SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of

LISA FLANZRAICH, BENAY WAITZMAN, LINDA WOOLVERTON, ED FERINGTON, MERRI TURK LASKY, PHYLLIS LIPMAN, on behalf of themselves and others similarly situated, and the NYC ORGANIZATION OF PUBLIC SERVICE RETIREES, INC., on behalf of former New York City public service employees who are now Medicare-eligible Retirees,

Petitioner,

For Judgment Pursuant to CPLR Article 78

- against -

RENEE CAMPION, as Commissioner of the City of New York Office of Labor Relations, CITY OF NEW YORK OFFICE OF LABOR RELATIONS, the CITY OF NEW YORK,

Respondents.

Index No.: 158815/2021

ORAL ARGUMENT REQUESTED

PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

New York City municipal retirees – firefighters, paramedics, cops, teachers, corrections officers, sanitation workers, and other civil servants – did not dedicate their professional lives to this City in order to maximize their income potential. Nor did they choose professions that afforded them the safest or healthiest workplace. Indeed, most would have made more money – and enjoyed a much safer and healthier existence – in the private sector. They sacrificed their bank accounts and their physical well-being in order to serve the people of this City. In turn, they were promised stable and secure retirement benefits, including continued healthcare paid for by the City, for life.

That foundational promise is enshrined in N.Y.C. Administrative Code § 12-126, which requires the City to pay (up to a specified dollar cap) for any available health insurance plan, including the Medicare Supplemental plans long relied on by elderly and disabled retirees to fill the gaps in Medicare coverage.[1] It is also reflected in the collective bargaining agreements ("CBAs") governing retirees' contractual relationship with the City, which grants vested rights to continued healthcare paid for by the City. For half-a-century, the City has abided by this statutory and contractual obligation and paid for retirees' chosen Medicare Supplemental insurance.

[1] For decades, the overwhelming majority of retirees have chosen the GHI Senior Care Medicare Supplemental Plan ("GHI Senior Care").

Now, however, out of pure greed, the City plans to cease honoring its statutory and contractual obligations. Unless this Court intervenes, scores of elderly and disabled retirees living on fixed incomes will be forced into a federally funded, and materially worse, Medicare Advantage Plan ("MAP"). Indeed, if they refuse to accept the MAP, they will have to pay thousands of dollars a year—a prohibitive expense for many—to retain their longstanding health insurance and the doctors, timely care, and critical benefits that come with it. Among other flaws, the MAP has a limited provider network, imposes dangerous and unfamiliar prior authorization requirements, and inflicts severe financial liability on enrollees whose out-of-network doctors fail to obtain prior authorization or follow the gauntlet of other rules established by the insurance company.

No budget concerns justify the City's disregard for its clear statutory and contractual obligations to retirees. The City's planned overhaul of retirees' healthcare benefits is illegal and unconscionable. Accordingly, Petitioners ask this Court to enjoin it and to protect the basic healthcare rights of thousands of vulnerable retirees.

ARGUMENT

I. Legal Standards.

Article 78 of the New York Civil Practice Law and Rules ("CPLR") provides a mechanism for parties to challenge the actions or inaction of agencies and officers of state and local government. Under CPLR § 7803, a Court may determine "whether the body or officer failed to perform a duty enjoined upon it by law," and "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion."

Pursuant to CPLR § 3212(a), any party may move for summary judgment in any action after issue has been joined. The motion "shall be granted if, upon all the papers and proof submitted, the cause of action . . . shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." CPLR 3212(b).

Petitioners are entitled to judgment as a matter of law in this Article 78 proceeding. As explained below, the undisputed facts establish that Respondents' sweeping and unprecedented overhaul of retirees' healthcare benefits violates Petitioners' statutory and contractual rights by: (1) forcing them to pay health insurance premiums that, under N.Y.C. Administrative Code § 12-126 and collective bargaining agreements, the City must pay; (2) diminishing their vested healthcare benefits; and (3) providing Petitioners who are retired school district employees healthcare benefits that are inferior to those afforded to their active employee counterparts, in contravention of the Moratorium Statute.

II. The City's Refusal to Pay for Retiree Health Insurance Coverage Violates N.Y.C. Admin. Code § 12-126.

A. The Plain Text of Section 12-126 Requires that the City Pay for Health Plans that Cost Less Than the Statutory Cap.

New York City Administrative Code § 12-126(b)(1) requires the City to pay for any health insurance plan that retirees select, up to a specified dollar cap (the full cost of the HIP-HMO plan).[2] The statute states: "The city will pay the entire cost of health insurance coverage for city employees, city retirees, and their dependents, not to exceed one hundred percent of the full cost of H.I.P.-H.M.O. on a category basis."[3]

Since 1967, when this mandate was first enacted, the City has complied with its statutory obligation and fully paid for health insurance plans (including GHI Senior Care) that fell below the statutory cap. Now, however, because the City would like to shift the cost of healthcare onto the federal government through its

[2] That cap is approximately $776 per person per month. *See* Cohen Aff. Ex. B (Fiscal Year 2021 GASB 74/75 Report, prepared by the NYC Office of the Actuary, June 30, 2021) at 127.

