At an IAS Term, Part 6, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 18th day of November, 2024.

P R E S E N T:

HON. JOY F. CAMPANELLI,
Justice.

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In the Matter of the Application of
KEITH J. LANE,

Petitioner,

For an Order Pursuant to Article 78 of the
Civil Practice Law and Rules,

-against- Index No. 533459/22

MELANIE WHINNERY, in her capacity as Executive Director of the New York City Employees' Retirement System
BRYAN BERGE, in his capacity as a Member of the Board of the Trustees of the New York City Employees' Retirement System,
BRAD LANDER, in his capacity as a Member of the Board of the Trustees of the New York City Employees' Retirement System,
JUMAANE WILLIAMS, in his capacity as a Member of the Board of the Trustees of the New York City Employees' Retirement System,
MARK LEVINE, in his capacity as a Member of the Board of the Trustees of the New York City Employees' Retirement System,
ANTONIO REYNOSO, in his capacity as a Member of the Board of the Trustees of the New York City Employees' Retirement System,
VANESSA GIBSON, in her capacity as a Member of the Board of the Trustees of the New York City Employees' Retirement System,
DONOVAN RICHARDS, in his capacity as a Member of the Board of the Trustees of the New York City Employees' Retirement System,
VITO FOSSELLA, in his capacity as a Member of the Board of the Trustees of the New York City Employees' Retirement System,
HENRY GARRIDO, in his capacity as a Member of the Board of the Trustees of the New York City Employees' Retirement System,
ANTHONY UTANO, in his capacity as a Member of the Board of the Trustees of the New York City Employees' Retirement System,
GREGORY FLOYD, in his capacity as a Member of the Board of the Trustees of the New York City Employees' Retirement System,
THE BOARD OF TRUSTEES OF THE NEW YORK CITY

EMPLOYEES' RETIREMENT SYSTEM., and THE NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM,

Respondents.

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The following e-filed papers read herein:	NYSCEF Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	32
Opposing Affidavits (Affirmations)	
Affidavits/ Affirmations in Reply	105
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Upon the foregoing papers, petitioner Keith J. Lane seeks judicial review, under Article 78 of the Civil Practice Law and Rules, of a determination of respondent New York City Employees' Retirement System (NYCERS) as set forth in the letter of NYCERS Associate Counsel I. Cassandra Benito, Esq, to Keith J. Lane, dated August 23, 2022 (Benito Letter), which 1) found that petitioner was not entitled to the accidental disability retirement benefit provided pursuant to New York City Administrative Code [AC] §§ 13-168 and 13-175; 2) upheld NYCERS' imposition of a retroactive assessment of Basic Member Contributions (BMCs) purportedly owed by petitioner to the relevant pension fund; and 3) rejected petitioner's contention that he was entitled to retire before the age of 62 without suffering a reduction in benefits as set forth in Retirement and Social Security Law [RSSL] § 603 (i) (2).

Petitioner had been an active employee in certain agencies of the City of New York (City) until he was disabled as the result of a motor vehicle accident on June 17, 2020. When petitioner entered service in 1988, he joined NYCERS as a Tier 4 member

enrolled in the 62/5 Retirement Plan with an effective date of July 1, 1988.[1] On or about September 9, 2021, as a result of his incapacitation from the motor vehicle accident, petitioner filed an application with NYCERS for an accidental disability retirement benefit pursuant to AC § 13-168 and RSSL § 605. On March 28, 2022, the Medical Board of NYCERS recommended approval of petitioner's application.

Previously, in March 2012, petitioner inquired to NYCERS about a possible pension loan. NYCERS informed petitioner that, at said time, he had only approximately $1,400 in BMCs credited to his Member Contribution Accumulation Fund (MCAF) account, leaving a deficit.[2] In response to petitioner's "Request for Information" concerning the deficit, dated March 28, 2012, NYCERS issued a "Certification of Rate Deduction," dated May 31, 2012, which set forth a repayment schedule of 390 installments of $166.17, totaling $64,803.30 to bring petitioner's MCAF account current.

