Index No. 158815/2021

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,

Petitioners.

For a 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, and the CITY OF NEW YORK

Respondents.

RESPONDENTS' MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR CROSS-MOTION TO DISMISS THE AMENDED PETITION

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PRELIMINARY STATEMENT

Respondents, by their attorney Georgia M. Pestana, Corporation Counsel of the City of New York, respectfully submit this memorandum of law in further support of their cross-motion to dismiss the Petition. It should be dismissed because (1) the imposed insurance premium for those enrolled in Senior Care is lawful under N.Y.C. Administrative Code § 12-126 ("§12-126"); (2) the Medicare Advantage Plus Plan ("MAPP") does not diminish any vested healthcare benefits; and (3) MAPP is in accordance with the Moratorium Statue.

On September 26, 2021, Petitioners filed their Petition seeking, among other things, to set aside the City's implementation of the proposed MAPP and enjoin retirees from paying a premium for GHI-Senior Care. Pet., ¶¶231-32. On October 18, 2021, Respondents filed a cross-motion to dismiss the Amended Petition, which Petitioners had ample time to respond. On January 30, 2022, Petitioners served a "summary judgment motion." NYSCEF Nos. 185-97. As stated in Respondents letter to this Court dated February 1, 2022, NYSCEF No. 198, Respondents' construe this motion as an opposition to Petitioners' cross-motion to dismiss ("Opposition").

ARGUMENT

POINT I

MAPP FAILS TO VIOLATE § 12-126

A. A Plain Reading of The Statue Fails to Suggest the City Has an Obligation to Incur Costs for All Healthcare Plans

MAPP does not violate §12-126. §12-126 reads: "[t]he 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." §12-126 guarantees a premium-free option for retiree health insurance and provides a statutory cap for how much the City must pay. Admin. Code §12-126(b). A plain reading of §12-126 reveals that although the City has an obligation to incur full costs of at least one plan, it is not obligated to bear the costs of every plan available to retirees and employees, or to maintain an array of cost-free plans.

Petitioners misconstrue §12-126. Petitioners assert that the City must continue to fully fund all health insurance plans that fall below a statutory cap, including GHI-Senior Care. Pets.' Mem., at pp. 7, 9. In support of their argument Petitioners refer to language defining "health insurance coverage." Admin. Code §12-126(a)(iv). Nothing in this definitional provision suggests an inherent obligation to incur the costs for all offered plans. The generic use of plural references to "contracts" and "companies" in the definition does not point to a requirement of plans; multiple contracts could easily be required for a single plan. (Indeed, the City's MAAP involves a combination of insurance entities that could require multiple contracts.) Canons of statutory construction highlight this principle: section 35 of the General Construction Law states that words "in the singular number include the plural, and in the plural number include the singular." *People v. Alston*, 88 N.Y.2d 519, 526 (1996) (construing a plural usage). It is notable that the history trumpeted by Petitioners, showing that the City was offering multiple plans in the

1960s, was not translated into a mandate when the predecessor to §12-126 was added in 1967. The more flexible text of the law permitted the City to respond to a changing health insurance environment. *Kuzmich v. 50 Murray St. Acquisition LLC*, 34 N.Y.3d 84, 93 (2019) ("If the Legislature intended to import the deregulation provisions of the RSL, it easily could have so stated."). City Council could have required a selection of free plans in clear terms, but it did not do so. Rather, it required the City to pay the cost of health insurance coverage pursuant to contractual arrangements negotiated by the City, and imposed a cap, tied to the cost of a particular plan, to protect the City's public fisc.

The City has not "force[d]" anyone into a plan. Pets.' Mem., at p. 8. Throughout, the City has provided retirees with the option to opt-out of MAPP, which is a substantially similar, if not better plan, or to remain in their plan. Retirees have the option of electing to participate in GHI-Senior Care, which will have a premium cost, or choosing the MAPP. Consistent the law, this is a cost-free option below the cap.