[3] Section 12-126(b)(1) also requires the City to pay for retirees' Medicare Part B premiums. That obligation is separate from, and in addition to, the one at issue in this case. *See* Cohen Aff. Ex. A (1984 N.Y. Law No. 28) at 25-26 (explaining that Local Law 120—now codified at Section 12-126—required the City to pay for retirees' health coverage, and "***[a]lso***, for those persons enrolled in [Medicare], the city would pay" their Part B premiums (emphasis added)). Because Medicare has significant gaps in coverage, retirees need—and, pursuant to Section 12-126(b)(1), the City has always paid for—health insurance plans (such as GHI Senior Care) to fill those gaps. These are commonly referred to as "Medigap" or "Medicare Supplemental" plans.

new MAP, it is choosing to blatantly disregard this clear legislative command. Absent court intervention, the City will soon force retirees who opt out of the MAP to pay thousands of dollars a year to keep their longstanding health insurance plans – despite the fact that those plans cost below the HIP-HMO dollar cap. Not only will this violate Section 12-126(b)(1), it will also financially ruin countless elderly and disabled retired City workers living on limited pension checks.

In their procedurally improper motion to dismiss, Respondents devote all of one paragraph to Section 12-126(b)(1). NYSCEF Dkt. No. 79 ("Resps.' Br.") at 3. They concede that Section 12-126(b)(1) is controlling, and they do not dispute that the health insurance plans in which virtually all Medicare-eligible retirees are enrolled (including GHI Senior Care) cost less than the statutory cap.[4] Instead, they contend – without citation to any authority – that Section 12-126(b)(1) requires only that the City pay up to the statutory cap for one of the health insurance plans available to retirees. *Id*. (claiming that Section 12-126(b)(1) "merely guarantees a premium-free option for retiree health insurance and provides a statutory cap for how much the City should pay").[5] Therefore, according to Respondents, the City's

[4] More than 80% of Medicare-eligible retirees choose the GHI Senior Care plan. *See* Cohen Aff. Ex. B (Fiscal Year 2021 GASB 74/75 Report, prepared by the NYC Office of the Actuary, June 30, 2021) at 126.

[5] Respondents' confusion may be fueled by affirmative misrepresentations made by amicus the Municipal Labor Committee ("MLC"). In this and other cases, the MLC has argued that Section 12-126(b)(1) entitles retirees to only one free health insurance option. To support this inaccurate assertion, the MLC has misquoted the very words of the statute, claiming that Section 12-126(b)(1) merely "requir[es] the City to provide 'a fully paid choice.'" MLC Amicus Brief, *Plavin v. Grp. Health Inc.*,

refusal to continue paying for health insurance plans that cost below the statutory cap does not violate the statute – because retirees will have one premium-free option: the MAP. This argument is fatally flawed in multiple respects.

First, the language, legislative history, and purpose of the statute – along with decades of uninterrupted past practice– all make clear that Section 12-126(b)(1) requires the City to fully pay for any health insurance plan that costs below the statutory cap, not just one such plan.

The plain language of the statute is expansive and unequivocal. It states, without exception, that "the city will pay the entire cost of health insurance coverage" for retirees (along with current employees and dependents), up to the statutory cap (the cost of the HIP-HMO plan). This obligation is not limited to the payment of just one health insurance plan. Had the drafters intended such a limited obligation, they could have easily conveyed that intent by writing, for instance, that "the city will pay the entire cost for *one health insurance plan*," or "the city will offer *a free health insurance option*," or "the city will pay the entire cost of *the H.I.P.-H.M.O. plan*." They did not.

Instead, the drafters described the City's financial obligation in the broadest possible terms: "*health insurance coverage*." That term is explicitly defined in the statute to encompass ***multiple*** health insurance plans. *See* N.Y.C. Admin. Code § 12-126(a)(iv) (defining "health insurance coverage" to include "hospital-surgical-

2019 WL 8128821 at *5 (December 20, 2019) (purporting to quote Section 12-126(b)(1)). The words "a fully paid choice" appear nowhere in the statute.

medical benefits to be provided by health and hospitalization insurance ***contracts*** entered into between the city and ***companies*** providing such health and hospitalization insurance" (emphasis added)). The only limitation on the City's financial obligation – the HIP-HMO dollar cap – reinforces the breadth of that obligation. By capping the City's obligation at the current cost of the HIP-HMO plan, the logical implication is that the City must pay for that plan *and* any others (up to the dollar cap); otherwise, inclusion of the cap makes little sense.

