See *University System of New Hampshire Board of Trustees* at 457. The Superior Court erred when it failed to vacate the arbitrator's award on this basis.

CONCLUSION

For the foregoing reasons, the Keene School District respectfully requests that this Honorable Court reverse the Superior Court's decision and vacate the underlying arbitrator's award for plain mistake and exceeding his authority under the parties' agreement.

RULE 16(3)(i) CERTIFICATION

The undersigned counsel certifies that the written decisions of the arbitrator and the Cheshire County Superior Court that are the subject of this appeal are included with this brief and attached hereto. *See* Addendum, pp. 38-61.

Respectfully submitted,
KEENE SCHOOL DISTRICT,

By its attorneys,

Dated: June 28, 2021

/s/ Peter C. Phillips

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CERTIFICATION OF COMPLIANCE

I hereby certify that I have complied with Supreme Court Rule 16(10) and 26(2) by forwarding a copy of the foregoing BRIEF OF APPELLANT – KEENE SCHOOL DISTRICT through the e-filing system of this Court on this 28th day of June, 2021 to Attorney Esther Kane Dickinson for the Keene Education Association, NEA-NH, (edickinson@nhnea.org) and Cheshire County Superior Court (JMasterson@courts.state.nh.us).

Dated: June 28, 2021

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REQUEST FOR ORAL ARGUMENT

The Appellant, Keene School District, requests 15 minutes of oral argument before the full Court, argument to be presented by Attorney Peter C. Phillips.

Dated: June 28, 2021

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STATEMENT OF COMPLIANCE

The undersigned counsel for the appellant hereby certifies in accordance with New Hampshire Supreme Court Rule 26(7) that this brief complies with New Hampshire Supreme Court Rules 26(2)-(4) and 16(11). Counsel specifically certifies that all issues raised in this appeal were properly presented to the court below and preserved by properly filed pleadings. Counsel also certifies that the portion of the brief from "Questions Presented" to "Request for Oral Argument" does not exceed 9,500 words.

Dated: June 28, 2021

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ADDENDUM

ORDER **PAGE**

Before: James S. Cooper, Arbitrator

In the Matter of Arbitration between:

KEENE SCHOOL DISTRICT

-and-

KEENE EDUCATION ASSOCIATION

Re: R. Scott Hyde and Randall C. Burns Grievance

Introduction

The Keene School District ("School District") and the Keene Education Association ("Association") are parties to a collective bargaining agreement ("Agreement") dated April 29, 2014 and covering the period from July 1, 2014 to June 30, 2018. The parties extended the Agreement to include the grievances filed herein. On February 14, 2020 the Association, represented NEA-NH UniServ Director Rachel Hawkinson, and the School District, represented by attorney Nathan C. Midolo, presented this matter in arbitration. The parties submitted post hearing Briefs on April 3, 2020.

Issues

The parties stipulated to the submission of the following issues for resolution:

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,[1] by paying the grievants their early retirement benefit beginning on November 1, 2019?

[1] Agreement Article 14 provides in pertinent part as follows:

14.1 Any full-time member 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 service … as a teacher in the Keene School District may apply for early retirement … Said application to retire early shall be made no later than December first (1st) prior to the intended July first (1st) retirement date….

* * *

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 RETIRMENT STIPEND AS A PERCENTGE OF THE AVERAGE OF THE PRECEDING 5 YEARS ANNUAL SALARY
35	39%
.	.
.	.
20	31.5%

14,4 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 benefits. Meaning and intending that the early retirement participant shall not be entitled to medical/dental insurance, life insurance or other benefits provided to the members of the bargaining unit, nor shall the stipend percentage be applied to the value of such benefits.

* * *

14.6 Stipends provided to employees under this plan shall automatically terminate upon the occurrence of any of the following:

a. Normal retirement age as determined by the Social Security Administration;

b. Death of the employee; in such event, the benefits of this plan shall not vest in the employee's estate; ….

c. After the employee has received seven (7) full years of the early retirement benefit.

* * *

14.9 A teacher who receives early full retirement may elect to have the total dollars of the seven (7) years of the benefit paid in equalized payments over the period from the beginning of the teacher's benefit to the normal retirement age as determined by the Social Security Administration. The teacher must make a non-alterable commitment to a pay scheduled when enrolling for the early retirement benefit.

