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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF NYC ORGANIZATION OF PUBLIC
SERVICE RETIREES,

Appellant,

-against-

NO. 93

CAMPION,

Respondent.

20 Eagle Street
Albany, New York
November 19, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Good afternoon. The first
2 matter on today's calendar is Matter of New York City
3 Organization of Public Service Retire - - - Retirees v.
4 Champion.

5 Counsel?

6 MR. DEARING: May it please the court. I'm
7 Richard Dearing for the City.

8 Your Honor, I'd like to request three minutes for
9 rebuttal, please.

10 CHIEF JUDGE WILSON: Yes, sir.

11 MR. DEARING: The injunction below suffers from
12 two distinct errors. First, it misunderstands
13 Administrative Code 12-126 to impose a mandate that the - -
14 - that if the City makes senior - - - the senior-care plan
15 available, it must pay for it. Second, and alternatively,
16 it misconstrues the cap provision in the I-code. I'm going
17 to start with the first of those arguments. I'll try to
18 make three sort of broad-brush points, one text - - -
19 textual; one kind of practical, logical; third, that's a
20 little bit of a meta point or framing point about how to
21 approach, I think, a statute like this one.

22 So the text, what does the text do and what
23 doesn't it do. What the text does, it confers, we
24 acknowledge, a very significant and also very specific
25 benefit, which is to say that the City must provide a

1 premium-free health-care plan or premium-free health-care
2 coverage for - - - not just for people during their working
3 life with the City, but their retired life throughout the
4 entirety of it and for their dependents.

5 CHIEF JUDGE WILSON: So let me just ask you - - -
6 sorry, right in front of you - - - the City - - - the way
7 that health care benefits are provided is through
8 collective bargaining?

9 MR. DEARING: Correct. That's - - -

10 CHIEF JUDGE WILSON: And that was true from the
11 '40s or somewhere long before any of this, right?

12 MR. DEARING: There was - - - I don't know about
13 the '40s, but there was - - - collective bargaining
14 predates this local law, and - - - and, you know, and you
15 can see that in the Board of Estimate Resolution that you
16 see in the record.

17 CHIEF JUDGE WILSON: And so is there a way to
18 look at the - - - at 12-126 as a restriction on bargaining
19 positions the City can take?

20 MR. DEARING: I think that's fair to - - - and
21 the question is what are those restrictions.

22 CHIEF JUDGE WILSON: Right.

23 MR. DEARING: Right. Yes, I think that's fair.
24 And in fact, I think a critical and important way to
25 understand 12-126 is that bargaining over health benefits

1 predates that statute. The content of our health offerings
2 has been determined by bargaining. It - - - 12-126 doesn't
3 speak to that.

4 JUDGE HALLIGAN: And is there something in the
5 record which confirms that you're paying for the multiple -
6 - - you have paid for the multiple plans solely as a result
7 of a collective bargaining obligation? Or is that not your
8 position?

9 MR. DEARING: I think our position is that - - -
10 I guess the way I would say it is that I don't think the
11 record is quite that specific. Well, what I - - - what I
12 would say is something a little bit different. If you look
13 at the - - - well, it's clear that the City had paid for
14 multiple plans before 12-126 existed. So I think what that
15 shows is that - - - and that practice, as I understand it,
16 it predated 112 - - - 12-126, and it has continued via
17 collective bargaining after 12-126. And you can see that.
18 If you look at the Board of Estimate Resolution, you will
19 see in the recitals of that resolution multiple agreements
20 referenced.

21 CHIEF JUDGE WILSON: And the City had actually
22 bargained for a provision of benefits that paid for one
23 hundred percent for multiple plans before that was - - -
24 the City was authorized to do that under state law, as my
25 understanding.

1 MR. DEARING: I think that's - - -

2 CHIEF JUDGE WILSON: And the statute had to be
3 enacted retroactively to fix - - - to cure that six-month
4 period as well - - -

5 MR. DEARING: I'm not sure - - - that might be -
6 - - that might be right. It's close in time on the - - -
7 on the state law, I think. But I definitely think - - -
8 it's clear that the bargaining comes first. So I - - -
9 what I think is very clear is that there's nothing in the
10 record that suggests that 12-126 was the impetus for
11 playing - - - paying for multiple plans.

12 JUDGE CANNATARO: So what is the significance,
13 then, of just past understanding and past practice with
14 respect to providing multiple plans and having the payment
15 scheme in place that existed prior to this latest
16 development?

17 MR. DEARING: I think not - - - none, because - -
18 - because of precisely this point, that there was - - -
19 there were multiple agreements reached through collective
20 bargaining.

21 A key thing that you will see in 12-126 - - - 12
22 - - - 12-126 doesn't say - - - I guess, let me just take a
23 step back. It's important to understand what collective
24 bargaining and what the Board of Estimate resolute - - -
25 what kind of thing it was and what kind of thing, for lack

1 of a better word, 12-126 is.

2 JUDGE HALLIGAN: Sorry. What's the it in the
3 first point that you made? What a thing it is. I just
4 want to make sure I get the antecedent.

5 MR. DEARING: The - - - what the Board of
6 Estimate Resolution and collective bargaining does. So
7 what those pieces put together, and it starts with
8 bargaining, is to identify plans and to say you'll be
9 offered a choice of those plans. And then the bargaining
10 also said we will pay for those plans. 12-126 comes in and
11 only does that third thing. It says we will - - - you will
12 have to pay one hundred percent. It doesn't say anything
13 about choice of plans, let alone say what those plans would
14 include. And that's not surprising because, you know, it's
15 quite one thing to say in a particular bargaining cycle
16 where - - -

17 JUDGE RIVERA: And so if just looking at the
18 plain text, tell me what words make it clear that you only
19 have to pay for one plan.