By letter dated February 21, 2020, NYCERS informed petitioner that following a review, NYCERS again found a deficit in his MCAF account, as of February 20, 2020, in the amount of $26,986.50. NYCERS stated that the principal reason for the deficit was that BMCs were not charged on petitioner's total earnings and provided a summary of the uncharged earnings. NYCERS stated that in order to resolve the deficit, NYCERS would first certify 16 installments of $147.61 to take effect on March 6, 2020 as "N414 arrears,"

[1] Under the basic 62/5 Retirement Plan for Tier 4 members, participants may retire with a full pension at age 62 with at least five years of credited service, or with a reduced pension between the ages of 55 and 61 (RSSL § 603 [a]).

[2] As a Tier 4 member entering NYCERS in 1988, petitioner was required to contribute BMCs representing 3% of his gross wages, including overtime to the MCAF account. Contributions are deducted from members' paychecks at each pay period, and are deposited into the MCAF account at 5 percent interest. In 2000, RSSL was amended to cap Tier 4 member contributions by eliminating any obligation to make BMCs upon the earlier of (1) attaining 10 years of service credit; or (2) reaching a tenth anniversary of NYCERS membership (RSSL § 911 [b] [1]).

and once these arrears were completed, NYCERS would then certify 208 installments of $147.99 to take effect on October 16, 2020 as "414 arrears." NYCERS advised petitioner that if deductions did not begin on these dates, then he should contact his payroll department or NYCERS immediately. NYCERS stated that petitioner had the option of making a lump sum payment of the deficit balance at any time, and that if the deficit was not paid by the time of retirement, his retirement benefit would be permanently reduced based on the outstanding balance and his age at retirement.

In response to the February 21, 2020 letter, petitioner sent NYCERS a Request for Information, dated March 2, 2020, inquiring about the new figures regarding the MCAF deficit and new installment plan and why they have changed since the 2012 correspondence. These issues were again raised by petitioner in a communication to NYCERS Executive Director Melanie Whinnery dated May 17, 2021. By letter dated, May 25, 2021, NYCERS responded that as of February 20, 2020, NYCERS found a deficit of $26,986.50 in petitioner's MCAF account, consisting of required BMCs of $20,575.75 from 1988 to 2000, minus $33,400.17 in paid arrears from June 22, 2012 to February 21, 2020, plus $39,810.92 in 5% annually compounded interest. In a subsequent letter, dated September 7, 2021, NYCERS summarized a virtual meeting with petitioner regarding the MCAF deficit and provided details as to how the deficit arose. In a subsequent letter to petitioner, dated November 1, 2021, NYCERS indicated that no BMC contributions were made during the years 1990-1991 and 1993-2011.

Petitioner filed with NYCERS a Request for Information, dated May 29, 2022, wherein he maintained that the BMC arrears were the result of NYCERS' failure (in

alleged contravention of the Pension Enhancement Law [Chapter 126 of the Laws of 2000]) to conduct an internal administrative review of his account in 2000 to determine his eligibility for the cessation of BMCs as provided by said law, and asserted that had a review been conducted, the deficit could have been rectified at that point rather than 12 years later. Petitioner further inquired, in essence, as to whether he was entitled to the greater disability retirement under AC §13-175, rather than the disability retirement under RSSL article 15 which was granted by the Medical Board.[3]

In the Benito Letter, NYCERS addressed the issues raised by petitioner's May 29, 2022 Request For Information as follows:

> "**A. <u>Accidental Disability & Retirement</u>**
>
> "In this correspondence, included as Exhibit A, you ask for clarity about the difference between retirement for accidental disability and regular service retirement.
>
> "A disability under Section 13-175 of the Administrative Code is only for Tier 1 and 2 members who are disabled as the result of an accident. You are not eligible for a disability retirement under this section of law.
>
> "For those who are eligible for a disability retirement under Section 605, the disability retirement allowance is equal to the greater of: (a) one-third (1/3) of your Final Average Salary (FAS); or (b) one-sixtieth (1/60) of your FAS for each year of credited service. If a member were eligible to receive a Service Retirement Benefit at the time that their disability retirement becomes effective, then the retiree would be entitled to receive the service retirement allowance, if that calculation is greater than the disability retirement allowance.