* * *

14.10 The parties agree that there can be mutual gains from an Early Retirement benefit. In an attempt to realize those benefits the parties agree that The Personnel Committee of the Board will collect and evaluate data, including input from the Association, relevant to the Early Retirement benefit and propose to the negotiators of successor agreements recommendations regarding the continuation of this benefit.

3. If so, what shall be the remedy?

Facts

The facts in this case are undisputed and may be quickly summarized. Randall Burns had 28 years of teaching in the School District when he applied for early retirement on November 19, 2018 with an effective date of July 1, 2019. R. Scott Hyde had 24 years of teaching in the School District when he applied for early retirement on October 10, 2018 with an effective date of July 1, 2019. The School District approved both applications via letters dated December 12, 2018 from Nancy C. Deutsch, the School District's Director of Human Resources which included the following sentences in the third paragraph:

> 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 2019 through June 30, 2020. This is so you and the Board do not incur additional N[ew] H[ampshire] R[etirement] S[ystem] ("NHRS") wage deductions from your stipend. ...

On March 12, 2019 R. Scott Hyde ("Hyde') wrote the School District's Director of Human Resources Nancy Deutsch and Human Resources Generalist Samantha Fletcher ("Fletcher") questioning why his first early retirement payment was being delayed for 120 days and that he had contacted someone at the NHRS who told him that the NHRS's regulations do not require an employer withhold early retirement benefits for 120 days and that he could not find support for such in the School District's Agreement with the Association.

Shortly thereafter Fletcher wrote back to Hyde that she had been in contact with NHRS and quoted the New Hampshire Retirement Statute RSA 100-A:1 that "Earnable compensation shall not include compensation in any form paid later than

120 days after the member's termination of employment from a retirement eligible position..." Further Fletcher reiterated what had appeared in the School District's December 12th letter that : "[t]he [School] District, and you as the retired member do not want to incur any earnable compensation penalties."

On April 29, 2019 Randall Burns and R. Scott Hyde filed identical grievances with the School District alleging that the School District's plan to withhold the payments of the early retirement benefits until the first pay period of November 2019 violated Article XIV, Sections 14.1, 14.3 and 14.9 of the Agreement. The grievants' proposed relief was for the School District to make the required early retirement payments beginning on July 1, 2019 and make all required payments to the New Hampshire Retirement System. The School District denied the grievances on May 21, 2019 as untimely pursuant to Article XI, Section 11.3.[2] and the Association submitted the matter to arbitration.

At the arbitration hearing the evidence may be succinctly summarized as follows. The School District's records with respect to payment of an early retirement benefit go back to 2005. These records show that teachers who availed themselves of the early retirement incentive between 2005 and 2011, retired on July1st and received their first payment under the program at the end of August or early September of the year of retirement. During this period of time the School District did not consider early retirement benefits as "earnable compensation" and therefore did not contribute the employer's 17% or deduct the employee's 7% of the payment and remit these sums to the NHRS.

[2] Article XI, Section 11.3 provides in pertinent part as follows: "A grievance must be filed within forty-five (45) consecutive days of the time the grievant knew or should have known of the facts giving rise to the grievance."

In 2011 the New Hampshire Legislature enacted a revised retirement statute for public employees which redefined "earnable compensation" so that effective on January 1, 2012: "members [entitled to benefits from the NHRS] who have not attained vested status prior to January 1, 2012 could no longer include "incentives to encourage members to retire early." For members vested prior to January 1, 2012 the new statute provided that such incentives were to be included as earnable compensation, something the School District had not done since 2005 and for which the School District had never budgeted. However, for all members, no matter when vested, payments made 120 days after termination from employment would not be included as earnable compensation.

The School District, based on its prior practice and having never budgeted for including the early retirement incentive as earnable compensation, fixed this problem by delaying the retiree's initial incentive check an additional sixty days from approximately September 1st to November 1st. Thereby, no matter when the teacher was vested in the retirement system, payments made 120 days after retirement did not count towards earnable compensation. Between 2012 and 2018, forty three teachers retired and received their first incentive check in the first payroll period of November and none questioned the School District's practice.