20 MR. DEARING: Well, I'll say two things. And I
21 just want to preface the answer with this. I don't think
22 this turns on necessarily whether it has to be only one
23 plan.

24 JUDGE RIVERA: Uh-huh.

25 MR. DEARING: The key thing for our position is

1 it doesn't say that we have to pay for every plan we make
2 available. I want to try to unpack that - - -

3 JUDGE RIVERA: I'm not sure I understand the
4 difference, but just, again, let's get back to my question.

5 MR. DEARING: I'll try to unpack - - - sure.

6 JUDGE RIVERA: Where's the language that supports
7 your position that you don't have to pay - - -

8 MR. DEARING: I think it's - - -

9 JUDGE RIVERA: - - - I think the position now
10 you're saying we don't have to pay for every plan.

11 MR. DEARING: We've said both of those things,
12 and I just think it's the second is all we have to defend
13 to win this case.

14 JUDGE RIVERA: Uh-huh. Uh-huh.

15 MR. DEARING: And that's what I want to home in
16 on. I think it's more what the statute does not say. And
17 I think the first - - - you know, more than what it does
18 say is what it does not say. And I think this first
19 because - - -

20 JUDGE RIVERA: Don't usually look at a statute
21 that way.

22 MR. DEARING: I think - - - I think we often do,
23 actually. And - - -

24 JUDGE RIVERA: Well, I'm not so sure we're going
25 to do that here. But go ahead.

1 MR. DEARING: Okay. Well, you know, I'm going to
2 do my best.

3 JUDGE RIVERA: All right.

4 MR. DEARING: Let me try to convince you of that.

5 JUDGE RIVERA: Fair enough.

6 MR. DEARING: What the statute doesn't say - - -
7 right - - - and I think this is undisputed - - - it does
8 not prescribe which plan or plans the City must offer.
9 That's clear. I think that's conceded. It doesn't do
10 that. And Justice Frank said, you don't even have to - - -
11 you don't have to offer senior care. Right.

12 The second thing it doesn't do - - - and I don't
13 think there's any language that does this. And when you're
14 looking, I think, at a statute that you're going to read to
15 constrain the collective bargaining process, along the
16 lines of Your Honor's question, and impose financial
17 obligations on the City, it's about what the statute does
18 say and doesn't say, not that we - - - we don't have to
19 refute the obligation, they need to establish it. And the
20 second - - -

21 JUDGE CANNATARO: So any - - -

22 JUDGE RIVERA: So it says - - - I'm sorry - - -
23 it does say entire cost - - - which you're not debating
24 that - - - of health insurance coverage. It sounds to me
25 like you interpret that to mean not all plans, and I don't

1 see how you get that from health insurance coverage.

2 MR. DEARING: I'll give you - - - I'm going to
3 try two - - - two things on that.

4 JUDGE RIVERA: Okay.

5 JUDGE CANNATARO: Can I just append a - - -

6 MR. DEARING: Sure.

7 JUDGE CANNATARO: - - - follow up to that very
8 question? A4 mandates a program of health insurance
9 coverage, which, as I understood it, means a suite of
10 available plans, not just one plan. So how do you get to
11 this - - - to the extent that you're arguing that we only
12 have to provide one plan or pay for one plan? How do you
13 get there with that language in A4?

14 MR. DEARING: I - - - well, there are two levels
15 to this, right? I don't - - - I don't read A4 the same
16 way, Justice Frank didn't read it the same way. And I
17 think if you - - - if you substitute it into the statute,
18 it really doesn't make sense read that way. The - - -
19 because the thing you pay for at the end is - - - is a
20 plan. The thing you pay a cost for is a plan. And so when
21 you substitute it into the statute, that's the better
22 reading.

23 But I really want to get to my second point
24 because I think this is the - - - the key point. No matter
25 how you - - - you could read program as I - - - I'd think

1 about it three ways, maybe - - - you could read it either
2 to mean or be satisfied by one plan. You could read it to
3 mean one plan per category maybe. Or you could read it to
4 mean more than one plan per category. And under any of
5 those readings, I think we still win this case - - -

6 JUDGE CANNATARO: So what - - - what does a
7 program of hospital medical surgical insurance mean? What
8 - - - what does the word program mean?

9 MR. DEARING: Well, I'm - - - I'm going to tell
10 you, you could read it - - - and this is the point I really
11 want to get to, because I think it's the crux of our
12 position. You can read it if you wish. I don't think it's
13 right, but to say that it requires more than one plan per
14 category of insured. But the thing that it doesn't say is
15 that the program, the 12-126 program, the program that's
16 made available free, has to include every single plan we
17 offer. It says a program. It doesn't say the program. It
18 doesn't say a program that includes every single plan.

19 And I just want to move to my second point, which
20 I'm just - - - which I think is more of a logical,
21 practical point, not a textual one. And it's because
22 really this is a variation on a greater includes lesser
23 argument on our part. Now, it's true, it doesn't always,
24 but it usually does.

25 And I think a key point - - - the first key point

1 is 12-126 does not compel us to offer senior care at all.
2 I don't think there's a dispute on that.

3 JUDGE SINGAS: Well, if we think that the program
4 is ambiguous, and we turn to the legislative history, can
5 you find support in the legislative history for your
6 position? I find it difficult for you.