B. Petitioners' Misinterpret The Legislative History of § 12-126

Petitioners cite legislative history in support, but, omit relevant language. Pets.' Ex. C, at p. 6. The relevant text reads: NYC "shall provide and pay for the entire cost of any basic health insurance plan . . . [and] [t]his insurance plan shall be administrated by the director of personnel of" NYC. Petitioners' omission of the modifying word "basic," which precedes "health insurance plan," distorts the statutory meaning. The word "basic" reflects the idea that the City need only fully fund one premium free basic health plan, and may offer other employee premiums, and health plans. *Id.* Instead, Petitioners highlight the word "any" in another attempt to imply that the City has an obligation to incur the costs for any available plan.

Petitioners state that absent any instruction in the legislative history, the City cannot purport that their financial obligation pertains to one plan. Pets.' Mem., at p. 11. Absent any clear instruction, Petitioners cannot speculate as the drafters' intent, let alone, craft their own language. *Id.*; *see also Patrolmen's Benevolent Assn. of City of N.Y.*, 2011 N.Y. Slip Op 32996(U), *4 (Sup Ct, N.Y. Cnty 2011) (interpretation of §12-126 turns on the need "to effectuate the intent of the Legislature").

Lastly, Respondents do not dispute that cumulative, contemporaneous, legislative statements can hold significant weight in determining legislative intent. Pets.' Mem., at pp. 12-13 (citing *Kolb v. Holling*, 285 N.Y. 104, 112 (1941). Instead, Respondents maintain that Petitioners' interpretation is inaccurate and, misleading, and improperly gives short shrift to the plain text, and the principle that statutes should be reasonably construed to provide for future as well as present circumstances. *People v. Holz*, 35 N.Y.3d 55, 59 (2020) (giving effect to the plain meaning of words used); *Matter of Comptroller of the City of N.Y. v. Mayor of the City of N.Y.*, 7 N.Y.3d 256, 266 (2006) (It should not be assumed that legislators "intended to confine the scope of their legislation to the present, and to exclude all consideration for the developments of the future.") (quotations omitted).

C. Past-Practice Does Not Create An Obligation to Pay for Multiple Healthcare Plans

Petitioners argue that because the City incurred the cost for GHI-Senior Care in the past, it cannot stop doing so because that would be inconsistent with past-practice. "Past-practice" refers to instances where the courts look to an employer's past-practices in the absence of clear guidelines or an existing collective bargaining agreement ("CBA"), to resolve ambiguity. *Bayrock Spring St., LLC v. 246 Spring St. (Soho NYC) Mezz, LLC*, 2019 N.Y. Slip Op 30203(U), *11 (Sup Ct, N.Y. Cnty 2019). To establish the next course of action, past-practice may suggest a set

precedent for the employer. It may also create a duty to bargain over changes to the practice with representatives of unionized employees, *Matter of Chenango Forks Central School District v. N.Y.S. P.E.R.B.*, 21 N.Y.3d 255 (2013), but Petitioners emphasize that unions do not directly represent them. They have no bargaining rights *per se*; rather, they must assert transgressed legally vested rights, a situation that is absent here. Thus, Petitioners past-practice argument is, largely, inapplicable.

Assuming Petitioners' argument applies, the City continues to adhere to its past-practice regarding a premium-free plan for retirees, and offering other plans that require retiree premiums. The fact that retirees may choose to continue to participate in GHI-Senior Care and incur a monthly cost does not suggest any deviation from past-practice. Pets.' Mem., at p. 13. Nor have Petitioners provided any evidence to support the statement that the City will no longer fund multiple healthcare plans. Even Petitioners' annexed documents fail to support their mischaracterization. For example, Petitioners Exhibit B explains available plans and varying monthly costs to retirees. Pets.' Ex. B, at pp. 117, 128. Similarly, while the Employee Health Benefits Program General Information dated July 1, 1983 lists several plans that do not shift cost for basic medical and hospital coverage to the employee, the document simply suggests that the City incurred costs for multiple plans, not that the City has an obligation to do so.