Respondents' interpretation of 12-126 simply cannot be reconciled with the wording of 12-126(b)(1), or the statute read as a whole.

B. The Legislative History of Section 12-126 Shows Clear Intent to Cover Not *One* Plan but *Any* Plan that Costs Less Than the Statutory Cap.

Although a review of the legislative history would seem unnecessary here – given the unambiguous statutory text – that history decisively confirms that Section 12-126(b)(1) requires the City to fully pay for <u>any</u> health insurance plan that costs less than the statutory cap. And that of course includes GHI Senior Care which currently costs approximately $191 per month. Section 12-126 was originally enacted by the New York City Council through Local Law No. 120 of the Laws of 1967. The proceedings of the 1967 session repeatedly recite that the statute "**would provide that The City of New York pay for the entire cost of <u>*any*</u> health insurance plan**" that met the statutory requirements. Cohen Aff. Ex. C

(1967 N.Y. Law No. 120) at PDF pp. 6, 9 (emphasis added). This is fully consistent with Petitioners' plain language reading of the statute.

Nothing in the legislative history of Section 12-126 supports Respondents' tortured reading of the statute. Indeed, there is no mention, or even suggestion, in the legislative history that the City could satisfy its financial obligation by paying for only one of the health insurance plans available to retirees.[6] Nor would such a rule make sense given the express legislative purpose. Section 12-126 emerged out of a desire to "provide for and protect the general health and welfare" by requiring the "assumption by the City" of "premium costs" associated with a "Choice of Health Insurance Plans" for both "Active and Retired City Employees." *Id.* at PDF pp. 23-24.

The intent was to protect those who served the City – many of whom sacrificed their safety, their potential for higher earnings, and often their health – by paying for their health insurance coverage, up to the dollar cap. It was not to create loopholes through which the City could avoid financial responsibility. The City committed itself to paying up to a certain (reasonable) amount for health insurance coverage for each retiree. There would have been no reason for it to condition or limit that commitment on the retiree's choice of a specific health

[6] The irrationality of Respondents' statutory interpretation is revealed by the absurd results it would allow, if not invite. If Respondents' argument were accepted, and the City were only required to pay for one health insurance plan, the City could satisfy this obligation by agreeing to fund a plan that offered worthless benefits and a provider network consisting of a single doctor. Any argument that would permit such a preposterous result under Section 12-126 is clearly flawed.

insurance option. And no such condition is mentioned in the statute or legislative history. Indeed, given the diverse healthcare needs and personal circumstances of the large retiree population, the purpose of the statute would be most effectively served by allowing each retiree to choose, without financial penalty, the plan that was right for them.

Tellingly, when the City enacted the statute in 1967, it simultaneously provided for ***multiple*** health insurance plans to be offered to all retirees, ***all of which*** were paid for by the City (up to the dollar cap) in explicit acknowledgment of its new statutory obligation. Specifically, in conjunction with the passage of Local Law No. 120 (which was later codified at Section 12-126), the City adopted the following resolution:

> Whereas, it is the desire and intent of The City of New York to grant to **all of its retired employees** . . . **a choice of health plans** consisting of H.I.P.-Blue Cross, G.H.I.-Blue Cross and Blue Cross-Blue Shield-Major Medical (Metropolitan Life Insurance Company), . . . **and the City shall assume full payment for such health and hospital insurance**, not to exceed 100% of the full cost of H.I.P.-Blue Cross (21-day Plan) on a category basis, effective April 1, 1967.

Id. at PDF pp. 26 (emphasis added). This contemporaneous construction further eliminates any doubt that Section 12-126(b)(1) requires the City to pay for ***any and every*** health insurance plan available to retirees, up to the statutory cap. *See Kolb v. Holling*, 285 N.Y. 104, 112 (1941) (holding that the "practical construction" placed "upon a statute[] by the Legislature or by departments of State government" around

the time of the statute's enactment is "entitled to great weight" because it "evince[s] the sense in which the language was understood at the time").

C. Past Practice Confirms the City's Obligation.

The City's practice of paying for the multiple health insurance options (including GHI) that cost below the statutory cap has continued uninterrupted for a half-century. *See, e.g.*, Cohen Aff. Ex. D (Employee Health Benefits Program General Information, July 1, 1983) at 4-5 (listing the various health insurance plans (including GHI) available to retirees, and explaining that all such health insurance coverage "is paid in full by the City of New York"); Cohen Aff. Ex. B (New York City Office of the Actuary Report, June 30, 2021) at 117, 128 (noting the multiple health insurance plans (including GHI) paid for by the City, and explaining that retirees must pay for health insurance coverage only if, and to the extent, the plan they select is more expensive than the HIP-HMO plan).