Grievants' Hyde and Burns testified that they first realized what the effect was on their retirement benefit caused by delay in compensation in the late spring of 2019 and discovered that if the School District had paid the bi-weekly sums beginning in July of 2019 rather than November 2019, deducting their 7% contribution from each payment and making the required 17% employer contribution, their monthly retirement benefit would have increased by over a $100 and they would have been entitled to this benefit for their lifetime, far more than their total four month contribution.

Discussion od Arbitrability

Under traditional rules of labor arbitration, the party raising the issue of arbitrability bears the burden of proving the dispute should not be subject to an arbitral resolution. I have carefully considered the School District's argument that 71 days had passed since the School District had advised Burns and Hyde that their retirement incentive checks would begin in November while their date of retirement was July 1st. But simply relying on the School District's letter of December 12th is mistaken. The language of Article XI requires the School District prove that the grievants "knew or should have known of the *facts* giving rise to the grievance." (emphasis added). The facts in this matter required inquiry to the School District and to the NHRS. The facts were not entirely clear to the grievants until late in March 2019 after confirming that NHRS would not penalize them if the incentive payments were made in July. The School District's claim that this delay would avoid the penalty of a deduction from their payments, but failed to mention that this also meant a significant reduction of their lifetime benefit. It took a number of months for Burns and Hyde to figure this out.

There is an additional reason the matter is arbitrable. The School District did not delay their payments from July 1st to November until after the grievance was filed. Surely the School District could have voided the entire grievance by changing its policy. It was not the December 12th letter which violated the Agreement, but its delay in making the payments in July. By then the Association knew the facts and had already filed its grievance. For both of these reasons, I find the dispute arbitrable.

Discussion of the Merits

The Association bears the burden of proving a violation of the Agreement overcoming the School District's defenses. I find that Association has done so for the following reasons. First the clear language linking Section 14.3 to Section 14.1 is compelling. The retirement date is set in stone as July 1st of each year and requires application by December 1st of the previous year. These two dates are extremely important to the School District and to the potential applicant. The teacher must be willing to retire on a date certain and the School District must be able to budget for the additional expense of the incentive. The School District must also plan for a replacement teacher. With this in mind, Section 14.3 makes it crystal clear that a teacher taking advantage of the early retirement "shall receive from said date an annual stipend....." The 'said date" unequivocally refers to July 1st. Thereby making the stipend date July 1st. Between 2005 (as far as the School Districts' records exist) and 2011 fifty-seven teachers took part in the early retirement incentive program and the School District compensated them via payment at the end of August or the beginning of September. No retiree complained of this sixty day delay and the School District neither deducted from incentive checks nor contributed to NHRS. Between 2012 and 2018 another forty-three teachers took advantage of this program and the School District moved its first payment date to early November. Again, no teacher complained of this delay and no deductions or contributions were made to NHRS.

The School District's rationale for this change for delaying payment by an additional 60 days (to the first pay period of November) was that the New Hampshire Legislature's modification of the retirement statute no longer permitted as earnable compensation "cash incentives paid by the employer to encourage members to retire" in the NHRS's calculation of a retiree's pension benefit. The

catch however, was that the change in the statute was only applicable to "members who have not attained vested status prior to January 1, 2012." Hyde and Burns, the grievants herein, however, had attained vested status prior to January 1, 2012 and therefor the new statute was not applicable to them and the School District's retirement incentive if paid prior to November would be included in their earnable compensation and the appropriate deductions taken from their stipend along with the required contribution by the School District to NHRS.

The School District, however, decided to take advantage of the exclusion from "earnable compensation" for all retirees, no matter when vested, and to do this the School District took advantage of another provision within the statute which excluded any compensation paid to a member more than 120 days after the date of retirement. The School District met the 120 day requirement by making the first incentive payment after November 1st, more than 120 days after July 1st. By doing this, the School District no longer had to deduct 7% of the retiree's incentive check for the retiree's contribution to NHRS but also avoided the School District's 17% contribution to the retirement fund. While the School District characterized this change as a benefit to the employee by "avoiding a penalty" or "not incur[ring] additional NHRS wage deductions from your stipend" in fact it was much more than that. The School District was avoiding its contribution and diminishing the retiree's retirement benefit. The statute did not require this delay and Article XIV of the Agreement did not permit it.

