FMCS Case No. ----------

In the Matter of Arbitration between:

Union

and

College

Arbitrator: Richard Bales
Grievant: Daniel T. DTB

Grievance: August 31, 2020
Hearing: January 6, 2021
Brief Exchange: February 15, 2021
Award Date: February 19, 2021

Award

I. Facts

College is a small, residential, liberal arts college in _____, The Union has long represented a group of approximately fifty Maintenance and Custodial employees at College. The relationship between College and the Union was governed at all times related to this Grievance by a collective bargaining agreement with an effective date of December 23, 2019 ("2019 CBA") (Joint Ex. 1).

In early 2018, the Union employees were employed by XYZ Industries, Inc. (XYZ), an independent contractor which at the time provided facilities services to College. The relationship between XYZ and the Union was governed then by a CBA between those two parties ("2017 XYZ CBA"). the Union Ex. 5. However, in 2018, College decided not to renew its contract with XYZ and to bring the work in-house. College hired nearly all the Union employees and voluntarily recognized the Union as the employees' exclusive representative for purposes of collective bargaining. The parties bargained their first collective bargaining agreement in 2018 and that agreement became effective November 1, 2018 ("2018 CBA"). Joint Ex. 2. The parties subsequently bargained for a new agreement, which became effective December 23, 2019 (the "2019 CBA" described above). Joint Ex. 1. The 2019 CBA is the one at issue in this Grievance, and the relevant language is the same in the 2018 and 2019 CBAs.

The 2017 XYZ CBA required XYZ to maintain a 401(k) plan for the Union employees and to match employee contributions as follows:

> The Plan will provide that upon a minimum contribution of two percent (2%) of monthly wages by participating employees, the employer will contribute eight percent (8%). See Memorandum. The Employer will pay the administrative fees for the 401(k) Plan.

the Union Ex. 5, Article XIII "Retirement Plan". The 2017 XYZ CBA also contained an "emergency" clause, providing:

> [I]n the case of emergency, such as flood, fire, epidemic or other unforeseen major contingency, the terms of this Agreement shall not be deemed to apply in connection with measures deemed necessary by the Employer for the care and protection of students, the equipment, and the buildings of the College, or reasonably necessary to repair or replace the same in connection therefore for occupancy.

Union Ex. 5.

As described above, in 2018 College brought the work performed by the Union in-house, voluntarily recognized the Union, and negotiated a new CBA. On the issue of retirement plans, College's bargaining priority was to transition the Union employees from the 401(k) plan they had received through XYZ to the 403(b) plan College offered to the other employees on campus (the "all-college 403(b)"). This would enable College to avoid having to administer and pay fees on two separate retirement plans. Testimony of TS, Associate Vice President for Business and Finance.

The Union was agnostic as to whether its members participated in the old 401(k) plan or College's all-college 403(b) plan. Instead, the Union's priority was to ensure that whichever plan College used, the Union members would be no worse off under College's plan than they were under the 2017 XYZ CBA. *See generally* Testimony of MF, Union Representative.

College's all-college 403(b) plan differed from the 401(k) plan in the 2017 XYZ CBA in two significant respects. First, College's all-college 403(b) plan *requires* all employees to contribute 2% of their income; the 401(k) plan in the 2017 XYZ CBA contained no such employee-contribution requirement. *Compare* College Defined Contribution Plan Summary Plan Description ("SDP"), College Ex. 3 at p. 3 *with* 2017 XYZ CBA at Article XIII.

The second difference between College's all-college 403(b) plan and the 2017 XYZ CBA 401(k) plan is that the 2017 XYZ CBA 401(k) plan contained a mandatory employer match. The 2017 XYZ CBA 401(k) plan required XYZ to contribute 8% of an employees' salary to her/his 403(b) account if the employee contributed 2% (the "8%-for-2% match"). See 2017 XYZ CBA Article XIII ("… upon a minimum contribution of two percent (2%) of monthly wages by participating employees, the employer *will contribute* eight percent (8%."). (Emphasis added). By contrast, all employer matching under College's all-college 403(b) plan is discretionary, save for carve-outs for College's security officers (and, in an amendment presumably added after 2018, the Union employees). SPD, College Ex. 3, at p. 4, Article III.

A third concern for the Union in negotiating a new CBA with College was that it wanted to clarify that the time its members had spent working for XYZ would count toward the two-year vesting requirement in College's all-college 403(b) plan. *Id*. at p. 9, Article V.