7 MR. DEARING: I think we have a lot of support in
8 the legislative history, and I think the legislative
9 history they rely on is quite suspect.

10 And let me make two points. But if I could, I
11 just want to - - - I just want to put a - - - put a fine
12 point on the idea that it - - - that there's no dispute
13 that we don't have to offer senior care at all. That's the
14 greater in the greater includes the lesser. And the
15 question really is why does this - - - is the statute
16 appropriate led - - - appropriately read to bar the lesser
17 step of saying we'll make it available on an opt-out basis
18 - - - purely opt-out basis. We're going to have a 12-126
19 program that we pay for. You can opt out of that and pay
20 for senior care. Why does the statute forbid that?

21 Let's talk about the legislative history. The
22 most significant thing: There was a prior version of this
23 bill that did something that did include text that goes
24 much closer, if not all the way, to what petitioners are
25 asking for. That's at - - - at 1324 of the record. That

1 said the City's obligation would be to pay one - - - the
2 entire cost of any basic health insurance plan. That's
3 what it said. Mayor Lindsay - - - they passed that. Mayor
4 Lindsay vetoed that bill. And in a veto message that - - -
5 that is worth reading in - - - in full on record, page
6 1326, the mayor repeatedly hammered again and again the
7 idea of open ended and unforeseeable financial consequences
8 from the City from that language. And the bill was
9 thoroughly rewritten after that veto.

10 JUDGE SINGAS: But wasn't that only as to the
11 statutory cap?

12 MR. DEARING: It's not. And if - - - if it were
13 just about the statutory cap, what it - - - what they would
14 have done is continued to use any basic health insurance
15 plan and add a statutory cap, but that's not what they did.
16 They fundamentally rewrote the statute. They didn't keep
17 that language in that judge - - - that Mayor Lindsay had
18 objected to, any basic health insurance plan. That
19 language was scrapped, and it doesn't appear anywhere in
20 the bill that was actually enacted.

21 JUDGE TROUTMAN: But does it - - - does it say
22 one plan only?

23 MR. DEARING: It doesn't. And I'm trying to make
24 the - - - I'm trying to make a different point, which - - -
25 which - - - I mean, we think program is better read that

1 way. But I'm trying to make a different point, which is
2 that even if you disagree, what it clearly doesn't say is
3 that the - - - a program, as defined here - - -

4 JUDGE TROUTMAN: So your argument is premised on
5 what's absent?

6 MR. DEARING: And I - - - yeah. And I think
7 entirely appropriately, because this is a statute about
8 imposing a fiscal obligation on the City - - -

9 JUDGE HALLIGAN: So what exactly do you think was
10 behind - - - what was Lindsay's concern exactly?

11 MR. DEARING: Lindsay's - - - in his veto?

12 JUDGE HALLIGAN: Yeah. Uh-huh.

13 MR. DEARING: He said three things. He said this
14 would require us to pay for coverages which the City cannot
15 possibly now anticipate.

16 JUDGE HALLIGAN: Uh-huh.

17 MR. DEARING: He even objected to the language in
18 the bill that said that you - - - the bill, as originally
19 written, said, you're going to pay the part B premium. He
20 said, that's the problem. You know, right now it's \$3.
21 You should say - - -

22 JUDGE HALLIGAN: Okay.

23 MR. DEARING: - - - we'll pay \$3. And what he
24 said was, unable - - - we're unable to foresee or influence
25 what that premium is going to be. We shouldn't be

1 committed to it. And he said I would accept a bill that
2 achieves payment of the part B premium - - - that's what he
3 said - - - without exposing the City to unforeseeable and
4 possibly unwelcome demands on its financial resources. And
5 that's precisely the situation that we find ourselves in
6 now with - - -

7 CHIEF JUDGE WILSON: And then it was rewritten to
8 fix the \$3 as a number.

9 MR. DEARING: It was rewritten to fix that. It
10 was - - -

11 CHIEF JUDGE WILSON: No. No. I mean, what was
12 put into the revised bill was \$3.

13 MR. DEARING: It was. And many other things.

14 CHIEF JUDGE WILSON: Right. Right. Right.

15 MR. DEARING: This bill was thoroughly rewritten
16 from stem to stern after this veto.

17 CHIEF JUDGE WILSON: So I hear an implied answer
18 to Judge Rivera's question, because I too would ordinarily
19 say, what does the statute require - - - I don't know - - -
20 on it's plain language? It sounds as if you're - - - if
21 you were forced to answer that question, which you haven't
22 yet been, but I'm going to try - - - you would say that
23 program is defined as a combination of hospital, surgical,
24 and medical benefits. That's a program. And the statute
25 requires you to provide a program.

1 MR. DEARING: That's correct.

2 CHIEF JUDGE WILSON: And if you provide a
3 program, that's - - - you can't - - - if we, again, think
4 of this in the collective bargaining framework, you can't
5 offer less than that.

6 MR. DEARING: That's correct.

7 CHIEF JUDGE WILSON: You can be bargained to
8 require more than that.

9 MR. DEARING: Precisely. That is the minimum
10 obligation that is codified in the statute. We satisfy
11 that obligation. And I think the way to see that - - - we
12 can do more, as you say, in a collective bargaining - - -
13 the way to see that we satisfy - - -

14 CHIEF JUDGE WILSON: You have done more. You did
15 more historically - - -

16 MR. DEARING: We've done it historically. Right.

17 JUDGE HALLIGAN: But your position is that's a
18 function of the collective bargaining obligation, not the
19 statute.