The School District argues that Section 14.4 specifically excludes the School District's obligation to make the 17% contribution for the four months of payment from July 1st to November 1st. But Section 14.4 provides that the retiree "shall not be entitled to any benefits whatsoever *except the stipend set forth herein.* (emphasis added). The stipend however includes all sums due for paying the

stipend, including required contributions to NHRS. The second and third sentences of Section 14.4 are only applicable to calculate the amount of the stipend per the percentages set forth in Section 14.3 of the Agreement. This makes it clear that the salary used for calculating the benefit does not include medical/dental insurance, life insurance or other benefits. These sentences do not obviate the School District's compliance with making retirement incentive payments on July 1st including all of the NHRS contributions as well as forwarding the deductions from the retiree's obligation to NHRS.

Alternatively the School District argues that there has been an established past practice of making these payment 60 days or 120 days after the July 1st retirement date for many years and it has consistently budgeted assuming this practice. The interpretation of a past practice under a labor agreement does not bend to one party's interpretation of the Agreement. A key element of a past practice is "mutuality;" that is the Association must have accepted the School District's interpretation or modification of the Agreement. There is no evidence that the Association knew about the 120 day delay in the School District's making these payments, much less that it agreed with such a practice.

The Agreement must be interpreted as written and therefore the grievance must be sustained. Of course, the Association should be careful of what it asks for because the Agreement recognizes that this benefit is not fixed in stone per Article XIV, Section 14.10. However, under the terms of the current agreement, Burns and Hyde are entitled to the only remedy available.

Remedy

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.

Award

For the reasons set forth above, the following is hereby awarded:

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.

Date: April 14, 2020

James S. Cooper

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

CHESHIRE, SS. **SUPERIOR COURT**

Keene School District

v.

Keene Education Association

No. 213-2020-CV-00100

ORDER ON PLAINTIFF'S PETITION TO MODIFY OR VACATE THE ARBITRATOR'S AWARD

The Plaintiff, Keene School District ("the District"), asks the Court to modify or vacate an arbitrator's award interpreting the Collective Bargaining Agreement ("the Agreement") between the District and the Defendant, Keene Education Association ("the KEA"). (Court Index #1.) The KEA objects. (Court Index #6.) The Court held a hearing on November 6, 2020. For the reasons that follow, the Court DENIES the petition.

BACKGROUND

The Keene Board of Education entered into the Agreement with the KEA on March 11, 2014. (See A.R. at 3–38.)[1] The Agreement established rules ranging from non-discrimination policies to rates of pay. (Id.) But it also created a provision—Article XIV—for early retirement. (Id. at 23–25.) Article XIV allowed any union member age 55

[1] The parties provided the Court with the arbitration record. Thus, the Court will refer to that record as "A.R."

or older with at least 20 years of full-time service to apply for early retirement. (Id. at 23.) Specifically, section 14.1 established the timing and process for early retirement:

> . . . [the qualifying member may apply] under this plan as of July first (1st) in the calendar year in which said member reaches age fifty-five (55) or as of the July first (1st) prior to the intended July first (1st) retirement date on a form approved by the board . . .

(Id.) Section 14.3 notes that "[said] early full retirement participants shall receive from said date an annual stipend in accordance with the following schedule . . . ." (Id.) Further, section 14.4 defined Article XIV's limits:

> 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.

(Id. at 23–24.)

The Agreement also established grievance procedures. Relevant here, section 11.3 specified that "[a] grievance must be filed within forty-five (45) consecutive days of the time the grievant knew or should have known of the facts giving rise to the grievance." (Id. at 18.) That section also created rules regarding arbitration. It established that if a grievance reached arbitration, the arbitrator "shall have no power or authority to do other than interpret and apply the provisions of this Agreement." (Id. at 19.)

