STATE OF NEW YORK
STATE EMPLOYEE RELATIONS BOARD

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In the Matter of the Arbitration Between

JS Case No. 4620

COUNTY OF ROCKLAND,

Employer,

and

OPINION AND INTERIM AWARD

CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 1000, ROCKLAND COUNTY LOCAL 844

Union,

Re: Working Retirees.

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Before JOHN E. SANDS, Impartial Arbitrator

OPINION

On October 19, 2020 the parties agreed to submit the following issues to arbitration by me:

A. Is the May 16, 2016 grievance procedurally arbitrable?

B. If so, is the May 16, 2016 grievance substantively arbitrable?

C. If so, did the employer violate the parties' collective bargaining agreement by treating working retirees under a New York City retirement system as retirees under "any NY State Retirement System" within the meaning of Section 1.d of the parties' July 30, 2012 Final Settlement MOA (with the understanding that the County contends that the quoted words mean any of the public retirement systems in New York State)?

D. If so, what shall be the remedy?

Pursuant to my authority under the parties' collective bargaining agreement, I conducted a remote hearing by Zoom on October 19, 2020. Both parties appeared by counsel and had full opportunity to adduce evidence, to cross examine each other's witnesses, and to make argument in support of their respective positions. Each has submitted a post-hearing brief, and neither has raised any objection to the fairness of this proceeding.

On the entire record so produced, I find the following relevant facts. The parties negotiated their July 30, 2012 "Final Settlement MOA" to cover the period January 1, 2011 through December 31, 2013 during a time when the County was in severe financial straits. The bargaining unit gave up significant concessions in return for which the County agreed not to terminate or layoff any bargaining unit member for budgetary reasons through the end of that term.

The concession at issue here is paragraph 1.d of that agreement:

> Effective January 1, 2013, Employees receiving benefits from *any NY State Retirement System* shall not be eligible for benefits under Articles X, XI, XII, XllI, XIV 1, 2, 3 4, 5, 6, 7, 9, 11, 13, XV 1, 2, 3, 5 XVI, XVII, XX 10, 16, 20. Upon hire or rehire such employees shall be placed on the salary schedule at a rate most nearly equal to the salary received by incumbents performing similar work with a similar amount of experience.
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> [Employer Exhibit 1, p. 4; emphasis added.]

Joan Silvestri, Rockland County Commissioner of Social Services who had been Commissioner of Personnel at the time, participated in the negotiations as a County representative in 2011 and 2012. She testified that the County's main concern was to "skinny down" its financial burden to the greatest extent possible and to avoid the expense of "double-dipping" of benefits by rehired retirees. She agreed with CSEA negotiator Larry Sparber's testimony that, throughout the parties' negotiations, the County representatives had only referred to rehired retirees who had worked for Rockland County and not to former employees of any other employer.

On November 28, 2012, prior to Section 1.d's January 1, 2013 effective date, Commissioner Silvestri sent a letter to all working retirees potentially affected by the MOA's paragraph 1.d, which read, in relevant part:

> Rockland County and CSEA . . . negotiated Memoranda of Agreement which curtail certain benefits for retirees currently receiving a pension from *a New York state retirement system* working in positions in [this] unit. . . .
>
> If you have been receiving benefits or could have potentially received benefits because of your status as a working retiree, beginning January 1, 2013 the following Rockland County benefits will no longer be available to you: . . .
>
> CSEA
>
> * * *
>
> Grievance Procedure
>
> * * *

> You have been identified as a working retiree based on Rockland County Personnel records and/or New York State Retirement System records. If you are NOT currently receiving a pension from *a New York State Retirement System*, please complete the section below and return to the Personnel Department by December 14, 2012. . . . .
>
> [Employer Exhibit 1, pp. 10-11; emphasis added.]

The parties agree that their grievance procedure appears in Article XVIII.A and Appendix A of their collective bargaining agreement and that paragraph 1.d does *not* include the grievance procedure as a provision for which covered working retirees are ineligible. In addition, I note that the two italicized references above differ in the initial capitalizations of the phrase, "New York State Retirement System." Paragraph 1.d applies only to "any NY State Retirement System" with initial caps.