Only those that elect to opt-out of the substantially similar, if not more beneficial, MAPP, and elect to choose GHI-Senior Care will incur a premium cost. The City has no obligation to pay the full costs of all existing healthcare plans, as Petitioners falsely claim. Simply because the cost of GHI-Senior Care premiums may fall below the statutory cap does not shift the obligation to the City. Petitioners fail to demonstrate how the statutory language obligates the City to provide multiple plans. Further, Petitioners have failed to articulate a clear limiting principle

that applies to their view of how to construe §12-126 and how the City is bound by its past practices. Petitioners would lead the court away from the idea of rights rooted in statute or binding commitments, and into uncharted territory of health insurance rights as a judicial construct out of whole cloth.

D. Partial Federal Funding Fails to Violate § 12-126

In a final effort, Petitioners argue that because the City receives partial Federal funding, Respondents violated §12-126. Essentially, Petitioners argue that any time a statute requires "the City" to fund, a program, the funds used to make a payment can only originate from City imposed taxes or fees. According to Petitioners, for the City to accept and use Federal or State funds means that the City is in violation of the requirement that "the City" make the payment. This is absurd.

This is both impractical and ignores the fact that the Federal government allocates certain budgetary spending to states. Plaintiff cites to *United States ex rel. Lacey v. Visiting Nurse Serv. Of N.Y.*, No. 14-cv-5739 (AJN), 2017 U.S. Dist. LEXIS 159378, at *5-6 (S.D.N.Y. Sep. 26, 2017) to state that Medicare Advantage plans are federally funded. Pets.' Mem., at p. 15. Even so, this argument is fundamentally flawed. It ignores the role that the Federal and State government have assumed in assisting municipalities in providing services not just limited to healthcare. The implication of this argument that if the Federal government offers the City a health insurance program for its employees or retirees at little or no cost to the City, such a program cannot satisfy §12-126—would lead to an absurd result in which the City is forced to fully subsidize an inferior plan that at the expense of taxpayers and public services. *People of the State of N,Y, ex rel. McCurdy v. Warden, Westchester Co. Correctional Facility*, 36 N.Y.3d 251, 262-263 (2020) (rejecting construction of a statute that would lead to "absurd results"). The phrase "entire cost"

refers to any remaining cost that must be paid by the City to avoid employee premiums, and is not a requirement to forego valuable benefits offered by outside parties.

POINT II

MAPP DOES NOT DIMINISH ANY EXISTING HEALTHCARE BENEFITS

A. NYC Retiree Contracts and the City's Summary Plan Description Do Not Ensure a Right to Choose from Multiple City-Funded Plans

The City provides a cost free healthcare plan and multiple other plan options, which is reflected in the statute and in various CBAs. Nothing, requires that all the healthcare plan options be free to employees or retirees. Petitioners nonetheless assert that all plans must be free of charge. Pets.' Mem., at pp. 15-16. In support, Petitioners cite to the Complaint in *City of New York v. Grp. Health Inc.*, No. 06-cv-13122 (RJS) (RLE), 2008 U.S. Dist. LEXIS 95055 (S.D.N.Y. Nov. 21, 2008) to suggest that the City has an obligation to pay for multiple plans. Petitioners, again, misconstrue the language.

The language in ¶ 25 of the *Grp. Health Inc.* Complaint reads: "The overwhelming enrollment preference is due to the fact that the HIP-HMO plan and the GHI-CBP plan are the only generally available ones whose cost is paid in fully by the employer without any payroll deduction." Compl., ECF Dkt. No. 1, ¶ 25. Nowhere does the City, "admit" it shall pay for any and all plans. Nor does this position appear in Petitioners cited other paragraphs (30 & 31). Rather, the City states that its liability for an existing plan will not exceed the HIP-HMO statutory cap. *Id.* ¶¶30-31. Petitioners also omit that, in those same paragraphs, the City stated that in the past, the City and the MLC "agreed to adjust the design of the GHI-CBP plan to reduce the benefits or increase the co-pays," effectively stating this has been done and is rooted in a legal basis. *Id.* ¶ 31.