20 MR. DEARING: When we have done more than the
21 statute - - -

22 JUDGE HALLIGAN: Yeah.

23 MR. DEARING: - - - that's - - - that's our
24 position. And as I said it, it predates the statute - - -

25 JUDGE RIVERA: But then why in that provision - - -

1 - right - - - does it refer to contracts in the plural and
2 companies in the plural?

3 MR. DEARING: I have two answers. One is many
4 plans, including senior care, and including all the plans
5 the City - - - that - - - that were offered pursuant to the
6 Board of Estimate resolution had multiple contracts with
7 multiple companies.

8 JUDGE RIVERA: Uh-huh.

9 MR. DEARING: All of them did. It doesn't really
10 tell you anything about one plan or more.

11 I will note again, the object of the program is
12 not a program of plans. The object is a program of
13 benefits entirely consistent with being one plan per
14 category.

15 But I think the most important point and where I
16 - - - where I want to try, you know, to stop - - - to draw
17 the backstop of this argument is that it clearly doesn't
18 say that the - - - that this program, this minimum
19 obligation that we must meet, has to include every plan we
20 offer.

21 And if you - - - I just want to put it this way,
22 one point, and then I'd like, if I could, to talk about the
23 cap for a minute, maybe. The - - - the - - -

24 JUDGE RIVERA: So - - - so let me be clear about
25 that. And by the way, I'm not so persuaded on your other

1 point, because then following your analysis that we look at
2 what's - - - we listen to silence rather than to what is
3 affirmatively spoken in the - - - said out in the - - - in
4 12-126.

5 One would say, ah, if that is true - - - you got
6 contracts and companies multiple per plan - - - that then
7 one would say, plan, not contracts and companies. So it
8 seems to me it undermines your argument, but fair enough.
9 That's your position on that.

10 But I'm still having difficulty sort of
11 understanding how the beginning of the provision that's
12 talking about coverage, as opposed to just saying a plan,
13 and then putting a cap, doesn't lead one to the place that
14 it is really talking about whatever plans you offer, you
15 have to pay for them. Versus on one side, you're arguing,
16 no, it's only one plan, but no, it's not only one plan, it
17 could be multiple plans.

18 MR. DEARING: I'm just arguing that there's
19 multiple layers to our argument. I don't think there's
20 anything unusual or surprising about that - - -

21 JUDGE RIVERA: No. No. I understand that. But
22 I'm having difficulty - - - I'm having difficulty making my
23 way past the plain language. That's what I'm saying to
24 you. I know you're - - - you're making your argument.
25 Perhaps you've persuaded everybody but me. But I'm just a

1 little unclear. If you're saying it could be more than one
2 plan, what then you mean by that?

3 MR. DEARING: Well, I think the better question
4 is for petitioners. What do they think that means, right?
5 Because what it doesn't say - - -

6 JUDGE RIVERA: Okay. Well, I'll - - - I will ask
7 them too, but I'm asking you.

8 MR. DEARING: No, but - - - no, but this is a key
9 point because what it does not say, in contrast to the
10 Board of Estimate resolution, which is about products of
11 collective bargaining - - -

12 JUDGE RIVERA: Yes. Yes.

13 MR. DEARING: - - - and about, you know, a
14 specific policy, not a codification of a not - - -
15 something into the future. What it doesn't say is what
16 those plans need to be. And that is a gaping hole, I
17 think, in their argument. And here's the reason - - -
18 here's the way to see that. If we ignore senior care - - -
19 if we just ignore senior care, and we look at the - - - the
20 - - - the - - - the other plans that we're paying for, we
21 meet the minimum obligation of 12-126. Right. I think
22 that's clear. And now, you - - - we - - - if we just
23 ignore it - - - if we got rid of it, we - - - we meet the
24 obligation of 12-126. But now, if we bring it in and say
25 the following: Purely, in your election, you can reject

1 the free plans and - - - at - - - on an optional opt-out
2 basis, just like you can opt to reject City health
3 insurance altogether, you can opt out and pick a plan that
4 you pay for now. Now, we're - - - now, we violated this
5 minimum obligation. Before, we've added something, and yet
6 to - - - and yet we were in compliance with the minimum
7 obligation in the first instance, and now we run afoul.

8 JUDGE HALLIGAN: I know your light's on, but if I
9 could just ask you to briefly address the relationship
10 between whatever is before us in this case and Bentkowski.

11 MR. DEARING: Sure. I think there's a
12 significant interaction. Right. So what's before us in
13 this case is what I've tried to home in on here. The crux
14 of the ruling below is that we don't have to offer Senior
15 Care, but if we do, 12-126 imposes an obligation to pay.

16 There's another question about the statutory cap,
17 which I haven't quite gotten to yet. Bentkowski is a - - -
18 is not rooted - - - as it comes to your core, and I - - -
19 obviously, we have a leave motion there. We think it is -
20 - - if any case is leave worthy, that one is. Bentkowski
21 is not rooted in 12-126 in the First Department's ruling.
22 It's rooted in a promissory estoppel theory, which - - -
23 which held that as a result of promissory estoppel, based
24 on our summary plan descriptions, the City has an
25 obligation to - - - to provide a Medicare supplemental

1 plan. It doesn't say it has to be senior care. It says it
2 has to be a Medicare supplemental plan, which - - - meaning
3 our offerings on the side of Medicare eligible plans cannot
4 only include Medicare Advantage plans.