This consistent, longstanding practice serves as a tacit and binding concession by the City that Section 12-126(b)(1) requires the City to pay for more than just one health insurance option. *See Kolb*, 285 N.Y. at 113 (assigning "controlling" weight to the city of Buffalo's past payment practice and requiring it to continue making payments pursuant to that practice).

Ignoring this history (and Section 12-126), the City now claims that it has carte blanche to suddenly stop paying for Supplemental plans that cost less than the statutory cap. No evidence or authority supports the City's position.

In sum, the statutory text, legislative history, public policy, past practice, and basic common sense all compel the same conclusion: in Section 12-126(b)(1), the City Council said – and intended – that the City would pay up to the statutory cap for any health insurance plan available to retirees, not just one plan. Because it is undisputed that GHI Senior Care and other health insurance plans available to retirees – and long relied on by them – cost below the cap, the City cannot now, for the first time ever, refuse to pay for those plans.

D. A Shift to Federal Funding Would Violate Section 12-126 Even if the Statute Guaranteed Payment for Only One of the Offered Plans.

Even assuming *arguendo* that Section 12-126(b)(1) did require the City to pay for only one health insurance option – despite the clear statutory text and overwhelming evidence to the contrary – the City would still be in violation of the statute. That is because the premium-free health plan it is offering – the MAP – is ***federally*** funded; the City is not paying for it (which explains the City's intense efforts to force retirees into it). In other words, what the City is actually proposing is that *the City not pay for* ***any*** *retiree healthcare plan* – either the retirees will pay the $191 premium or the federal government will pay the cost of coverage. In either case, the City avoids financial responsibility.

Indeed, as reflected in the draft contract between the City and the Alliance, with the exception of a small administrative payment in the first year ($7.50 per person per month for marketing), the City will not pay a dime for the MAP. Cohen

Aff. Ex. E (Medicare Advantage Group Agreement, Addendum A) at PDF p. 224; *see also United States v. Visiting Nurse Serv. of New York*, No. 14-CV-5739 (AJN), 2017 WL 5515860, at *2 (S.D.N.Y. Sept. 26, 2017) (noting that Medicare Advantage plans are "funded by the federal government and managed by private insurance companies"). Therefore, contrary to Respondents' contention, the MAP cannot possibly satisfy Section 12-126(b)(1)'s requirement that "[t]he ***city*** will pay the entire cost of health insurance coverage."

Nothing in the statute or the legislative history suggests that the City is relieved of its obligation to pay for retirees' healthcare by forcing them onto a plan that is paid for by someone else; and allowing that party to diminish the benefits.

III. Retirees Have a Vested Right to Their City-Funded Healthcare.

A. Retirees' Contracts and the City's SPDs Both Enshrine a Right to Choose from Among Multiple City-Funded Plans.

Respondents do not, and cannot, dispute that the retirees have contractually guaranteed health benefits.[7] Nor do they dispute that the operative contracts – the CBAs governing the retirees' former employment with the City – confer a right to choose from among ***multiple*** health plan options that are ***fully paid for*** by the

[7] Although some CBAs discuss health insurance benefits in the context of active employees, as opposed to retirees specifically, it is understood, and uncontested, that retirees are entitled to at least the same benefits. *See, e.g.*, First Amended Petition ("Pet."), Ex. J (New York City Employees' Retirement System Handbook) at 44; *cf.* Chapter 504, Part B, section 14 of the 2009 session laws (the "Moratorium Statute").

City.[8] The City itself has conceded this point in court filings. *See City of New York v. Grp. Health Inc.*, No. 06-CV-13122 (RJS) (RLE), 2008 WL 4547199 (S.D.N.Y. Oct. 10, 2008), ECF No. 1-2 (City's Complaint) ¶¶ 25, 30, 31 (City's admission that "through its collective bargaining agreements," it has paid, and is "required" to pay, for multiple health plan options, specifically those with premiums below a certain cap). For retirees on Medicare, City-funded health insurance has always included a Medicare Supplemental plan such as GHI Senior Care, which fills Medicare's significant gaps in health coverage.

Assuming *arguendo* that there is any ambiguity regarding retirees' contractually guaranteed health benefits – and there is not – extrinsic evidence clarifies that guarantee. The most comprehensive health benefits document provided to all City employees and retirees is the Summary Plan Description ("SPD"). The SPD is written and distributed by the City, and in its 80-plus pages it details how employees and retirees can take advantage of the health benefits to which they are entitled.