Happily, both parties achieved their objectives at the bargaining table. College successfully bargained for language allowing it to merge the Union employees into its all-college 403(b) plan. See underlined language below. The Union successfully bargained for language (a)

giving its members the ability to opt out, (b) making an 8%-for-2% match mandatory, and (c) clarifying that contributions would vest "two years after contribution" rather than after two years after contribution *to College's plan*. See italicized language below. The new language provided:

> Regular employees shall be entitled to participate in the College's Defined Contribution Plan according to its terms, *except that a) it will not be mandatory for employees to contribute to by deferring wages into the Plan, b) if an employee contributes at least 2% of wages to the Plan, the College will contribute an amount equal to 8% of the employee's wages, and c) the College's contributions will vest two years after contributed.*

2018 CBA at Article 14. The 2018 CBA was subsequently replaced by the 2019 CBA, which contains identical language.

The parties negotiated in 2018 one additional change relevant to this Grievance. As described above, the 2017 XYZ CBA contained an "emergency" clause. The 2018 CBA contains a nearly identical clause, with the changes noted as follows:

> [I]n the case of emergency, such as flood, fire, epidemic or other unforeseen major contingency, the terms of this Agreement shall not be deemed to apply in connection with measures deemed necessary by the ~~Employer~~ College for the care and protection of students, the equipment~~,~~ and the buildings of the College, or reasonably necessary to repair or replace the ~~same in connection therefore for occupancy~~ equipment or buildings.

2018 CBA, the Union Ex. 5. Nothing in the record indicates either party intended to alter the meaning of this clause beyond clarifying that College was now the employer rather than XYZ. The "emergency" clause language in the 2019 CBA is identical to the corresponding language in the 2018 CBA.

In early 2020, the COVID-19 pandemic shut down institutions throughout the country. Higher-education institutions were particularly hard-hit, because traditional classroom teaching requires large numbers of students and faculty to be in confined spaces for hours at a time. Particularly hard-hit were residential colleges such as College. They experienced precipitous declines in both their tuition revenue and their revenue from room-and-board.

College was no exception. COVID-19 caused an operating deficit of the University's budget of between $2.4 million and $6.2 million for the 2021 fiscal year. In late spring and early summer, College leadership knew the budget would be bad, but did not yet know how bad or for how long.

On June 26, 2020, College President JCK sent an email to all College employees announcing a variety of budget cuts. Relevant to this Grievance was his announcement that College would "[t]emporarily suspend employer contributions to the 403(b) retirement plan for Fiscal Year 2021." College Ex. 5. His email also noted that his "decision to temporarily suspend 403(b) contributions was a very difficult one, and I pledge to you that we will reinstate these

contributions as soon as it is possible to do so." *Id*. College acknowledges it did not consult or attempt to bargain with the Union before either making the decision to suspend matching 403(b) contributions or announcing that decision to all College employees. Testimony of Sharon SK, Director of Human Resources.

On June 30, Kate KDG, HR Specialist, sent a follow-up email to all College employees telling them the suspension of employer contributions would be effective at the end of August and instructing employees on how they might change their employee contributions. College Ex. 7. About an hour and a half later, she emailed MF, Union Representative. This email stated in pertinent part:

> To be completely transparent with our communications, we are sharing the email below. All employees received this email from Human Resources regarding the College Retirement Plan and the upcoming changes due to our current College financial situation.
>
> Due to the fact that the contract does not address a pandemic situation, we understand the contract will need to be amended to reflect this unfortunate but necessary change. We welcome the opportunity to meet with you to do so. Please let us know your availability.

Id. Mr. MF replied later that day:

> I wish you hadn't sent this memo to our members without discussing it with us first. As you mentioned, our members are under contract and to say that these changes are coming when there has been no agreement or even discussion of an agreement is just inaccurate and confusing.

Union Ex. 1. The parties continued to discuss the issue, with College consistently insisting it had the unilateral right to suspend employer contributions and the Union insisting the 2019 CBA required College to bargain first with respect to any suspension affecting the Union employees. See, e.g., College Ex. 6; the Union Ex. 2.

The Union grieved; College denied the Grievance. Joint Ex. 3, 3A. The parties agreed to arbitrate and selected me as arbitrator. The parties then agreed to proceed with an online hearing, which was held January 6, 2021.