5 CHIEF JUDGE WILSON: Let me just ask you to take
6 two minutes on the cap, because I think it probably - - -

7 MR. DEARING: Sure.

8 CHIEF JUDGE WILSON: - - - will help us to hear
9 that before we hear from counsel.

10 MR. DEARING: Sure. Two minutes on the cap. So
11 I think the cap point is really pretty simple, and it - - -
12 it is that it doesn't make any sense, and nothing in the
13 statute says that - - - you know, you would have to see
14 something very clear in the statute, and you don't, to say
15 that the appropriate cap for a group of Medicare eligible
16 individuals is determined by a plan for non-Medicare
17 eligible individuals.

18 Insurance for non-Medicare eligible individuals
19 and insurance for Medicare eligible individuals are two
20 completely different animals. Fundamentally different
21 insurance, fundamentally different cost profiles. The
22 record shows this abundantly. And it's just simply not an
23 apples-to-apples comparison of any kind to say that when
24 you look at Medicare eligible individuals, you're going to
25 determine the cap by reference to a non-Medicare eligible

1 plan, a plan they couldn't even enroll in if they wanted
2 to, and a plan whose economics are fundamentally,
3 categorically different from plans for Medicare eligible
4 individuals.

5 And I think the language of the - - - of the
6 statute, you know, as I said, it would be surprising to
7 reach that result. You would need something pretty clear
8 in the statute. There's nothing clear in the statute. And
9 every textual indication there is in the statute cuts for
10 us.

11 JUDGE GARCIA: As to that cap issue, where did
12 you preserve that in the record?

13 MR. DEARING: We preserved it - - - we raised it.

14 JUDGE GARCIA: Where?

15 MR. DEARING: We - - - let me - - - I'll give you
16 the cites. We raised it - - - this is in - - - in supreme
17 - - - because I think that's the only place there's a
18 question of preservation. We - - - we raised it for, you
19 know, joint issued abundantly in the Appellate Division.
20 We raised it in a argued - - - in a letter after our oral
21 argument. It's R 1970 to 1971. Petitioners responded to
22 that letter. That's - - - that's R 1972 to 1974. And the
23 court reached the question. The court, in its opinion,
24 listed all the submit - - - there were also two amicus
25 submissions that dealt with the cap. That's - - - that's

1 ECF 205 and ECF 208. The court listed all four of those
2 submissions. That's R7. And the court reached the merits
3 of the cap question. That's R9. So I think from the
4 standpoint of preservation, it is preserved under this
5 court's cases.

6 I just - - - if I could circle back just a second
7 to the text of the local law because I think we win even
8 before you get to these textual points, but I want to
9 unpack the textual point. The law says that the cap is
10 determined on, quote, a category - - - on a category basis,
11 unquote, which - - - which makes clear that it's meant to
12 be apples-to-apples.

13 And if you look at a rate sheet for our plan
14 rates, you will see lines and boxes, and they might have
15 individual, they might have family, and they might have
16 Medicare. They're all separated out. They're all
17 different. They're fundamentally different economically.
18 And when you - - - when you make clear that the cap is to
19 be determined on a category basis, I think it only
20 underscores the correctness of our position on the cap.

21 The other thing I would say about the cap is that
22 the - - - that the language enacted by the City Council in
23 1967 specifically refers to health insurance coverage
24 predicated on enrollment in Medicare, so that - - -

25 JUDGE GARCIA: I'm sorry. Where in the supreme



1 court opinion do they address the cap?

2 MR. DEARING: This is - - - this is the - - -
3 this is the part I'm referencing. It's at - - - it's at
4 R9.

5 JUDGE GARCIA: Okay.

6 MR. DEARING: It says the following: It is the
7 court's understanding that threshold - - - I'm not going to
8 say he addresses it at great length, but this is what he
9 says. Judge - - - Justice Frank, I should say. "It is the
10 court's understanding that the threshold is not crossed by
11 the cost of the Retiree's current health insurance plan.
12 This is buoyed by the fact that the current plan has been
13 paid for by the respondents in full to this point." So he
14 did not hold that the cap issue was unpreserved. On my - -
15 - by my lights, he - - - he reaches the cap question in
16 that, and that is how he resolves it.

17 JUDGE HALLIGAN: And threshold means cap in your
18 reading; is that what you're referring to?

19 MR. DEARING: That is - - - that is what it means
20 - - -

21 JUDGE HALLIGAN: Okay.

22 MR. DEARING: - - - in the context of that
23 opinion. That's correct.

24 I have one point of update for the court on - - -
25 on - - - I don't think this is pertinent to the statutory



1 construction question, but I think it's appropriate to
2 update the court - - - that for the last three years the
3 cost, the rate on H.I.P.-H.M.O. for Medicare eligible
4 individuals has been 7.50 per person per month. The
5 tentative rate for the upcoming year has been increased
6 dramatically to - - - to \$198 per month, still \$26 below
7 the rate for senior care.

8 In our view, that really reflects the - - - on
9 the one hand, the effects of the productive competition
10 that the Medicare Advantage initiative brought to this
11 entire equation for the last three years, and the fact that
12 it's been blocked for three years and H.I.P. has increased
13 its rate for its HMO plan. But I just want to make sure
14 the court is aware of that.

15 CHIEF JUDGE WILSON: Thank you.

16 MR. GARDENER: Good afternoon, and may it please
17 the court. Jake Gardener of Walden Macht Haran & Williams
18 for the respondents.