[8] *See, e.g.*, Pet., Ex. F at 23 (requiring DOE to offer "a choice of health and hospital insurance coverage" from among certain plans and "to pay the full cost of such coverage"); *id.*, Ex. I at 7 (requiring the Board of Education to offer "a choice of health and hospital insurance coverage" from among certain plans and "to pay the full cost of such coverage"); *id.*, Ex. G at 12 (requiring "[t]he City [to] continue to provide a fully paid choice of health and hospitalization insurance plans," and granting retirees "the option of changing their previous choice of health plans"); *id.*, Ex. B at 83, 160 (guaranteeing retirees City-funded health insurance coverage and a "choice of Health Plans"); *id.*, Ex. E at 13 (guaranteeing City-funded health insurance coverage to employees and retirees).

The SPDs all clearly state multiple times that retirees are guaranteed a choice of multiple health plans paid for by the City. And when the cost of a particular plan exceeds the HIP-HMO cap, the employee or retiree pays for the difference. *See* Pet., Ex. A at 7, 17, 27; *id.*, Ex. C at 4, 8, 16 (stating that "[t]here is no cost" for health insurance coverage "under some of the health plans" offered by the City). Moreover, the SPDs repeatedly explain that retirees are eligible for health insurance benefits based on the "City policy in place at the time [they] retire," and are entitled to the "benefits applicable" to them "at that time." Pet., Ex. A at 15; *id.*, Ex. C at 14.

B. Past Practice Confirms that These are Vested Benefits.

Decades of uninterrupted past practice confirm the same. Every Petitioner and current retiree had, when they retired, a choice of a Medicare Supplemental plan – including GHI Senior Care – fully paid for by the City. Pet. ¶¶ 9, 184.[9] Over the years, countless union and City human resource representatives have confirmed

[9] *Cf.* Cohen Aff. Ex. D (Employee Health Benefits Program General Information, July 1, 1983) at 4-5 (listing the various health insurance plans (including GHI) available to retirees, and explaining that all such health insurance coverage "is paid in full by the City of New York"); Cohen Aff. Ex. F (United Federation of Teachers Pension Handbook, 2004) at 55 (noting that basic health insurance under HIP, GHI, and any "of the other plans available" are "cost free."); *City of New York v. Grp. Health Inc.*, No. 06-CV-13122 (S.D.N.Y. Nov. 13, 2006), ECF No. 1 (City's complaint) ¶¶ 24-31 (explaining the City's decades-long history of paying for multiple health insurance options, including GHI); Cohen Aff. Ex. B (New York City Office of the Actuary Report, June 30, 2021) at 117, 128 (noting the multiple health insurance plans (including GHI) paid for by the City).

for the retirees what the governing CBAs and SPDs express: that they are entitled to the health insurance benefits in place when they retired.[10]

That choice, and the level of benefits provided, has continued unabated for the entire period of their retirement – which spans decades for many retirees – just as the CBAs, SPDs, and union and HR representatives promised. Respondents do not contest this past practice.

Although consideration of past practice is unnecessary here given the unambiguous healthcare rights accorded in the operative CBAs, that undisputed past practice is conclusive evidence of those rights. *See, e.g.*, *Chenango Forks Cent. Sch. Dist. V. New York State Pub. Emp. Rels. Bd.*, 21 N.Y.3d 255, 263 (2013) (noting that a "binding past practice" is established where "the practice was unequivocal and was continued uninterrupted for a period of time sufficient under the circumstances to create a reasonable expectation" that the practice would continue); *Inc. Vill. Of Hempstead v. Pub. Emp. Rels. Bd.*, 137 A.D.2d 378. 383 (3d Dep't 1988) ("[S]ubstantive rights may arise not only through collective negotiations, but also through consistently followed past practices."); *Myers v. City of Schenectady*, 244 A.D.2d 845, 847 (3d Dep't 1997) (holding that city's "19-year practice of continuing to provide fully paid health insurance coverage to plaintiffs' class, even after the expiration of the various collective bargaining agreements," constituted "very substantial evidence" that retirees had right to those benefits "for the entire period

[10] *See, e.g.*, affidavits of Petitioners Flanzraich, Waitzman, Woolverton, Ferington, Lasky, and Lipman.

of their retirement"). Respondents have not addressed, much less disputed, this well-settled law.