None of the facts described above are disputed. There is only a single disputed fact in the entire Grievance. It is not particularly important to the resolution of the Grievance, and is specifically noted below. Thus, this is a pure contract-interpretation dispute.

II. Issue

Whether College breached the parties' CBA when, because of financial hardship caused by the COVID-19 pandemic, it suspended employer matching contributions to College's 403(b) Retirement Plan for employees represented by the Union? If so, what is the remedy?

III. Relevant CBA Provisions

ARTICLE 14- RETIREMENT PLAN

Regular employees shall be entitled to participate in the College's Defined Contribution Plan according to its terms, except that a) it will not be mandatory for employees to contribute to by deferring wages into the Plan, b) if an employee contributes at least 2% of wages to the Plan, the College will contribute an amount equal to 8% of the employee's wages, and c) the College's contributions will vest two years after contributed. (Emphasis added.)

ARTICLE 19 - MANAGEMENT RIGHTS

Except as modified or restricted by a provision of this Agreement, the College retains all managerial rights it had before it recognized the Union as the exclusive bargaining representative for unit employees. Such rights, vested exclusively in the College, include but are not limited to the rights: *** to take whatever action is necessary to determine, manage and fulfill the mission of the College and to direct unit employees.

The exercise of the foregoing rights and powers by the College, and the adoption and implementation of policies, rules, regulations and practices in furtherance thereof shall be limited only by the specific and express terms of this Agreement.

ARTICLE 25— CASES OF EMERGENCY

It is agreed that in the case of emergency, such as flood, fire, epidemic or other unforeseen major contingency, the terms of this Agreement shall not be deemed to apply in connection with measures deemed necessary by the College for the case [sic] and protection of students, the equipment and the buildings of the College, or reasonably necessary to repair or replace the equipment or buildings.

IV. Relevant 403(b) Provisions

TIAA ERISA 403(b) Volume Submitter Plan, Basic Plan Document #20

9.02 AMENDMENT.
(A) Permitted Amendments. The Employer, consistent with this Section 9.02 and other applicable Plan provisions, has the right, at any time to amend the Plan as follows:

(1) Adoption Agreement. To restate or amend the elective provisions of the Adoption Agreement (changing an existing election or making a new election) in any manner the Employer deems necessary or advisable

SPD
Page 4:

[F]or Employees who are employed by the Facilities Department and are paid exclusively on an hourly basis - the Employer will make Matching Contributions of 8% of Compensation provided the Participant's Elective Deferrals equal or exceed 2% of the Participant's Compensation.

Page 12:

Can the Employer amend the Plan?

Your Employer has the right to amend the Plan at any time. * * *

V. Arguments and Analysis

As described above, this Grievance involves no significant disputed facts. The parties simply disagree on how to interpret the following language in their CBA:

> ARTICLE 14 - Regular employees *shall* be entitled to participate in the College's Defined Contribution Plan according to its terms, *except that* a) it will not be mandatory for employees to contribute to by deferring wages into the Plan, b) if an employee contributes at least 2% of wages to the Plan, the College *will* contribute an amount equal to 8% of the employee's wages, and c) the College's contributions will vest two years after contributed.

(Emphasis added.)

A. The Union's Argument

The Union argues that "will" is mandatory. The main clause of Article 14 makes it mandatory, not discretionary, that College permit the Union employees to participate in the all-college 403(b) plan, and sub-clause (b) makes it mandatory, not discretionary, that College will match a 2% employee contribution with an 8% employer contribution.

Grammatically, the "except that" phrase and the sub-clauses that follow it might be interpreted as applying to the entire main clause. If so, then sub-clauses (a), (b), and (c) would be exceptions to the general rule that Union employees have the right to participate in the all-

college 403(b) plan. However, this cannot be correct, because none of these sub-clauses restricts the right of Union employees to participate in the plan.

Instead, a much more plausible interpretation of the "except that" phrase is that it applies only to the short phrase that immediately precedes it – i.e., it restricts the "according to its terms" phrase. If so, then sub-clauses (a), (b), and (c) would be exceptions to the general rule that the terms of College's all-college 403(b) plan apply to the Union employees in the same way those terms apply to other College employees.

This is the best reading of the "except for" phrase for two reasons. First, grammatically, a well-written modifying clause modifies the word or clause or phrase in closest proximity to it. Here, "except that" immediately follows "according to its terms".