With that background aside, the story begins many years before the filing of this lawsuit. The District's records on early retirement go as far back as 2005. (Id. at 73–75.) During that year until 2011, members who participated in the early

retirement program retired on July 1 and received their first stipend payment at the end of August or in early September. (Id.) But that all changed in 2011. (Id.) That year, the legislature revised the public employees statute—RSA 100-A—in regard to the definition of "earnable compensation" for New Hampshire Retirement System ("NHRS") benefits. See RSA 100-A:1, XVII(a) (2011). For union members whose NHRS benefits vested before 2012, incentives to encourage members to retire early—such as the stipend at issue here—would qualify as earnable compensation for NHRS computations. Id. This mattered to the District, because if the stipends qualified as earnable compensation then the District had to deduct 7% of the stipend for the NHRS contribution and, significantly, had to make the 17% employer contribution. (A.R. at 145.) But the legislature did not stop there. It also specified that any payments made 120 days after employment ended would not qualify as earnable compensation. RSA 100-A:1, XVII(a) (2011).

Thus, starting in 2012 and continuing to 2018, the District began paying members their stipends on November 1st rather than the end of August, so as to guarantee that no stipend would qualify as earnable compensation because of the 120-day window. (Id. at 73–75.)

Time marched on without any issues related to the payment delay. But that all changed when two teachers—Randall Burns and Robert Hyde—applied for early retirement in 2018. (Id. at 57–59.)

Burns and Hyde applied in 2018 and were approved on December 12, 2019. (Id. at 56–59.) Their approval letter informed them that the payments

would begin on November 1 of 2019. (Id.) But in the Spring of 2019, they discovered that because the stipends commenced in November, and thus were not earnable compensation for NHRS purposes, they would lose out on over $100 every month for the duration of their retirement. (Id. at 175–179.)

The two teachers filed grievances with the District on April 29, 2019 and the dispute eventually went to arbitration. (Id. at 60–71.) Then, a year later on April 14, 2020, the arbitrator interpreted the Agreement in favor of the KEA and the teachers. (Id. at 210–219.)

The first issue was the timeliness of the grievance. Burns and Hyde received notice about the delayed payment schedule on December 12, 2018. (Id. 57–59.) But they did not realize the effect of that schedule on their retirement benefits until March 2019. (Id. at 175–179.) They then filed the grievance on April 23. (Id. at 60–66.) The arbitrator found that the grievance was timely because, under Article XI, section 11.3, neither Burns nor Hyde knew or should have known about the effect of the stipend delay until March and filed the grievance in April within the 45-day window. (Id. at 215.) Thus, the arbitrator found the dispute arbitrable. (Id.)

The second issue surrounded whether the District violated the Agreement because of the delayed stipends. The District argued that Article XIV, section 14.4 specifically excluded any other benefits other than the stipend. (Id. at 185.) But the arbitrator found differently for two reasons. First, he found that sections 14.1 and 14.3 clearly listed July 1 as the beginning of payments. (Id. at 216.) And second, he found that 14.4's use of the word "stipend" included all sums due

for paying the stipend, including required contributions to NHRS. (Id. at 217–218.) Thus, he found that the District violated the Agreement by delaying payments to avoid NHRS contributions. (Id. at 218.)

The third issue regarded the past practice of making the stipend payments in November. The District argued that since it had done so since 2011 without an objection by the KEA or any member, the practice had effectively become part of the Agreement. (Id. at 186.) The arbitrator once again disagreed, finding a lack of mutuality since there was no evidence that the KEA knew about the 120-day delay or even agreed to it. (Id. at 218.)

In the end, the arbitrator noted that it was impossible to order the NHRS to retroactively collect contributions from Burns, Hyde, and the District and then to recalculate their retirement benefit. (Id. at 218–219.) But he said this was what the NHRS should do to "make the grievants whole." (Id. at 219.) Thus, he found that "the grievants may pursue their statutorily entitled retirement benefits with the [NHRS]." (Id.)

Exactly one month later, on May 14, 2020, the District filed suit asking this Court to vacate or modify the arbitrator's decision under RSA 542. (See Compl.) The KEA objected and the Court held a hearing on November 8.