In sum, under the plain language of the CBAs governing the retirees' contractual relationship with the City – as confirmed by overwhelming and undisputed extrinsic evidence – the retirees are guaranteed a certain level of healthcare benefits, including the right to choose from among multiple insurance plans (one of which is GHI Senior Care) that are fully funded by the City. The City is violating that right by suddenly refusing to offer the retirees ***even <u>one</u> such plan***. For the first time ever, the City is forcing its elderly and disabled retirees to either (1) pay thousands of dollars a year (plus newly imposed copays) to keep their longstanding Medicare Supplemental plan and, by extension, the doctors and benefits that come with it, or (2) be automatically enrolled in the MAP. And the MAP is a ***federally*** funded (not City-funded) plan that provides benefits drastically inferior to those the retirees have always received[11] and is not even guaranteed to remain premium-free.[12]

[11] Among other diminutions, the MAP establishes a limited provider network that excludes hundreds and perhaps thousands of retirees' doctors, imposes dangerous prior authorization requirements, inflicts severe financial liability on enrollees whose out-of-network doctors fail to obtain prior authorization or follow all of the Alliance's myriad rules, and requires unprecedented co-pays. *See* Cohen Aff. Ex. G (2022 Evidence of Coverage) beginning at 2, *passim*.

[12] *See* Cohen Aff. Ex. G (2022 Evidence of Coverage) at 59, § 4.2 (explaining that premiums for MAP enrollees "[g]enerally," but not necessarily, "won't change during the benefit year" and that there may be "changes for the next benefit year in your plan premium").

C. The City is Prohibited from Overhauling Retirees' Vested Benefits without their Consent.

Respondents brush off their blatant violation of retirees' contractual rights by claiming that those rights are subject to whatever modifications the City and the unions happen to negotiate. Resps.' Br. at 4. There are several fatal flaws to this argument.

First, Respondents do not, and cannot, point to anything in the operative CBAs that gives the City the power to modify – much less rescind – retirees' right to choose from among multiple City-funded healthcare plans with benefits equivalent to those provided upon their retirement. That is because no such writing or power exists. Nor has any such modification occurred, as Respondents concede. Resps.' Br. at 5 (acknowledging the City's "failure to make changes . . . in the past" and explaining that "at no point had the City argued that they intended to retroactively change existing CBAs nor have they done so").[13] Yet the City is attempting to modify and rescind benefits conveyed by statute and contract, but without any legal authority to do so.

Second, although unions are, of course, free to negotiate modifications to their contractual arrangements with the City, they are not free to do so on behalf of those

[13] As explained in the Petition, a minority of CBAs incorporated certain memoranda of understanding between the City and the MLC which agreed to study, discuss, and recommend potential healthcare cost-saving options. However, none of the CBAs committed to any specific changes, let alone implementation of a Medicare Advantage Plan or elimination of existing healthcare benefits. Pet. ¶¶ 32-33, 190-91.

they no longer represent. It is black-letter law that unions do not represent retirees. *Kolbe v. Tibbetts*, 22 N.Y.3d 344, 354 (2013) ("once employees retire, they are no longer represented by the union in collective bargaining negotiations").[14] The CBAs themselves make this fact abundantly clear. *See, e.g.*, Pet., Ex. F at 1 (stating that the collective bargaining unit represents only specified "employees"); *id.*, Ex. G at 1 (same); *id.*, Ex. I at 1-2 (same); *id.*, Ex. B at 1-5 (explaining that the collective bargaining unit was elected by active union members and that it represents only specified employees); *id.*, Ex. E at 1 (stating that the collective bargaining agreements only "cover the employees represented by the Unions"); *see DeRosa v. Dyster*, 90 A.D.3d 1470, 1471–72 (4th Dep't 2011) (holding that CBA's reference to "employees" does not encompass retirees).[15]

Thus, any agreement the unions might reach with the City to diminish healthcare benefits will bind only active employees and future retirees; it will not retroactively strip existing retirees of their vested benefits, since they no longer have a seat at the negotiating table.[16]

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[14] *See also Agor v. Board of Educ., Northeastern Clinton Cent. Sch. Dist.*, 115 A.D.3d 1047, 1049 (3d Dep't 2014) ("employees are no longer represented by the union upon retirement"); *Della Rocco v. City of Schenectady*, 252 A.D.2d 82, 84 (3d Dep't 1998) ("once employees retire, they are no longer represented by the union").

[15] Accordingly, Respondents are not helped by the CBA provisions they cite reiterating the basic contract law principle that the parties can renegotiate their agreements. Resps.' Br. at 4. As explained above, if the CBAs at issue in this case are renegotiated (which they have not been), retirees will not be parties to those renegotiated agreements.