Second, this interpretation is consistent with the parties' bargaining history. When the parties negotiated Article 14 in 2018, College wanted to eliminate the 401(k) plan the Union employees had at the time through XYZ and move the Union employees into College's all-college 403(b) plan. The parties struck a bargain in which the Union agreed to let College change plans, and College agreed to language that would give the Union employees the same benefits and protections they had under the previous plan. Each of the (a), (b), and (c) clauses describe a way the all-college 403(b) plan would apply differently to the Union employees to ensure they would receive the same benefits and protections they had under the previous plan.

Thus, the "except that" phrase and the three clauses that follow it do not indicate exceptions to the Union employees' right to participate in College's all-college 403(b) plan. Instead, they list terms in College's all-college 403(b) plan that will be applied differently to the Union employees as compared to other College employees. One of those terms is that College "will" match a 2% contribution by a Union employee, whereas College has discretion to match contributions by other employees.

B. College's Arguments

College argues it had the unilateral right to suspend the 8%-for-2% match for all College employees, including members of the Union. College raises six arguments in support of that proposition.

1. "Will" Is Permissive.

First, College argues that "shall" is mandatory and "will" is permissive. Though these words often are used interchangeably, in Article 14 they might arguably have a different meaning. When a drafter uses two different words in the same sentence, the usual presumption is that the drafter intended two different meanings.

Here, however, College interprets these words as meaning the opposite of each other, and ascribes to "will" a meaning quite different from its usual use. College proposes that contractual language stating a party "will" do something gives that party the contractual right not to do it. College cites no authority for this counter-intuitive proposition. In Article, 14, if the parties had intended to make College's 8%-for-2% match permissive, it seems much more likely that instead of using the word "will", they would have used the word "may", as they have done elsewhere in the CBA to express the permissive. See, e.g., Articles 3.2, 3.3, 3.4, 3.5, 4.1, 4.4, 5.8, 5.9, 6.0, etc.

More importantly, College's interpretation of "will" as discretionary is inconsistent with the ways the parties consistently use that word elsewhere in the contract. The CBA uses the word "will" 78 times, including:

- College "will" deduct the Union's monthly dues from employees' paychecks (Article 2.3).
- The Union "will" reimburse College for certain benefit costs during an employee's paid leave for Union business (Article 4.7).
- The Union "will" cooperate with College in maintaining high performance standards (Article 5.6).
- An employee "will" be paid $50 for being on-call, and an on-call employee who is called in "will" receive at least three hours' standard pay (Article 5.9).
- College "will" provide overtime on a rotating basis (Article 7.6).
- Meal times "will" be taken at times established by an employee's supervisor, and employees "will" be required to follow College's timekeeping policies (Article 7.7).
- A new employee "will" be considered probationary for the first 90 days (Article 8.2).
- Vacancies "will" be filled by seniority (Article 8.4).
- Seniority "will" govern layoffs (Article 8.5).
- The Union agrees there "will" be no strikes during the term of the CBA (Article 21).

This list provides but a fraction of places in the CBA where the parties use "will" to express a mandatory action. I find it difficult to believe that College would interpret the Union's no-strike promise as merely discretionary. Instead, it is clear from the text of the CBA that the parties often used "shall" and "will" interchangeably to mean a CBA term is mandatory, and "may" to mean a CBA term is discretionary.

2. "according to its terms" Incorporates by Reference the Discretionary Terms of the SPD.

College's second argument is that Article 14's "according to its terms" phrase incorporates by reference the terms of the Summary Plan Description for College's all-college 403(b) plan. This SPD explicitly gives College discretion over whether to match employee

contributions, and also explicitly permits College to amend the plan at any time. College witnesses testified they gave a copy of the SPD to the Union negotiators during negotiation of the 2018 CBA, a claim the Union denies. [This is the one factual dispute in this Grievance.] College argues that by not objecting to the "according to its terms" language, the Union accepted the SPD's incorporation by reference into the 2018 and 2019 CBAs, and thereby accepted College's ability to suspend the 8%-for-2% match at any time.

However, I find this argument unpersuasive for four reasons.

First, as described above, the "except that" phrase and the three clauses that follow it limit the scope of the preceding "according to its terms" phrase. The "according to its terms" phrase means that most terms of College's all-college 403(b) plan apply to the Union employees just as they apply to other College employees. However, the "except that" phrase and the three clauses that follow it provide specific exceptions – terms that will apply differently to the Union employees as compared to other College employees. One of those terms is that College "will" provide an 8%-for-2% match to the Union employees, whereas College has discretion to match contributions by other employees.