[3]Following petitioner's May 29, 2022 Request For Information, petitioner was notified by letter dated July 15, 2022 that the Board of Trustees of NYCERS adopted the recommendation of the Medical Board approving petitioner's application for a disability retirement and established a retirement date of June 2, 2022.

"Please note that you are a member of the Basic Tier 4: 62/5 Retirement Plan. That Plan allows for a service retirement at age 62. It further provides for the ability to retire for service anytime between age 55 and 62, subject to an age reduction (known as "Tier Equity"). Since you are over age 55 but under age 62, any calculation for a service retirement allowance would be subject to that age reduction.

* * *

"**G. '9/7/2021 NYCERS Letter'**

"In this correspondence, attached as Exhibit G, you state 'This NYCERS letter addressed the 8/20/21 virtual meeting- Tier 4 governed by Article 15- Pension Enhancement Law 2000- Agencies I was employed by, Breakdown of all payment plans, payments remaining 192 & lump sum payout of $23,518.90 by 6/25/21 if I would like, etc.'

"Assuming this inquiry is related to the letter sent by NYCERS dated September 7, 2021 (attached as Exhibit D1) which outlined the deficit in your account and the number of payments outstanding, as stated in that letter, you were put on a repayment plan that would withhold $147.00 per pay period until the entire balance was paid in full. You were given the option to pay off the deficit in a lump sum.

"H. **July 20, 2020 and July 30, 2020 NYCERS Letters**

"In this correspondence, attached as Exhibit H, you claim that Chapter 553 of the Laws of 2000 states that employees who have attained age 62 or at least 30 years of service can retire without a penalty.

"Chapter 553 of the Laws of 2000 amended the Retirement and Social Security Law (RSSL) Section 603(i)(1) to state that a member of the '**New York State and Local Employees**' [emphasis added] Retirement System who has met the minimum service requirements but who has less than 30 years of credited service may retire at normal retirement age, but no earlier than attainment of age 55, in which the amount of his or her retirement benefit ... shall be reduced in

accordance with the following schedule...' This section **only** applies to members of the New York State and Local Employees Retirement System, not to general members of NYCERS.

"Chapter 553 of the Laws of 2000 amended the RSSL to add Section 603(i)(2) to state that a member of NYCERS who has met the minimum service requirement may retire prior to normal retirement age, but no earlier than attainment of age 55, in which event [']the amount of his or her retirement benefit ... shall be reduced in accordance with the following Schedule...' This is known 'Tier Equity' and allows members to retire between age 55 and 62 with a reduction in their pension benefit.

"There is no language in the RSSL that states that a NYCERS member in the Tier 4: 62/5 Plan member is eligible to receive their retirement benefit without a reduction between age 55 and 62 based on the number of years of credited service.

"NYCERS is bound by all applicable laws and regulations and must calculate a member's retirement benefit accordingly. NYCERS is required by law to apply the age reduction when performing your service retirement calculation due to you retiring prior to age 62.

* * *

"**K. NYCERS Sept. 7, 2021 Letter**

"This correspondence, included as Exhibit K, inquires about Chapter 126 of the Laws of 2000 . . . and information related to notification of your ability to meet the qualifications.

Chapter 126 of the Laws of 2000 is related to the cessation of basic member contributions (BMCs). Your required BMCs were stopped on October 1, 2000 in accordance with the law. However, at various points during that period of your membership (that being from period of July 1, 1988 thorough October 1, 2000), BMCs were not properly withheld from your paycheck, and therefore, there was a deficit in the BMCs required. The September 7, 2021 letter (included as Exhibit

> D1) further explains why there was a deficit in your account related to BMCs. . .
>
> * * *
>
> "This is NYCERS' final determination related to each of the above-mentioned categories. If you wish to contest this final determination, the law gives you the opportunity to institute court proceedings in the form of a Civil Practice Laws and Rules Article 78 proceeding no later than four months from the date of the receipt of this letter."