[16] Where, as here, healthcare benefits are involved, it is especially important that retirees not be bound by agreements reached by active employees, as those two groups generally have very different healthcare needs and incentives. Active

Third, "[r]etiree benefits carry with them an inference that they continue . . . and may not be diminished without [retirees'] consent." *Dibattista v. Cty. of Westchester*, 35 Misc. 3d 1205(A), 2008 WL 8783343, *1 (Sup. Ct. N.Y. Cty. July 29, 2008) (cleaned up). Retirees have never consented to the discontinuance of their healthcare benefits, and Respondents have not, and cannot, overcome the inference that those benefits continue throughout retirement. Indeed, the undisputed facts in this case strongly support such an inference. Most notably:

- The CBAs at issue do not contain any durational limit on retiree benefits. *See id*. at *1 ("Where, as here, there is no durational limit in the immediate prior collective bargaining agreements as to retiree health insurance benefits it is unlikely that such benefits, which are typically understood as a form of delayed compensation for past services, would be left to the contingencies of future negotiations."); *Agor*, 115 A.D.3d at 1049 ("[G]iven that employees are no longer represented by the union upon retirement and, therefore, are not involved in subsequent negotiations, a construction that would limit the right to coverage to the duration of the agreement could potentially render the benefit inconsequential, as the plaintiffs no longer would be

employees are generally younger and healthier than retirees, and they—unlike retirees—receive salaries and other employment benefits that are subject to negotiation. Thus, the collective bargaining priorities of active employees do not reflect those of retirees.

in a position to negotiate with the District over future benefits." (cleaned up)).

- Once they retired, retirees no longer had any voting rights or representation in the collective bargaining process.[17] NYSCEF Dkt. No. 91 (Affidavit of Marianne Pizzitola); Affidavits of Michael Brocoum and Scott Fried. *See Evans v. Deposit Cent. Sch. Dist.*, 183 A.D.3d 1081, 1083 (3d Dep't 2020) (explaining that, when considering whether retirees' healthcare benefits were "vested" (meaning not subject to alteration without retirees' consent), the court "has put great weight on whether retirees had voting rights because, if there were no such rights, it is logical to assume from the absence of any such durational language of how long retirees will receive benefits that the bargaining unit intended to insulate retirees from losing important insurance rights during subsequent negotiations" (cleaned up)).

- Over the past half-century, retirees have had access to at least the same healthcare benefits they received when they retired. *See id.* (holding that "rights are considered vested" if "there was established precedent of such practice").

[17] Some unions encourage retirees to continue paying voluntary dues – in return for getting calendars, social invitations, and PBA cards to give to friends. The United Federation of Teachers has a retiree council. But retirees do not get to vote on union contracts.

Lastly, if, as Respondents contend, retirees' healthcare benefits could change at any time during their retirement without their approval, the SPDs would be expected to mention that critical fact. Not only is there no such mention, the SPDs affirmatively declare the opposite: they state that retirees are entitled to the "benefits applicable" to them "at th[e] time [of their retirement]." Pet., Ex. A at 15; *id.*, Ex. C at 14.

Respondents point to page 17 of the 2016 SPD as supposed proof that retiree benefits can change. Resps.' Br. at 3 (citing NYSCEF Dkt. Nos. 33 at 17). However, Respondents fail to disclose that the changes discussed on that page relate to retirees adding and dropping dependents, and to ***the right of retirees to voluntarily transfer from one health plan option to another***, which only proves Petitioners' point. Indeed, as Petitioners assert, and the CBAs make clear, the ***only*** permissible changes to retirees' vested health insurance benefits are those that the ***retirees*** themselves choose from among the City-funded health plan options they are contractually guaranteed.

IV. The City's Planned Healthcare Overhaul Also Violates the Moratorium Statute.

A. The Moratorium Statute Bars the City from Reducing Retiree Benefits to a Level Below Those of Active Employees.

The health benefits of Petitioners who retired from school districts are subject to additional protections under the Retiree Health Insurance Moratorium

Act, Chapter 504, Part B, section 14 of the 2009 session laws (the "Moratorium Statute").[18] That statute provides that:

> [A] school district . . . shall be prohibited from diminishing the health insurance benefits provided to retirees and their dependents or the contributions such . . . district makes for such health insurance coverage below the level of such benefits or contributions made on behalf of such retirees and their dependents by such district . . . unless a corresponding diminution of benefits or contributions is effected from the present level during this period by such district . . . from the corresponding group of active employees for such retirees.

The purpose of the Moratorium Statute is to protect the rights of "retirees [who] are not represented in the collective bargaining process, [and] are powerless to stop unilateral depreciation or even elimination of health insurance benefits once the contract under which they retired has expired." *Bryant v. Bd. of Educ.*, 21 A.D.3d 1134, 1135 (3d Dep't 2005) (quoting Assembly Mem in Support, 1996 McKinney's Session Laws of NY, at 2049-50)).