College's interpretation of the "according to its terms" phrase would effectively erase the Article 14 "except that" phrase and all three clauses that follow it. For example, the SPD requires employees to contribute 2% of their income to the 403(b) plan. Article 14(a) says the Union employees are not required to do so. If "according to its terms" means all terms of the 403(b) plan apply to the Union employees, then College has the unilateral ability to require the Union employees to make that 2% contribution notwithstanding explicit language in the CBA saying they don't have to. But this isn't what Article 14 says, and it's not what the parties bargained for. An arbitrator does not have the authority to erase language from the CBA. Thus, the "according to its terms" phrase cannot be interpreted as overriding the explicit language in 14(b) requiring an 8%-for-2% match.

Second, the SPD itself makes an exception for the Union employees. See SPD page 4 ("[F]or Employees who are employed by the Facilities Department and are paid exclusively on an hourly basis - the Employer *will* make Matching Contributions of 8% of Compensation provided the Participant's Elective Deferrals equal or exceed 2% of the Participant's Compensation.") (Emphasis added). Even under the terms of the SPD, then, the 8%-for-2% match is mandatory, unless somehow the "will" in this provision of the SPD can be interpreted as discretionary. But that interpretation of "will" is no more plausible in the SPD than it is in the CBA. See, e.g., SPD, Article II, p. 2 (participants "will" pay taxes when they withdraw money from their 403(b) account before retirement – such taxes are not permissive); SPD, Article VIII, p. 13 (if an employee dies while employed by College, College "will" use the vested account balance to provide the decedent's beneficiary with a death benefit – College does not have the option of pocketing the money).

Third, College's interpretation of the "according to its terms" phrase nullifies the word "will" in Article 14 clause (b).

Fourth, I find unpersuasive College's argument that the Union accepted the SPD's incorporation by reference into the 2018 and 2019 CBAs by not objecting during bargaining. The Union had no authority to bargain over the language of the SPD, because the all-college 403(b) applies to College employees who are not members of the Union. The Union has authority to bargain over only the terms of its own CBA. Here, College specifically bargained for – and obtained – explicit language in that CBA giving the Union employees different terms than other employees were entitled to under the SPD – the terms enumerated in Article 14 (a), (b), and (c). These different terms give the Union employees a better deal than other employees. From the Union's perspective, that's the whole point of collective bargaining.

The above analysis does not render the "according to its terms" language superfluous. The "according to its terms" phrase means that most terms of College's all-college 403(b) plan apply to the Union employees just as they apply to other College employees. For example, College can change the plan provider, the investment options, or the terms under which employees may borrow from their accounts – and College can do so for all employees without having to bargain first with the Union. As to the three promises made in Article 14 (a), (b), and (c), however, College cannot make unilateral changes without first bargaining for them.

3. The Emergency Clause

Third, College argues its suspension of the 8%-for-2% match is justified by the "emergency" clause of Article 25, which provides:

> It is agreed that in the case of emergency, such as flood, fire, epidemic or other unforeseen major contingency, the terms of this Agreement shall not be deemed to apply in connection with measures deemed necessary by the College for the case [sic] and protection of students, the equipment and the buildings of the College, or reasonably necessary to repair or replace the equipment or buildings.

College argues the COVID-19 pandemic qualifies as an Article 25 "emergency". I agree, for two reasons. First, Article 25 specifically states it applies during an "epidemic"; a "pandemic" is simply an "epidemic" that is widespread geographically, which COVID-19 certainly is. Second, the "such as" and "other unforeseen major contingency" language indicates Article 25 is not limited to floods, fires, and epidemics.

College presented evidence at the arbitration hearing that (1) COVID-19 caused an operating deficit of the University's budget of between $2.4 million and $6.2 million for the 2021 fiscal year; (2) College saved $1.6 million in fiscal year 2021 by suspending the 8%-for-2% match for all College employees; and (3) of that $1.6 million, approximately $200,000 in savings resulted from suspending the match to the Union employees alone. I have no reason to doubt these numbers.

These numbers are dire, and no doubt have created significant pain throughout College. Nonetheless, I find that Article 25 does not apply to College's suspension of the 8%-for-2% match for the Union employees, for two reasons.