LEGAL STANDARD

RSA chapter 542 governs the arbitration of disputes. See RSA 542 et seq. The chapter allows parties to bring an arbitrator's decision to the superior court for it to (1) confirm the award; (2) correct or modify the award for plain mistake; (3) or vacate the award due to some type of misconduct by the parties or if the arbitrator exceeded their

power. RSA 542:8. An arbitrator can commit plain mistake in two ways: (1) "when the law has changed after the issuance of an award, but before the award is reduced to final judgment" or (2) "when the [arbitrator] clearly misapplied the law to the facts." Finn v. Ballentine Partners, LLC, 169 N.H. 128, 146 (2016) (cleaned up). If the arbitrator misapplied the law to the facts, the error will be "apparent on the face of the record and . . . would have been corrected had it been called to the arbitrators' attention." Id. at 145 (cleaned up). On review, the trial court "examine[s] the face of the record to determine if there is validity to the claim of plain mistake, and defer[s] to the arbitrator's decision if the record reveals evidence supporting it." John A. Cookson Co. v. N.H. Ball Bearings, 147 N.H. 352, 356 (2001).

In the arena of collective bargaining agreements ("CBAs"), "the general rule is that the interpretation of a CBA is within the province of the arbitrator, subject to certain exceptions" irrelevant here. Univ. Sys. of N.H. Bd. of Trs. & a v. Dorfsman, 168 N.H. 450, 457 (2015). Thus, the trial court's review is "limited to determining whether the arbitrator's construction of the CBA is to any extent plausible." Id. (cleaned up). Courts will refuse to enforce awards in situations where the arbitrator's words "manifest an infidelity to the obligation to draw the essence of his award from the collective bargaining agreement." Id. (cleaned up). One such example of that infidelity occurs "when the award conflicts with the express terms of the CBA." Id. (cleaned up). This is because when the CBA language is clear and unequivocal, "an arbitrator cannot give it a meaning other than that expressed by the agreement." Id. (cleaned up).

But while the arbitrator cannot ignore the express language of the CBA, a court should not reject an award simply because it disagrees with the arbitrator or the

arbitrator misread the contract. Appeal of Merrimack County, 156 N.H. 35, 40 (2007) (cleaned up). Even if the court is convinced the arbitrator committed serious error, it is not enough to overturn their decision "[a]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority." Id. (cleaned up).

DISCUSSION

The District makes three arguments. First, it argues that the arbitrator committed plain mistake by finding that the stipend should include contributions to the NHRS. (Pl.'s Memo. at 10–13.) Second, it contends that the arbitrator committed plain mistake because he failed to incorporate the District's past practice of delayed payments into the Agreement. (Id. at 13–19.) Third, it argues that the arbitrator exceeded his power by directing the grievants to pursue their statutorily entitled benefits with the NHRS. (Id. at 19–20.)

The KEA disagrees. First, it argues that the arbitrator did not exceed his power in fashioning a remedy. (Def.'s Memo. at 7–8.) Second it argues that the arbitrator did not commit plain error in his interpretation of the Agreement. (Id. at 8–12.) Third, it contends that the arbitrator did not commit plain error by not finding the past practice as a part of the Agreement. (Id. at 13–18.) The Court will address each of the three arguments in turn.

I. Interpreting the Agreement

The District makes two arguments here. First, it argues that the arbitrator went beyond the scope of the issues when he determined that the stipend should include the NHRS contributions. (Pl.'s Memo. at 10–12.) Second, it contends that the arbitrator

failed to give full weight to express language in section 14.4 excluding any benefits except the stipend. (Pl.'s Memo. at 10–13.) The KEA disagrees. It argues that the arbitrator did not go beyond his power in interpreting the Agreement and, further, his interpretation was reasonable. (Def.'s Memo. at 8–12.)

The Court finds that the arbitrator neither exceeded his authority nor committed plain mistake in interpreting the Agreement. As for the arbitrator's authority, the Court is strained to see how the arbitrator could make a full finding without addressing whether the stipend could include the contribution. In its brief at arbitration, the District's main argument was that section 14.4's language that the member "shall not be entitled to any benefits whatsoever except the stipend . . . ." clearly excluded the NHRS contribution. (A.R. at 195-199.) Thus, it came as no surprise when the arbitrator addressed that argument in his finding. (Id. at 217.) His conclusion that "the stipend however includes all sums due for paying the stipend, including required contributions to NHRS" was a direct response to the District's argument. (Id. at 217–218.). But the District emphasizes that the parties did not list the issue for the arbitrator, and therefore the District did not agree to arbitrate that issue. (Pl.'s Memo. at 10–12.) The Court does not understand how a party can center its brief around an argument only to later argue that it never agreed to a finding on that argument. Thus, the arbitrator clearly had authority to discuss section 14.4 and whether the stipend could include contributions.