Petitioners reference several exhibits which point to CBAs requiring, in sum, that the City or the DOE offer a free healthcare plan. Pets.' Mem., at p. 16, n. 8. Respondents do not dispute this contention and indeed, the City continues to offer, NYC employees and retirees, a premium free healthcare option: (MAPP, with the Court's approval.)

B. "Past-Practice" Does Not Require Retirees Access to the Same Benefits At The Time They Retired

Petitioners argue that the CBAs annexed to the Petition ensure that retirees receive the same health insurance benefits at the date of retirement. Pets.' Mem., at pp. 17-18, 20-22 This is incorrect and unfeasible. Petitioners cite a litany of cases, none of which support their position. Rather, these cases reflect the position that upon expiration of a CBA, until a new CBA is adopted, the prior agreements will remain in effect and the employer may not deviate. Petitioners' citation to *Chenango Forks Cent. Sch. Dist. v. New York State Pub. Empl. Rels. Bd.*, 21 N.Y.3d 255, 263 (2013) is inapposite. There, a school board, absent a new CBA, attempted to discontinue the existing, negotiated, practice of reimbursing Medicare-Part B premiums due to costs. *Id.* at p. 260. Here, the City continues to provide retirees with a free healthcare option, and has made no commitment to provide multiple options from which to choose. Further, the MAPP is the result of extension negotiations between the Municipal Labor Committee ("MLC") and the City. MAPP, being the product of bargaining between the City and the MLC, is consistent with the Collective Bargaining Law. "[W]hen such a past practice is shown to exist, the employer is not free to discontinue it without prior negotiation." *Inc. Vill. Of Hempstead v. Pub. Emp. Rels. Bd.*, 137 A.D.2d 378, 383 (3d Dep't 1988). Here, there has been negotiation, thereby, making the MAPP lawful.

Petitioners' citation to *Myers v. City of Schenectady*, 244 A.D.2d 845, 847 (3d Dep't 1997) is misplaced. There, the court decided that the City of Schenectady cannot decide to

reimburse fifty percent of the Medicare-Part B reimbursement costs for retirees. *Id.* at p. 846. Here, nothing has been done unilaterally, it is the product of negotiation.

Thus, the City has not unilaterally changed a benefit conferred by contract nor discontinued the option of a premium free healthcare plan. Consequently, the Petition must be dismissed.

C. The City is Not Prohibited from Altering Retirees Vested Benefits Without Their Consent

Petitioners' claim that the City cannot negotiate with unions, and due to those negotiations, modify benefits is unsupported. Petitioners' position is that, similar to the situation of a prehistoric insect preserved in amber, whatever benefits existed at the time a represented City employee retirees, exist forever for that retiree, regardless of subsequent negotiations between the City and union representatives. Petitioners assert that the unions no longer represent retirees and thus, cannot renegotiate benefits afforded under an existing CBA when, the now, retiree was an active employee. Simultaneously, Petitioners assert that benefits that increased via subsequent CBAs can accrue to their benefit. This is meritless.

The unions and the City have the ability to negotiate modifications to CBAs. *Kolbe v. Tibbetts*, 22 N.Y.3d 344, 356, n.3 (2013) ("[I]n those cases that the parties contemplated future modifications to health-coverage—due either to the inclusion of language suggesting that the employers retained the right to make alternations . . . understanding that reasonable modifications to benefits were permissible." (internal citations omitted)). Indeed, Petitioners concede, the unions are "free to negotiate modifications to their contractual agreements with the City." Pets.' Mem., at p. 20. Here, the MLC negotiated with the City. The annexed CBAs, reflect that parties may negotiate contractual obligations and change certain aspects of healthcare plans. The history of negotiated changes to benefits for both employees and retirees militates against any idea that

benefits somehow legally vest at a certain time, without the possibility of future negotiated modifications.