On December 17, 2012, Commissioner Silvestri responded to working retirees who responded to that letter that they were not currently receiving a pension from a "New York state retirement system" (with no initial caps). She listed the "public retirement systems in the state of New York and included five New York City retirement systems and funds. Her letter concluded,

> The system from which you are currently collecting a pension is included in the above. Therefore we believe you have been correctly identified as a working retiree affected on January 1, 2013 by the provisions of the CSEA . . . [agreement].

[Employer Exhibit 1, p. 12.]

Silvestri identified as Employer Exhibit 2 a list of working retirees potentially losing benefits that her office had compiled in preparation for issuance of her December 17th letter. That document highlights the names and data of thirteen "NYS retirement system but not County of Rockland" employees. Silvestri testified that she had not copied CSEA on either her November 28th or December 17th letters, nor had she given the union a copy of Employer Exhibit 2. Sparber testified without contradiction that the date of our Zoom hearing, October 19, 2020, was the first time he had seen Employer Exhibit 2.

On July 15, 2015 Rockland County hired Gregory Arocho, a former New York City Police Officer who had retired under the New York City Police Pension Fund, a retirement system within New York State but not a New York State Retirement System. Arocho received first-day new employee orientation that included advice that, as a retiree from the New York City Police Pension Fund, he was a New York State retiree ineligible for benefits under the CSEA agreement. Seven months later, in January of 2016, Arocho contacted Sparber to complain that he had not received any leave benefits. (Prior to that time Arocho had been serving his six-month probationary period.)

Sparber investigated the situation, and on May 16, 2016 filed this grievance, in evidence as Joint Exhibit 2. In response to Sparber's information request, on July 29th the County Personnel Department provided him with a list of forty "CSEA Working Retirees as of July 2016" coded as working retirees. Of these, 23 are former Rockland County employees, three are other retirees from a New York State Pension System, ten are "retired" for health benefits only but receive other benefits and accruals, and four were retired from New York City Retirement Systems. This was Sparber's first confirmation from the County of the extent of its denial of contractual benefits to bargaining unit working retirees who had not retired from a New York State Retirement System (with initial caps).

The County failed to respond to CSEA's grievance, and CSEA filed a CPLR Article 75 petition to compel arbitration of this and three other grievances. The County opposed as to this grievance on both substantive and procedural arbitrability grounds. On December 16, 2019 the court rejected the County's procedural arbitrability challenge, ruling that "whether the arbitration was brought within a 'reasonable time period'" involves a procedural stipulation appropriate for arbitral determination rather than a condition precedent within the court's jurisdiction. The court also rejected the County's substantive arbitrability challenge, holding that the grievance "did not allege a claimed violation of [law]

but [is] reasonably related to interpretation of the instant CBA." (Joint Exhibit 5.) On March 9, 2020 the parties entered a Stipulation of Settlement agreeing to submit this grievance to arbitration through New York State Public Employment Relations Board. (Joint Exhibit 6.) As noted above, the case proceeded to arbitration by me on October 19, 2020.

On these facts, the County argues with respect to arbitrability that the union's grievance is both procedurally and substantively non-arbitrable (a) because it was grossly untimely, having been filed more than three years after the County began withholding contractual benefits from working retirees in the CSEA bargaining unit and (b) because the County's withholding contractual benefits was an administrative decision exclusively reviewable under CPLR Article 78. In support of these arbitrability challenges the County cites Article XVIII, Appendix A ("Grievance and Disciplinary Procedure") of the parties' collective bargaining agreement, Sections B.2 and C.1 of which read,

> Section B ("Application") paragraph 2:
>
> Anything to the contrary notwithstanding the procedure shall not apply to matters which are reviewable under administrative procedure established by law or pursuant to rules having the force and effect of law. Consequently, such items which include but are not necessarily limited to dismissals, demotions, suspensions, position classification, Civil Service examination and ratings thereof are not subject to review as grievances under this procedure.

Section C ("Consideration of Grievances"), paragraph 1:

> Employees, supervisors and appointing authorities are expected to exhaust every administrative device to amicably settle all differences of opinion. An employee must initiate action under this procedure *within a reasonable length of time after the occurrence of the alleged grievance*.
>
> [Joint Exhibit 1, p. 32; emphasis added.]