Nor did the arbitrator commit plain mistake in his interpretation of the Agreement. The District has a high hill to climb when considering the "great deference" courts afford arbitrators. N.H. Ball Bearings, 147 N.H. at 356. Even if the Court disagreed with his finding, it must uphold the finding as long as he was "arguably construing or applying

the contract and acting within the scope of his authority." Appeal of Merrimack County, 156 N.H. at 40. And here, the arbitrator did both. The arbitrator found that the Agreement set the retirement date as July 1 in section 14.1 and clearly referenced that date in section 14.3 by noting that a teacher enrolling in the program "shall receive from said date an annual stipend . . . ." (A.R. at 216.) That language clearly sets July 1 as the first date of payment, regardless of what section 14.4 says. The question posed to the arbitrator asked if "the School District violate[d] the Agreement, Article 14, by paying the grievants their [stipends] beginning on November 1, 2019?" (Id. at 210.) The arbitrator's finding on that question reasonably relied on the Agreement's express language about payments beginning on July 1.

But the District insists that section 14.4 expressly prohibits any other payments outside of the stipend. (Pl.'s Memo. at 10–13.)) The arbitrator did not commit plain mistake by concluding differently. The section reads as follows:

> 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.

(A.R. at 23–24). He found that the last two sentences related to the calculation of the stipend, instead of defining general stipend benefits. (Id. at 217–218.) The Agreement's significant choice of the words "meaning and intending" makes the arbitrator's interpretation entirely reasonable. (Id. at 23–24.) Even though the language in the last two sentences could be more precise as it relates to the salary computation, the arbitrator's interpretation was still reasonable.

In sum, the Court finds that the arbitrator neither exceeded his authority nor committed plain mistake in interpreting the Agreement. The arbitrator reasonably found that the District violated the Agreement and that the stipend could include NHRS contributions.

II. Past Practice

The District challenges the arbitrator's finding on past practice for two reasons. First, it argues that he failed to consider the historical evidence that from at least 2005-2018 the stipend never included NHRS contributions. (Pl.'s Memo. at 13–14.) Second, it contends that he failed to analyze whether the KEA should have known about the delayed payments, and, even still, the evidence supported such a finding. (Id. at 13–19.) In support of its argument, it points to section 11.3 which requires an analysis of whether grievants knew or should have known about the facts underlying a complaint. (Id. at 17.) The KEA responds twofold. First, it argues that the arbitrator clearly used section 11.3 in his arbitrability determination. (Def.'s Memo. at 12–13.) And second, it argues that the evidence did not show that the teachers, or the KEA for that matter, knew or should have known about the effect of the delayed payments. (Id. at 13–14.)

The Court finds that the arbitrator reasonably found a lack of mutuality for the past practice. First, the arbitrator did not commit plain error by not using section 11.3. He arbitrator properly that section when determining arbitrability. He found that neither Burns nor Hyde knew or should have known about the effect of the delayed payment until March. (A.R. at 215.) When he approached the past practice issue, he correctly used the law of past practice rather than section 11.3. (Id. at 218.)

The law on using extrinsic evidence such as past practice in CBA disputes is by no means uniform. See 20 Williston on Contracts § 55:23 (4th ed. 2020). Some courts follow the approach of the parol evidence rule and rarely consider extrinsic evidence. Id. Other courts follow a more liberal trend of using past practice to interpret collective bargaining agreements. Id. However, those courts are "reluctant to depart from the clear meaning of the terms of a collective bargaining agreement." Id.; see also Port Huron Educ. Ass'n MEA/NEA v. Port Huron Area Sch. Dist., 550 N.W.2d 228, 328 (Mich. 1996); Ramsey Cty. v. American Fed'n of State, Cty. & Mun. Emps., etc., 309 N.W.2d 785, 798 (Minn. 1981). If the agreement is ambiguous, those courts will accept evidence that "a party knew or should have known of the alleged past practice." 20 Williston on Contracts § 55:23. But if the agreement is unambiguous and clear, "an understanding or past practice must be evidenced by substantially stronger evidence" and must be "so widely acknowledged and mutually accepted that it may be said to have amended the contract." Id.