Petitioner thereafter commenced the instant Article 78 proceeding on November 15, 2022. In his second amended verified petition, filed on April 3, 2023, petitioner challenges as arbitrary and capricious NYCERS' determination, as set forth in the Benito Letter, 1) advising petitioner that he was not entitled to the accidental disability retirement benefit provided by AC § 13-175; 2) imposing a retroactive assessment of BMCs, together with an assessment of compounded interest and repeatedly failing to provide an accurate accounting and assessment of BMCs purportedly owed; and 3) finding that petitioner was not entitled to retire before his normal retirement age without imposition of the so-called "tier equity" penalty which otherwise applies to members who, in contrast to petitioner, have not completed at least 30 years of credited service. Petitioner raises an additional objection to NYCERS' determination, set forth in a letter dated January 9, 2023, requiring petitioner to pay $21,692.94 as a condition to continuing to receive his retirement benefits without reduction.

Discussion

As an initial matter, this proceeding is hereby restored to the active calendar.[4]

In an Article 78 proceeding seeking judicial review of administrative action, "the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious" (*Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 363 [1987]; *see Matter of 85 E. Parkway Corp. v New York State Div. of Hous. & Community Renewal*, 297 AD2d 675, 676 [2d Dept 2002]). "[O]nce it has been determined that an agency's conclusion has a sound basis in reason . . . the judicial function is at an end" (*Matter of Woodson v Town of Riverhead*, 203 AD3d 935, 937 [2d Dept 2022] [internal quotation marks omitted]; *see Matter of Espinal v County of Nassau*, 172 AD3d 1064, 1066 [2d Dept 2019]). If the determination is rational, it must be upheld, even though the court, if viewing the case in the first instance, might have reached a different conclusion (*see Matter of Manko v New York State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 88 AD3d 719, 720 [2d Dept 2011]). Moreover, "[a]n agency's interpretation of the statutes and regulations that it administers is entitled to deference, and must be upheld if reasonable" (*Matter of CHT Place, LLC v New York State Div. of Hous. & Community Renewal*, 219 AD3d 486, 488 [2d Dept 2023] [internal quotation marks omitted]).

[4] The parties entered into a stipulation, so ordered by this court on April 3, 2024, agreeing to the withdrawal of petitioner's motion to restore and for restoration of this proceeding to active status.

Petitioner argues the statutory scheme governing benefit eligibility for NYCERS members incorporates provisions of both the AC and RSSL and that, contrary to the position of NYCERS, there is nothing in the relevant statutes (AC §§ 13-168 and 13-175 and RSSL § 605), which restricts eligibility for the more favorable disability retirement benefits set forth in the AC to Tier 1 and Tier 2 members only.

AC § 13-1301 (71) defines a "Tier I member" as "[a] member whose benefits (other than a supplemental retirement allowance) are prescribed by this chapter and who is not subject to the provisions of article eleven, article fourteen or article fifteen of the [RSSL]." AC § 13-1301 (74) defines a "Tier IV member" as "[a] member who is subject to the provisions of article fifteen of the [RSSL]." There is no dispute that petitioner is a Tier 4 member and therefore "subject to the provisions of article fifteen of the [RSSL]." While petitioner argues that there is no explicit statutory exclusion of Tier 4 members from AC title 13, it was not irrational for NYCERS to interpret AC §§ 13-1301 (71) and (74), read together as a whole, as limiting Tier 4 members to the provisions of RSSL article 15 and its less favorable disability retirement benefit scheme. To the extent petitioner argues that the provisions AC title 13 must take precedence over the provisions of Article 15 of the RSSL, the latter statute plainly states that "[i]n the event that there is a conflict between the provisions of this article and the provisions of any other law or code, the provisions of this article shall govern" (RSSL § 600). Thus, NYCERS's determination that the accidental disability retirement provided under AC title 13 was not applicable to petitioner, a Tier 4 member, has a rational basis and is neither arbitrary nor capricious.