To accomplish this purpose, the "moratorium statute sets a minimum baseline or floor for retiree health benefits which is measured by the health insurance benefits received by active employees. In other words, the moratorium statute does not permit an employer to whom the statute applies to provide retirees with lesser health insurance benefits than active employees." *Bailenson v. Bd. of Educ. of Chappaqua Cent. Sch. Dist.*, 194 A.D.3d 1039, 1040 (2d Dep't), *leave to appeal denied*, 37 N.Y.3d 914 (2021) (cleaned up). It follows that "a school district

[18] This group includes Petitioners Phyllis Carol Lipman, Linda Woolverton, and dozens of retirees who have submitted affidavits in this case.

may not diminish retirees' health insurance benefits unless it makes a corresponding diminution in the health insurance benefits or contributions of active employees." *Id*.

This protection is separate from and in addition to retirees' rights under Section 12-126 and the CBAs. As the Court of Appeals has explained, the Moratorium Statute prescribed "a bottom floor, beneath which school districts and certain boards were forbidden to go in diminishing benefits." *Kolbe v. Tibbetts*, 22 N.Y.3d 344, 358 (2013); *see also Anderson v. Niagara Falls City Sch. Dist.*, 125 A.D.3d 1407, 1408 (4th Dep't 2015) ("[R]espondents contend that the holding of the Court of Appeals in *Kolbe* precludes a cause of action under the moratorium statute where the disputed benefit stems from a CBA or other contract. We reject that contention.").

B. The City's Planned Reduction of Retiree Benefits Violates the Moratorium Statute.

Respondents' plan to force retirees to accept inferior benefits is barred by the Moratorium Statute because no corresponding diminution will be made to active employee benefits.

The most glaring difference between how active employees and retirees will be treated under the City's planned MAP implementation is that only the former will receive what they are owed under Section 12-126. Active employees will continue to receive the statutory subsidy towards their choice of health insurance, resulting in multiple healthcare options fully paid for by the City. Retirees, by

contrast, will soon have to pay $191.57 per person per month to keep their Senior Care plan, even though the applicable premium is below the HIP-HMO dollar cap.

There is also a difference in co-pays. Under the free GHI plan available to active employees (GHI-CBP, which is the most popular option), individuals who go to a preferred (in-network) specialist have no co-pays (Pet. Ex. J, p. 2). Under the MAP, retirees have a $15 co-pay for all specialists – even MAP-in-network providers (Pet. Ex. K, p. 19). Respondents might think a $15 co-pay is insignificant. But to a senior citizen on a small, fixed pension who typically might see multiple specialists, that is a significant difference in coverage.

A third difference between active employee benefits and retiree benefits involves PICA treatments. Such treatments, which involve injectables like insulin, are covered for active employees (Pet. Ex. A, pp. 24, 61-63), but not for retirees under the MAP (Pet. Ex. K).

These important differences result in diminished benefits to retirees as compared with active employees—precisely the outcome the Moratorium Statute exists to prevent. Accordingly, Respondents' planned overhaul of retirees' health benefits violates the Moratorium Statute and should be permanently enjoined.

CONCLUSION

The City's attempt to force a Medicare Advantage Plan on retirees – by withholding the subsidy guaranteed by both statute and contract – is a shameless and illegal power play. There is nothing in law, in any contract, or in any past

practice that allows the City to do this. And in fact, the law (Section 12-126), multiple CBAs, and decades of consistent past practice say it cannot.

Perhaps it was because the City knew that no one represented the interests of retirees – certainly not their former unions nor the MLC – that they thought they could get away with it. Perhaps it was the lure of hundreds of millions of dollars flowing from the federal government – predicated on the City getting retirees off a Supplemental plan and onto an Advantage plan – that clouded Respondents' ethical compass. Perhaps because the City knew that what they were portraying as "better than Senior Care" was in fact incomplete, inadequate, and insensitive to retirees' needs and fears that they felt compelled to hold a sword over retirees' heads – in the form of a $191.57 per month premium.

The City has grossly overstepped its authority. They have no right to deny retirees what is guaranteed to them by statute, by contract, and by decades of uninterrupted past practice. The City acted in an unlawful, arbitrary, and capricious manner and exceeded its authority. Allowing the City plan to be implemented would cause irreparable harm to hundreds of thousands of senior citizens, disabled retirees, and the widows and widowers whose spouses gave their lives in service to this City.

The Court should grant Petitioners' Article 78 Petition, and thereby: require the City to continue paying for retirees' health insurance (up to the Section 12-126 statutory cap); permanently halt the City's attempt to force a Medicare Advantage Plan on retirees; ensure that the City continues to offer retires either the Senior

Care plan or an equivalent Supplemental plan; and enjoin the City from imposing a $15 co-pay in the Senior Care plan.

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