CSEA opposes these challenges contending with respect to procedural arbitrability (a) that the County waived any procedural objection not only by failing to engage in the grievance process but failing as well to raise any timeliness issues; (b) that the CBA's "reasonable length of time" standard is a flexible one that the union met by promptly grieving upon a newly-hired bargaining unit member's having brought the matter to the union's attention in January of 2016; (c) that, in any event, the County's false statements to bargaining unit working retirees without copies to the union that they had no recourse to the contract's grievance procedure, provided ample basis for equitable estoppel of the County's timeliness challenge, and (d) that, in any event, this grievance cites a continuing violation that gives rise to a new limitation period on each occasion that the employer wrongfully denies grievants' contractual entitlements.

With respect to the County's substantive arbitrability challenge, CSEA argues that substantive arbitrability is for court, not arbitral, determination

and that the County in fact raised a substantive arbitrability challenge to a court here and lost without having thereafter preserved its substantive arbitrability challenge in the Stipulation of Settlement.

On the merits, CSEA argues (a) that Section 1(d) of the Memorandum of Agreement, subsequently carried into the parties' collective bargaining agreement as Article IV(5), clearly and unambiguously applies only to working retirees receiving benefits from "any New York *State* Retirement System" –initial caps– which does not include a retirement system of New York City or any other-than-New York State Retirement System jurisdiction; (b) that all extrinsic evidence supports the grievance, and (c) that I should sustain the grievance, grant damages retroactive to 2012, and remand calculation of damages to the parties to negotiate in the first instance, retaining jurisdiction to resolve any remaining disputes that the parties fail to resolve on their own.

The County, on the other hand, contends (a) that CSEA has failed to sustain its burden of proving a contract violation by substantial evidence; (b) that Commissioner Silvestri's testimony concerning the intent of the working retirees provision is clear and dispositive; (c) that Sparber's "understanding" that the provision did not apply to New York City retirees is an unfounded assumption

that, at best, raises an ambiguity that must be resolved against the union, and (d) that I should dismiss the grievance in all respects with prejudice.

On the entire record before me including my assessments of witnesses' credibility and the probative value of evidence, I must sustain the union's grievance and grant the remedy it seeks. I reach that conclusion for the following reasons.

First, I reject as unfounded the County's substantive arbitrability challenge. The parties' Grievance and Disciplinary Procedure and its submission to arbitration expressly ". . . apply to any alleged violation of this agreement." (Joint Exhibit 1, p. 32.) The grievance at issue alleges violation of Article IV(5), which, as noted above, repeats Section 1(d) of the Memorandum of Agreement. As the court ruled, the parties' arbitration agreement is broad and clearly covers the subject matter of the union's grievance.

In addition, the County's CPLR Article 78 preemption argument simply makes no sense. Article 78 proceedings against a body or officer provide "[r]elief previously obtained by writs of certiorari to review, mandamus or prohibition. . . ." (CPLR §7801.) By contrast, this arbitration proceeding, expressly authorized by CPLR Article 75, alleges a contract violation within the parties' agreement to submit such matters to final and binding arbitration. The

logical extension of the County's preemption argument is that no violation of a public sector collective bargaining agreement could ever proceed to arbitration. The absurdity of that proposition compels its rejection. The subject matter at issue is substantively arbitrable.

Second, I reject as well the County's procedural arbitrability challenge based on untimeliness of the union's grievance. In the first place, the contract's time frame for commencing a grievance is "within a reasonable length of time after the occurrence of the alleged grievance." "Reasonable" is a flexible standard that takes into account all relevant circumstances. Here grievant Gregory Arocho understandably waited for expiration of his six-month probationary period before bringing his complaint to the union that he was being wrongfully denied contractual leave benefits, entitlement for which, as a new employee under Article XIV ("Leave with Pay"), Section 4 ("Vacation"), paragraph a, he did not even begin to accrue until he had completed six full bi-weekly payroll periods. (Joint Exhibit 1, p. 14.) The union investigated Arocho's claim, realized that all bargaining unit working retirees from other-than-New York State Retirement Systems were similarly affected, and filed this grievance within four months of its having learned of the situation. Under these circumstances, I find that the union filed this grievance within a reasonable period of time following its having learned

of the alleged violation. Moreover the grievance alleges a continuing violation that recurs every time the employer fails to provide benefits for which bargaining unit working retirees are eligible. Each such violation begins a new period for filing a grievance. The County's procedural arbitrability challenge accordingly fails. I will address in the remedy section below the question of how far back in time the grievance extends.