19 I can explain in four sentences why this court
20 should affirm. Section 12-126's authorizing statute.
21 General City Law Section 20, subsection 29-b allows the
22 City to pay certain costs for its retirees health care if
23 and only if the City offers, quote, "a choice of health
24 plans program." So the City has to offer a program with a
25 choice of health plans, and that is what the City has

1 always done through its health benefits program.

2 Section 12-126, by its plain terms, requires the
3 City to pay the entire cost up to the statutory cap of that
4 program, not just one plan within the program.

5 So I know this court was very concerned with what
6 is the meaning of program. It is the entire - - - like
7 Your Honor said - - - the entire suite of plans. It has
8 always been understood, the program is a term of art
9 distinct from plan. And the City has always offered a
10 choice of health plans through its health benefits program.

11 CHIEF JUDGE WILSON: So I want to make sure I
12 understand your argument, which is that state law would
13 prohibit the City from paying for one hundred percent of
14 retiree health care unless the City provides a choice of
15 plans.

16 MR. GARDENER: The only way that that Section 12-
17 126 is allowed to exist and allows the City to pay for
18 retirees health insurance, including the Medicare Part B
19 premium, is under section - - - under General City Law
20 Section 20, subsection 29-b, and it says that there has to
21 be a - - - the City has to offer a choice of health plans
22 program. So that phrase right there, it's very clear that
23 health plans - - - plans are different than program. And
24 once it offers - - - I agree that the - - - that 12-126 by
25 its terms - - -



1 CHIEF JUDGE WILSON: So what would - - - I'm
2 sorry - - - so what is your understanding that the legal
3 consequence would be if the City chose to offer only one
4 plan?

5 MR. GARDENER: If the City chose to offer only
6 one plan, which is essentially what happened after this
7 case in Bentkowski, that's unlawful for a number of reasons
8 that aren't before this court. I don't want to get ahead
9 of myself and start arguing Bentkowski to you, but it is a
10 lot - - -

11 CHIEF JUDGE WILSON: I don't mean Bentkowski, but
12 you just read me a statute - - -

13 MR. GARDENER: Yeah.

14 CHIEF JUDGE WILSON: - - - I think that would
15 suggest that the City lacks the authority to offer a single
16 plan.

17 MR. GARDENER: That's - - - or - - - or that - -
18 - that's a plain reading of General City Law Section 20.
19 It - - - it says that in order - - -

20 CHIEF JUDGE WILSON: And is that an argument you
21 made previously?

22 MR. GARDENER: That's - - - yes. We - - -

23 CHIEF JUDGE WILSON: Okay.

24 MR. GARDENER: - - - we - - - we note in our
25 brief that the term program refers to all health plans



1 because General City Law Section 20 refers - - - allows the
2 City to pay certain costs for its, quote - - - we actually
3 - - - in the brief, we say health plans program, but if you
4 just read the - - - the previous two words, it says choice
5 of health plans program.

6 But regardless, the point is that program
7 encompasses - - - it's not a plan, it's the entire suite of
8 health plans.

9 JUDGE CANNATARO: Is it your position that the
10 City is statutorily obligated to provide a Medigap plan as
11 part of the program?

12 MR. GARDENER: It is, but that's not - - - that's
13 not an issue before this court. In this case, the City has
14 offered a Medicare supplemental insurance. And the only
15 question is, given that program, does it have to pay up to
16 the statutory cap for all of those plans?

17 CHIEF JUDGE WILSON: So I thought I read the
18 papers - - - and correct me if I'm wrong - - - to say that
19 at least here the parties were not disputing the fact that
20 the City could choose to provide just one plan.

21 MR. GARDENER: So under - - - under the - - -

22 CHIEF JUDGE WILSON: I'm just asking if you - - -

23 MR. GARDENER: Yeah.

24 CHIEF JUDGE WILSON: - - - said that in your
25 papers.



1 MR. GARDENER: No, we - - - we certainly did not
2 - - - did not say that. It has to offer a program of
3 plans. And the facts in this case - - - the factual record
4 is that the City was going to offer a program of multiple
5 plans. And so the only question is when it does that, does
6 it have to pay up to the statutory cap for that program or
7 for just a single plan of its choice?

8 JUDGE HALLIGAN: But that's different than
9 whether they are in fact obligated to offer more than one
10 plan. The question of whether they have to pay if they do
11 offer is distinct, no?

12 MR. GARDENER: That's correct. The question is
13 whether they have to offer multiple plans wasn't - - -
14 wasn't briefed. Our position, it has to offer a choice of
15 plans. The question is what - - - what those plans are,
16 that was an issue in Bentkowski. And in Bentkowski, the
17 question is, under Section 12-126, and through common law
18 principles of estoppel, does the City have to continue to
19 offer Medicare supplemental insurance? And the courts
20 below all decided that the City does.

21 The question in this case is very simple. It's
22 what does program mean? And I - - - there's nothing in the
23 legislative text or the history that suggests that program
24 is the same thing as a plan.

25 And I'll add one other note. If you look at

1 Section 12-126.3, it makes reference - - - it uses the term
2 health insurance coverage - - -

3 CHIEF JUDGE WILSON: Well, it says a program of
4 benefits, right? That's what program modifies.

5 MR. GARDENER: That's correct. And program is,
6 you know, as the authorizing state statute indicates. And
7 also, if you look at the legislative history, it says - - -

8 CHIEF JUDGE WILSON: But I'm just looking at the
9 text for a moment.

10 MR. GARDENER: Yeah.

11 CHIEF JUDGE WILSON: So why isn't the plainest
12 way to read a program of hospital surgical medical benefits
13 to mean the program is a set of benefits that includes
14 hospital, surgical, and medical?