First, when there is an emergency, Article 25 permits College to override the terms of the CBA only when "necessary". Here, College made a strong showing of financial hardship, and showed also that suspending the 8%-for-2% match made a significant dent in the budget shortfall. However, College made no attempt to show no other options were available, and thus it failed to show that suspending the 8%-for-2% was "necessary". College administrators could have taken a salary reduction. College could have laid off untenured faculty, or sold property, or dipped further into its endowment, each of which could have covered the shortfall which College chose to close by cutting the 8%-for-2% match to the Union employees. None of these would have been pleasant, or even strategically or fiscally prudent. However, they were *possible*, and they would have paid for the Union's 8%-for-2% match. That means suspending the match was not "necessary".

Second, when there is an emergency, Article 25 permits College to override the terms of the CBA only when necessary "for the ca[r]e and protection of students, the equipment and the buildings of the College, or reasonably necessary to repair or replace the equipment or buildings." College argues COVID-19 devastated its finances, and this in turn would have made it difficult to provide the extra safety precautions required by COVID-19 to care for students, or to repair or replace campus buildings or equipment. True enough, but Article 25's focus on students, buildings, and equipment indicates that a general fiscal shortfall is not enough to trigger College's ability to unilaterally abrogate the CBA. If there were an earthquake and College needed to temporarily expand the job duties of the Union employees to include helping remove equipment from damaged buildings, the link between the emergency and the need to protect the equipment would be clear. Likewise, if College needed to invoke Article 25 to change work hours or job duties of the Union employees so they could more effectively sanitize classrooms or dorms to protect students from COVID-19, the link between the pandemic and the need to protect and care for students would be clear. But a sweeping power to unilaterally abrogate a collective bargaining agreement should be construed narrowly. Here I interpret Article 25's focus on students and buildings as excluding a general fiscal deficit.

An exception might exist if finances were so dire as to cause College to declare financial exigency (the higher-education equivalent of bankruptcy). Such a declaration would give it sweeping powers to restructure departments and lay off tenured faculty – but it also would come with devastating consequences to reputation, accreditation, faculty retention, enrollment, and bond ratings. Fortunately, that has not been necessary at College, which further reinforces my finding above that suspending the 8%-for-2% match was not "necessary".

4. Management Rights

College's fourth argument is that the Management Rights provision in Article 19, especially when coupled with the emergency clause in Article 25, gives College the right to take whatever action is necessary "to determine, manage and fulfill the mission of the College", particularly during a time of dire financial crisis such as the one cause by COVID-19. As described above, College presented copious evidence regarding the devastating effect the pandemic has had on College's finances, and I assume its accuracy. Still, College's management rights argument is unpersuasive, for three reasons.

First, by its own terms, the management rights described in Article 19 apply only "[e]xcept as modified or restricted by a provision of this Agreement." In other words, College has unilateral authority over the items listed in Article 25 only to the extent the rest of the CBA doesn't say otherwise. But as described above, Article 14 expressly *does* say otherwise – it requires College to honor its promise to the Union employees of an 8%-for-2% match. Thus, Article 25 does not override Article 14, and does not apply to the issue in this Grievance.

Second, College cites ELKOURI & ELKOURI, HOW ARBITRATION WORKS § 13.13.E (8th ed. 2016) for the proposition that "Managerial freedom to act may be expanded and managerial obligations may be narrowed if management's performance is affected by an emergency, an act of God, or a condition beyond the control of management. *The collective bargaining agreement may expressly provide exceptions for these situations or an arbitrator may hold such exceptions to be inherent and necessarily implied.*" (Emphasis added.)

The italicized language says there are two ways to expand management rights during an emergency: an express provision in the CBA or implied by the arbitrator. Here, there is an express emergency provision in the 2019 CBA – Article 25 – which I already have found does not apply to College's invocation of general financial distress to justify its suspension of its contractual promise of an 8%-for-2% match to the Union employees. An arbitrator that implies a *further* extension of management rights in an emergency, in the face of an explicit emergency provision negotiated by the parties and narrowly drawn, would be acting beyond the bounds of her or his contractual authority. See Article 20.4 ("The arbitrator shall have no right or authority to amend, modify, add to or subtract from the provisions of the Agreement.").