Third, the contract language at issue is clear and unambiguous. The working retirees whom it renders ineligible for the specified benefits are "Employees receiving benefits from *any NY State Retirement System. . . ."* The initial capitals of "Retirement System" means it is a proper noun, not a common noun that would be in lower case letters. The "Retirement Systems of New York State" cover employees of the State and participating public employers like Rockland County. Any New York State retirement system –lower case– would include not only Retirement Systems of New York State but as well the separate retirement systems that cover public employees of other governments located within the State like those of New York City. Grievants here fall within that latter class, and the language at issue accordingly does not render them ineligible for the specified benefits.

Fourth, bargaining history supports that conclusion. The subject matter at issue was a management demand seeking financial relief. It is undisputed that, throughout the parties' negotiations, they only discussed Rockland County retirees. Not once did the County negotiators mention retirees from other public employers like New York City that do not participate in New York State Retirement Systems. Under these circumstances the union reasonably concluded that the language at issue would not affect working retirees from other-than-New York State Retirement Systems. That establishes the contracting parties' meeting of the minds on this issue. Commissioner Silvestri's testimony that she intended otherwise is unavailing. Unexpressed intentions not stated across the bargaining table do not constitute bargaining history that informs contract interpretation. I accordingly conclude that the County did in fact violate the parties' agreement as this grievance asserts.

It remains only to consider remedy. Grievants are entitled to retroactive relief for the period their grievance properly covers. Under normal circumstances, that period would be limited by the agreement's time frame for commencing a grievance. This case, however, does not present normal circumstances. As noted above, the language at issue does not render working retirees ineligible to file grievances. Yet, from the start, the County repeatedly

advised working retirees that they had no access to the grievance procedure. And the County never copied the union on any of those communications. Little wonder that, until grievant Arocho raised the issue, no bargaining unit member came to the union to complain.

These are classic circumstances for application of equitable estoppel. The County made false statements to bargaining unit working retirees. They reasonably relied on those statements and did not complain to their union that they were being denied contractual benefits to which they were entitled. And the employer improperly failed to copy the union on those false statements to bargaining unit members so that it could timely intervene to protect their interests. Under these circumstances I find the County is equitably estopped from arguing that grievants' entitlement to relief should not extend back to the effective date of the contract term at issue, January 1, 2013. Because the parties did not address damages at the hearing, I shall retain jurisdiction of that issue for a period of three months from the date of this Interim Award to give them an opportunity to negotiate an agreed resolution. Either party may invoke that retained jurisdiction in writing to the other and to me within that three-month period. If neither party does so, that retained jurisdiction shall lapse, and this Award shall became final in all respects.

By reason of the foregoing, I issue the following

INTERIM AWARD

A. The May 16, 2016 grievance is procedurally arbitrable,

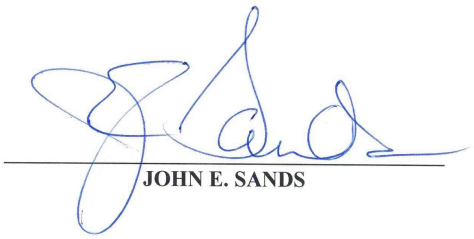
B. The May 16, 2016 grievance is substantively arbitrable.

C. The employer did violate the parties' collective bargaining agreement by treating working retirees under a New York City retirement system as retirees under "any NY State Retirement System" within the meaning of Section 1.d of the parties' July 30, 2012 Final Settlement MOA.

D. The employer is liable for contractual damages from the effective date of Section 1.d, January 1, 2013.

E. Because the parties did not address damages at the hearing, I retain jurisdiction of that issue for a period of three months from the date of this Interim Award to give them an opportunity to negotiate an agreed resolution. Either party may invoke that retained jurisdiction in writing to the other and to me within that three-month period. If neither party does so, that retained jurisdiction shall lapse, and this Interim Award shall became final in all respects.

Dated: December 14, 2020
Boca Raton, Florida



JOHN E. SANDS