Here, the arbitrator found that Agreement clearly set July 1 as the first date of stipend payments. (A.R. at 217–218.) So even though the arbitrator did not use the "should have known" language, and even assuming the arbitrator followed that liberal trend, the case law by no means would require him to because the Agreement clearly stated July 1 as the date of payment. And as will be discussed next, he did not find evidence that the practice was so widely acknowledged and mutually accepted.

With that issue aside, the Court finds that the evidence reasonably supported the arbitrator's finding on past practice. The District points to the following undisputed evidence to challenge the arbitrator's finding: (1) the District never paid NHRS

contributions for early retirees; (2) the District had used the November payment schedule since 2011 and before that delayed payments until early August; and (3) Hyde commented that the delayed payments and lack of NHRS contributions "ha[d] been an ongoing question for teachers retiring for many years[.]" (emphasis added). (Pl.'s Memo. at 13–19.) Those three pieces of evidence do not persuade the Court that the record did not support the arbitrator's decision. First, the past practice analysis focuses on the Agreement between the District and the KEA, and thus Hyde's comment sheds little light on what the KEA knew or even should have known. Second, the District did not provide any evidence of communications between it and the KEA about the delayed payment schedule. For example, the District did not copy the union on early retirement letters sent to retirees informing them of the November payment. And third, the District provided no evidence that any teachers prior to Burns or Hyde formally complained of the delay or the lack of NHRS contribution. The arbitrator even specifically mentioned the lack of complaints. (A.R. at 216.) So while the practice did continue for many years, even through at least two CBA negotiations, the record does not conclusively show that the KEA knew about it or had any way of knowing about it.

By contrast, in Appeal of N.H. Dept' of Safety, the arbitration panel found sufficient knowledge of past practice, in part, because the troopers had made their "interest, concern, and position obvious to the Division . . . ." 155 N.H. 201, 210 (2007). The issue was "raised in the context of negotiations" and still "continued openly." Id. Here, there was no evidence that the issue had been raised in negotiations, let alone mentioned to the KEA. Consequently, the Court cannot say that the arbitrator's decision was unsupported by the record. N.H. Ball Bearings, 147 N.H. at 356. In sum,

the arbitrator did not commit plain mistake when he failed to use a "should have known" standard and found that the KEA had no knowledge of the past practice.

III. The Remedy

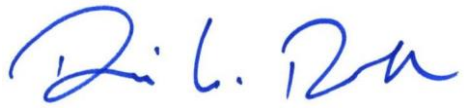
Lastly, the District argues that the arbitrator exceeded his authority when he ordered the grievants to pursue their statutorily entitled benefits. (Pl.'s Memo. at 19–20.) It contends that the Agreement clearly limits an arbitrator's power to interpreting and applying the provisions of the Agreement. (Id.) The KEA disagrees. First, it argues that the arbitrator did not order anything, displayed by his statement about it being "impossible" to order the NHRS to act. (Def.'s Memo. at 7–8.) Second, it argues that the parties asked the arbitrator to decide the remedy, and thus he was merely following their questions. (Id.)

The Court finds that the arbitrator did not exceed his authority when he ordered that the grievants could pursue their statutorily entitled benefits. The District points to section 11.3 of the agreement which specifies that "the arbitrator shall have no power or authority to do other than interpret and apply the provisions of this Agreement." (A.R. at 19.) Despite that, the parties asked the arbitrator to decide a remedy if he found a violation of the Agreement. And the only remedy he awarded was giving the teachers a green light to "pursue their statutorily entitled retirement benefits" with the NHRS. He specifically mentioned that it was impossible to make the NRHS retroactively collect contributions from the parties and then recalculate the retirement benefit. So, in the end, he did not "award" anything. Even still, the District asked him what the remedy should be. And he told them. Thus, he did not exceed his authority.

CONCLUSION

For the reasons outlined above, the Court DENIES the petition.

So Ordered.



Date: January 22, 2021

Hon. David W. Ruoff

Clerk's Notice of Decision
Document Sent to Parties
on 01/22/2021