Third, the logical conclusion to College's broad interpretation of the Management Rights and emergency provisions is that an emergency would give College carte blanche to rewrite any and all provisions in the CBA. Human Resources Director SK admitted exactly this when she testified on cross examination that she believed Articles 19 and 25 give College the unilateral right to cut wages guaranteed in the wage schedule of Article 5 and Appendix A. If true, a CBA would not be worth the paper it's printed on, collective bargaining would be a meaningless and futile exercise, and parties' only recourse to broken promises would be industrial warfare. Promises made in CBAs mean more than that.

5. Security Officers Didn't Grieve.

College introduced at the arbitration hearing a collective bargaining agreement between College and Police/Fire Union. College Ex. 8. This CBA, like the 2019 CBA signed with the Union, contains a 403(b) matching provision, except it gives Police/Fire Union only a 4% match instead of the 8% negotiated by the Union. College introduced testimony indicating that Police/Fire Union "did not object to or grieve the application of [College's suspension of all matches to the 403(b) plan] to its members despite having strikingly similar language in its CBA." College argues this indicates the reasonability of its application of the suspension to the Union employees.

The Union counters that Police/Fire Union's CBA contains the following critical language that the Union's CBA does not:

> Full-time bargaining unit employees participating in the College's group retirement plan under the same terms as the rest of the College's full-time employees may continue to do so on a grandfathered basis. If the plan terms offered the rest of the College's full-time employees change at any point during the term of this Agreement, the same changes will be made with respect to bargaining unit employees participating in the plan at the same time such changes are made with respect to the rest of the College's full-time employees.

Police/Fire Union CBA, College Ex. 8, at 18. Police/Fire Union's CBA explicitly says that changes College makes to the terms of the all-college 403(b) will apply equally to Police/Fire Union. the Union's CBA does not contain this language. Thus, the CBAs are not comparable, and should be interpreted differently.

Though the parties have not authorized me to provide a formal interpretation of Police/Fire Union's CBA, the Union's argument certainly looks compelling. More importantly, College's argument is irrelevant. Police/Fire Union might have chosen not to grieve for a host of reasons unrelated to the merits, such as bargaining weakness or solidarity with other College employees or anticipated concessions in future bargaining. Even if the two CBAs were absolutely identical, whether Police/Fire Union chooses to attempt to enforce its CBA is not relevant to the issue of whether College violated the Union's CBA by suspending the 8%-for-2% match.

6. College Should Be Applauded for not Furloughing or Laying Off Staff, Including the Union Employees.

College argues the Union employees should be grateful that College did not furlough or lay off staff, or impose an across-the-board pay reduction. I agree. College in many respects is a model employer. It brought the work done by the Union in-house despite a nationwide trend to outsource. It voluntarily recognized the Union, and bargained amicably. During the COVID-19 crisis it protected staff from layoffs, furloughs, and salary reductions – I doubt many small liberal arts colleges can say the same. However, this is not relevant to the contract-interpretation issue of whether College violated the Union's CBA by suspending the 8%-for-2% match.

At the arbitration hearing, several College witnesses implicitly criticized the Union for bringing this Grievance. These witnesses noted that College's suspension of the 403(b) match affected all College employees, and asserted it was inegalitarian for the Union to assert a special privilege of being exempt from the pain borne equally by all other College employees.

What this moral argument overlooks, however, is that College has backed the Union into a corner from which it has no choice but to vigorously pursue this Grievance. College's assertion that Articles 19 and 25 give it the authority to abrogate the CBA unilaterally without bargaining – even, according to College's argument, to unilaterally change the wage rates specified in the CBA – means that the Union must either bring this Grievance and force College to fulfill the promises made in the CBA, or accept that the CBA in its entirety is all but meaningless. Unsurprisingly, the Union chose the former rather than the latter.

Had College given the Union prior notice of its intent to suspend the 403(b) match for all employees, the Union might well have assented. However, having made a contractually binding promise to the Union of an 8%-for-2% match, College was bound either to honor that promise or to bargain for something different. By acting unilaterally, College has breached the terms of the CBA.

VI. Disposition

For the reasons described above, the Grievance is sustained. The relief requested in the Union's post-hearing brief is awarded. College is ordered "to rescind the decision to suspend contributions to the College 403(b) Plan, and to reinstate those contributions retroactive to August 31, 2020, the date that the suspension occurred." I retain jurisdiction for the limited purpose of resolving any disputes the parties may have about applying or interpreting this Award.

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Richard A. Bales, Arbitrator
February 19, 2021