Petitioners' citation to *DiBattista v. Cty. Of Westchester*, 35 Misc. 3d 1205(A) (Sup. Ct, Westchester Cnty 2008) is misplaced. *DiBattista* stands for the proposition that a CBA shall not diminish the group of retired persons' benefits absent their consent where such benefits are deemed to have vested. *Id.* Here, as demonstrated in the following Point of Law, the MAPP does not results in any diminished vested benefits. *DiBattista* predates appellate caselaw that emphasizes that relevant agreements set forth benefits that were intended to convey vested rights. *Village of Old Brookville v. Village of Muttontown*, 179 A.D.3d 972 (2d Dep't 2020) (long-term vested rights could not be inferred from CBA). Similarly, contrary to Petitioners' implication, *Evans v. Deposit Cent. Sch. Dist.*, 183 A.D.3d 108 (3rd Dep't 2020) does not address whether the union and employer can negotiate modifications to plans previously created by a CBA. *Evans* states that such earlier negotiated plans continue at the CBA's termination until an agreement upon a new agreement has been negotiated, if the circumstances and text support a finding that rights have vested. Regardless, Petitioners point to no language in agreements similar to the particularized commitment in *Evans* to "Retired employees (future and those who have been covered in the past)." *Id.* at 1084.[1]

Petitioners' citation to the Municipal Coalition CBA, NYSCEF No. 35, at p. 17, concerning "the right of retirees to voluntarily transfer from one health plan option to another," is misplaced. Pets.' Mem., at p. 24. Respondents do not dispute that during the applicable transfer period, New York City retirees may transfer to another eligible plan. What Petitioners ignore is

[1] The Second Circuit in *Donohue v. Cuomo*, 980 F.3d 53 (2d Cir. 2020) certified questions for the NY Court of Appeals ("COA") concerning circumstances which collective CBAS may create vested rights for retirees, and the COA agreed to decide these questions. 36 N.Y.3d 935 (2020).

that the language explicitly references the ability to switch to benefits for which they are eligible. New York City retirees still have the transfer option and Respondents have not stated otherwise. Contrary to Petitioners' argument, the Summary Plan Description ("SPD") lacks any language even suggesting that only retirees themselves may make such change. SPD, NYSCEF Dkt No. 33, at p. 17. Likewise, Petitioners argue that without language in the SPD that the City may alter retiree benefits, that they may not do so. Pets.' Mem., at p. 24. The party asserting a vested benefit must provide direct evidence, rather than simply asserting that silence conferred the benefit.

POINT III

MAPP FAILS TO VIOLATE THE MORATORIUM STATUTE

MAPP does not violate "the moratorium statute." The statute's purpose is to "protect[ ] retirees by in effect making them part of the collective bargaining process. [It] does not, however, prevent school districts from taking cost-cutting measures, so long as these apply equally to active employees and retirees." Senate Mem. in Support, 2003 McKinney's Session Laws of N.Y., at 1624. The parties agree that the statute ensures that an employer may not diminish retirees' benefits absent a diminution in value to active employees' benefits. The statute is not violated, however, if there is a modification which renders comparable benefits to by active and retirees. *Matter of Anderson v. Niagara Falls City School District*, 125 A.D.3d 1407, 1408-09 (4th Dep't), *lv. den.*, 25 N.Y.3d 908 (2015).

As stated in *Bryant v. Bd. of Educ.*, "[t]he statutory moratorium does not, however, require that the exact same benefit be taken from both groups (retirees and active employees), but only that there be a "corresponding diminution of benefits or contributions . . . from the present level . . . from the corresponding group of active employees." 4 Misc. 3d 423, 425 (Sup Ct, Broome

Cnty 2004) *reversed on other grounds*, 21 A.D.3d 1134, 1137 (3d Dep't 2005)[2](quotations omitted). Although Petitioners cite to purported distinctions between employee and retiree benefits, they fail to show how these differences change the comparable nature of the benefits so as to work a substantial divergence, which, need only be comparable, not identical. The Statute "is most reasonably interpreted as requiring a similar, or proportional, decrease in some type of health insurance benefit or contribution provided to active employees, rather than a decrease in the exact same benefit that is being taken from retirees as a prerequisite to reducing retiree benefits." *Bryant*, 4 Misc. 3d at 425. The court stated that issue involved was the "nature and extent of the diminution," "not the specific type of benefit." *Id.* at n.2.