Petitioner further challenges the retroactive implementation of BMCs and seeks a judgment annulling the determination of NYCERS and recovering as damages those BMCs collected, with interest, under CPLR 7806. Following a request by petitioner for NYCERS to investigate a deficit in his MCAF account, NYCERS determined that during certain periods, BMCs were not paid into the MCAF system. On January 28, 2020, petitioner again requested a review of his account because he believed his ongoing arrears were incorrect. NYCERS reviewed petitioner's MCAF and determined that its prior calculation of the deficit was incorrect and revised its figures.

Petitioner argues, in sum and substance, that the deficiency was caused by the failure of the relevant payroll departments of his City employers to properly deduct BMCs and, as a result, NYCERS should be estopped from recovering the amounts necessary to cover the deficiency. Under RSSL § 613, Tier 4 members such as petitioner "shall contribute three percent of annual wages to the retirement system in which they have membership" until October 1, 2000, the date of the enactment of the Pension Enhancement Law. NYCERS has a continuing "statutory responsibility, supported by broad public policy considerations, [which] requires that it take all necessary steps to insure the financial integrity of the pension fund," and any "erroneous calculations could not be the basis for an estoppel" (*Matter of Galanthay v New York State Teachers' Retirement Sys.*, 50 NY2d 984, 986 [1980]). Thus, upon discovery of the deficit, it was not irrational for NYCERS to hold petitioner responsible for correcting the resulting deficit, regardless of any failure by payroll departments to properly deduct BMCs as they became payable. NYCERS explained in detail its findings regarding the MCAF deficits,

following inquiries by petitioner, through correspondence and a virtual meeting, and set up plans for periodic repayment.

Petitioner also maintains that he should have been entitled to retire before his normal retirement age without imposition of the so-called "tier equity" penalty which otherwise applies to members who, in contrast to petitioner, have not completed at least 30 years of credited service. Petitioner contends that NYCERS' refusal to acknowledge petitioner's right to retire prior to age 62 without incurring the penalty set forth in RSSL § 603 (i) (2) clearly contravenes the legislative intent behind the amendments to RSSL § 603 to eliminate the disparity in financial penalties between Tier 2 and Tier 4 employees otherwise eligible for early retirement. Petitioner maintains that had he been entitled to an early retirement without penalty, he would have been afforded an opportunity to retire well in advance of his June 2, 2022 disability retirement, and seeks damages in an amount equal to the service retirement benefits he would have received if his opportunity to elect an early retirement were granted.

RSSL § 603 (i) (2) states that members of NYCERS such as petitioner (Tier 4: 62/5 Retirement Plan) are subject to an early retirement penalty in accordance with the schedule set forth therein. Petitioner claims that RSSL § 603 (i) (1), which imposes a penalty for those retiring before age 62 who had met the minimum service requirements "but who had less than thirty years of credited service," tacitly provides that no penalty shall be charged against those with 30 or more years of credited service such as petitioner. However, as explained by NYCERS in the Benito Letter, RSSL § 603 (i) (1) does not apply to members of NYCERS but rather to members of the New York State

and Local Employees Retirement System. The only other members expressly covered under the subsection are members of "a teachers' retirement system." Thus, even interpreting the RSSL § 603 (i) (1) as affording those members aged 55-61 with at least 30 years of credited service a retirement without penalty, it was not irrational for NYCERS to determine that said subsection did not apply to petitioner.

Accordingly, petitioner has not shown that NYCERS' determination was arbitrary and capricious, or otherwise demonstrated that the determination was an abuse of discretion or effected by error in law.

The court has considered all other arguments made in support of the second amended petition and finds them to be either unavailing or a request to have this court improperly substitute its judgment for that of NYCERS.

As a result, the instant Article 78 petition is denied, and this proceeding is dismissed.

The foregoing constitutes the decision, order and judgment of the court.

E N T E R,

Joy F. Campanelli

J. S. C.