15 MR. GARDENER: Because that - - -

16 CHIEF JUDGE WILSON: So for example, it wouldn't
17 be a program of hospital, surgical, medical benefits if it
18 didn't cover hospitals.

19 MR. GARDENER: So elsewhere in the statute, it
20 talks of a health insurance plan. And under principles of
21 statutory construction that this court has repeatedly
22 acknowledged, when you have different terms in the same
23 statute, it's reasonable to assume that different concepts
24 are intended. And that's especially so here, given the
25 fact that the legislative history says the City's health

1 insurance program offers a choice of three plans. That's
2 record cite 1339.

3 I'll also note that Mayor Lindsay, at the time,
4 he issued a statement about the legislation, and this is
5 what he said. He said the City's health insurance program
6 offers a choice of three different health insurance plans.
7 And given that, and what I said about General City Law
8 Section 20, program and plans are not to be confused. They
9 are two different things.

10 I will also note Section 12-126.3 uses the term
11 health insurance coverage with reference to 12-126, and it
12 talks of the program of hospital, surgical, medical
13 benefits provided to participants therein. Participants is
14 only used when you're talking about the health benefits
15 program. No one says - - - the City Council never said
16 participants when he was talking about a plan. A plan has
17 subscribers. If you look at record cite 89 and 320, again,
18 it talks about participants within the health benefits
19 program. So I think that's further textual evidence
20 granted in another part of 12-126 that supports our
21 interpretation.

22 I'll also note we haven't talked about the City
23 Council report that was attached to the final version of
24 the bill that became 12-126. And I don't think there's
25 ever been a report that's so decisively answers the

1 question before a court as this one. This is what the City
2 Council Committee on Health and Education said in - - - on
3 record cite 1327. "This bill would provide that the City
4 of New York pay for the entire cost of any health insurance
5 plan providing for medical and hospitalization coverage of
6 employees and retirees" - - -

7 CHIEF JUDGE WILSON: It's - - - that's actually
8 the language that was omitted from the prior draft, right?

9 MR. GARDENER: That's - - - that's the language
10 that was in the report of a prior draft. And the reason
11 why they kept it is because even though - - -

12 CHIEF JUDGE WILSON: Well, how do we know that?

13 MR. GARDENER: Well, here's why. If you look
14 through the - - - if you look through the sequence of
15 events - - -

16 CHIEF JUDGE WILSON: Uh-huh.

17 MR. GARDENER: - - - there was an original
18 version - - - like my - - - like my colleague - - - like my
19 adversary said - - - that said, any basic health insurance
20 plan. And Mayor Lindsay took issue not with the term any.
21 His focus, if you look at 12 - - - at 1326, he said there
22 were technical defects, and one of them was that there was
23 no - - - there was no definition for the term basic health
24 insurance plan, and that would create a problem because
25 there would be no cap - - - predictable cap. So what the

1 City Council did was they simply provided a cap for the
2 City's payment obligation tied to the same plan that was -
3 - -

4 CHIEF JUDGE WILSON: And - - - and took the word
5 "any" out.

6 MR. GARDENER: They took the word "any" out, but
7 they used the term program. So they basically just used -
8 - - it - - - they just described it through a different
9 mechanism. If they had suddenly dropped "any," that would
10 have radically altered the basic premise of this
11 legislation. And there's no indication that the City
12 Council somehow just did away with the term "any" when - -
13 - when Mayor Lindsay took no issue with it. It would have
14 been very surprising for the City Council, who was
15 aggressively pushing for the broadest possible legislation,
16 to suddenly do away with a basic premise of this
17 legislation, when Mayor Lindsay himself took no issue with
18 that.

19 It's true, he took issue with the fact that there
20 was no definition, there was no cap. And so the City
21 Council responded by providing a definition and a cap,
22 which came - - -comes right from resolution 292, which I
23 think we all agree required the City to pay for all three
24 of the plans that comprised its health benefits program at
25 the time.

1 So the key point is that Mayor Lindsay had no
2 problem with the term any or where the City's obligation to
3 do as it had been doing under Resolution 292. His only
4 concern was, you have to give me some sort of predictable
5 cap going into the future, and that's exactly what the
6 Committee on Health and Education did.

7 JUDGE RIVERA: So go - - - going back to the
8 text, what, if any, work in your view is the word
9 "contracts" doing here?

10 MR. GARDENER: I think it's doing a lot of work,
11 Your Honor. And as we explained in our brief, the City
12 says, just in a conclusory fashion, that you can have a
13 single plan with multiple insurers pursuant to a single
14 contract. There's nothing in the record - - - there's no
15 documentation that indicates that a single plan can be
16 executed pursuant to a single - - - to multiple contracts.

17 In fact, the only documentation in the record is
18 the MAPP, the Medicare Advantage Plus Plan. And there, you
19 have two insurance companies who have a single contract
20 with the City. So I think the word contract does a lot of
21 work, although it doesn't have to, given the word program.

22 CHIEF JUDGE WILSON: But is it the case you could
23 have a single program? For example, could you contract
24 separately for the hospital benefits from the medical
25 benefits?

1 MR. GARDENER: I don't know if it's possible.
2 That's beyond my - - -

3 CHIEF JUDGE WILSON: Okay.

4 MR. GARDENER: - - - my knowledge. I just know
5 that by using the term contracts and companies, plural, I
6 think you should contrast that with the language used in
7 General City Law section 20, which was designed to give the
8 City maximum contracting flexibility; there, unlike in 12-
9 126, the language that the City drafted - - - because it
10 was a legislation through home-rule request - - - was
11 contract or contracts with, quote, "one or more insurance
12 companies."