The comparison period concerning the provided benefits is June 30, 1994 until present. *Matter of Altic v. Bd. of Educ.*,39 N.Y.S.3d 549, 550 (4th Dep't 2016); *Matter of Jones v. Bd. of Educ. of Watertown City Sch. Dist.*, 816 N.Y.S.2d 796, 799 (4th Dep't 2006). Petitioners incorrectly start their history with the rollout of the MAPP and make no demonstration that changes to retiree benefits over almost thirty years have disproportionately harmed retirees. Viewing the plans as a whole, as well as recent changes to active plans he differences fail to amount to a violation of the statute. It is easy to see why Petitioners' narrow focus on the MAPP rollout is misleading, even if one accepts their erroneous proposition that it substantially reduces the substance of their healthcare benefits. Over the past seven/eight years, the Office of Labor Relations has engaged in continuing efforts with MLC to reduce the cost of healthcare plans, which involved changes to active plans.

Since 2009, the City, in collective bargaining, made changes to the actives' coverage to save costs, while making no changes to retirees coverage. Nespoli Aff., NYSCEF No.

[2] The Third Department reversed this decision, without discussing whether the lower court correctly analyzed this aspect. *Bryant v. Bd. of Educ.*, 800 N.Y.S.2d 778, 781 (3d Dep't 2005).

61, ¶¶3-14. These changes to the coverage of active employees include the addition of copays for most specialists at $30 per visit, while the MAPP will charge $15; emergency room copays at $150 per visit, while the MAP will charge $50; $50 copays for high cost radiology for which the MAP will charge $15 and numerous other changes. *Id.* ¶ 21. The MAPP is, on the whole, superior to both the plan for active employees, which also applies to under age 65 pre-Medicare retirees, and the Senior Care plan.

As such, within the applicable period, comparable adjustments have been made to both active and retirees. To fulfill the legislative intent, it is appropriate to examine the substance of the health benefits and costs relative to those available to active employees throughout the period, and not whether Petitioners will always have free access to their preferred plan. Petitioners have not demonstrated a substantial diminution of retiree benefits in comparison to active employees' benefits.

CONCLUSION

The decision to implement MAPP was reasonable, rational, and lawful. MAPP provides enhanced benefits to retirees and reduces City costs that can be directed to the maintenance of the Stabilization Fund to provide other benefits to active employee and retirees. It will cost approximately fifty million dollars every month the City delays implementing MAPP.

For the foregoing reasons, Respondents respectfully request that vacate the injunction, allow Respondents to implement MAPP, and grant Respondents' motion, denying both the Amended Petition and Petitioners' motion in the entirety, denying in all respects the relief requested, enter judgment for the Respondents, and grant Respondents costs, fees, and disbursement together with such other relief as the Court deems just and proper.

Should the Court deny Respondents' motion, in whole or in part, Respondents reserve their right to serve and file an answer to the Amended Petition, under CPLR § 7804(f), and respectfully request thirty (30) days from the order's date of service with notice of entry to serve a verified answer.

Dated: New York, New York
February 4, 2022

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CERTIFICATION

I hereby certify pursuant to Rule 202.8-b of the Uniform Civil Rules for the Supreme Court and County Court of the State of New York that the enclosed brief is produced using 12-point Times New Roman type and the total number of words in the foregoing document including footnotes and exclusive of the caption, table of contents, table of authorities, and signature block, is 4,130 according to the "Word Count" function of Microsoft Word, the word-processing system used to prepare the document, and thus that the document complies the word count limit set forth in Rule 202.8-b and file memoranda of law not to exceed 7,000 words, exclusive of the caption, table of contents, table of authorities, and signature block.