13 So the fact that in 12-126, the City
14 contemporaneously decided to use the plural exclusively
15 gives you an indication that that use of the plural was a
16 deliberate choice. And it reflects the City Council's
17 desire for the City to pay for the whole program, which it
18 has done for fifty-six years.

19 And another important point, Your Honor brought
20 up collective bargaining. There is nothing in this record
21 or outside the record that I have seen that says that the
22 City is going to pay up to the statutory cap for all plans
23 based on collective bargaining. There are collective
24 bargaining agreements in the record. If you look at record
25 168 to 330, 443 to 640, 725 to 838, not a single one of

1 those collective bargaining agreements mentions the City's
2 obligation to pay for senior care, or for all of the plans
3 in the - - - in the health benefits program. That
4 obligation comes solely from Section 12-126.

5 So on my adversaries rebuttal, I would like to
6 hear where in the record there's any support for the notion
7 that this is done through collective bargaining as opposed
8 - - - as opposed to - - -

9 JUDGE GARCIA: So the way it would be done would
10 be to get the City Council to amend the statute, right?

11 MR. GARDENER: Exactly, Your Honor. And - - -
12 and that happened. After our victory below, Mayor Adams'
13 administration lobbied the City Council hard to change
14 Section 12-126. And the City Council, which is responsible
15 for balancing the City's budget, so it's very well aware of
16 any sort of budgeting concerns here, refused that. Just
17 flat out refused it. And I think that's an indication of
18 where the City Council, who - - - they should be the ones -
19 - - if there's an issue with how this is interpreted, the
20 City Council would be the logical place to fix any supposed
21 problem. The City Council has refused - - -

22 JUDGE RIVERA: Well, that's the council of today.
23 We're trying to figure out this statute, which predates the
24 council of today and the request of today, right?

25 MR. GARDENER: That's correct. Although, I think

1 it's interesting that we actually have a sworn affidavit
2 from a former City Council member, Barry Salman. He
3 submitted an affidavit that's unrebutted that said, you
4 know, I sat on the City Council right after this law was
5 drafted. I also voted on various - - - he voted on various
6 amendments to the statute - - -

7 JUDGE HALLIGAN: Well, we generally don't - - -
8 don't put a lot of weight on a statement like that, do we?

9 MR. GARDENER: I don't know if this court does.
10 I just - - - I just want to note it since it arose. But I
11 do think one thing that is interesting is the - - - the
12 City itself - - - I'm not sure if - - - if this court is
13 aware of who Stephen Lewis is. He is the leading expert on
14 the administrative code. He's - - - he was with the New
15 York City Law Department for forty years, including as
16 chief of legal counsel. In 2016, he wrote a memo that
17 said, and I'm quoting, "The administrative code requires
18 that the City, with respect to any offered plan, pay up to
19 the full cost of H.I.P.-H.M.O." And I think it's telling
20 that in 2016, before the City had an incentive to try to
21 interpret the statute in a way to its liking, it was
22 saying, internally - - -

23 JUDGE RIVERA: But it didn't say "every," right?

24 MR. GARDENER: And "any" offered plan - - -

25 JUDGE RIVERA: "Any" could mean whatever you



1 offer - - -

2 MR. GARDENER: That - - -

3 JUDGE RIVERA: - - - and that could be "one," as
4 opposed to "every." Now there - - - you'd have a much
5 easier go with it if it said "every," I think.

6 MR. GARDENER: I - - - there's actually - - - we
7 cite in our - - - in a footnote in our case, this court has
8 held repeatedly, the court said, that the word "any" means
9 "every," - - - "all" and "every." So this court has held -
10 - - and I'm sorry, I can't remember the exact footnote - -
11 - but we cite the Court of Appeals decision saying that the
12 word "any" means "every" or "all."

13 JUDGE RIVERA: As used by a lawyer in a memo?

14 MR. GARDENER: As - - - then we also cite a case
15 saying that the - - - that the legislature should be
16 assumed to understand these past holdings, which began well
17 before Section 12-126 was enacted in 1967. So I do think
18 that that - - - the fact that the City has always
19 interpreted for fifty-six years this statutory provision to
20 require them to fund all of the plans in the health
21 benefits program, I think that's incredibly telling.

22 JUDGE GARCIA: Counsel, I see your light's on.
23 Could you just briefly address the preservation argument
24 for the cap?

25 MR. GARDENER: Yeah. So I have - - - I don't



1 have a major disagreement with how it was described before.
2 It was after briefing and oral argument on the dispositive
3 - - - dispositive motion below, the City filed a one-and-a-
4 half-page letter the night before this - - - the court said
5 it was going to issue its decision, basically saying for
6 the first time ever, that guess what, HIP VIP - - - HIP VIP
7 Premiere Medicare plan sets the statutory cap at \$7.50. I
8 was the one who wrote the letter in response the next
9 morning, scrambling, you know, from my apartment in the
10 middle of COVID, just objecting to the fact that this was
11 basically an ambush and it was procedurally improper. The
12 court then issued its decision just a few hours later, and
13 it didn't grapple with the issue at all.

14 In its decretal language, the Court simply held
15 that the City has to pay up to the cap for whichever plan
16 retirees choose. If you look at the bottom at that
17 decretal language, that's all it held. It noted in passing
18 in - - - in the language that - - - that - - - that my
19 adversary referenced, that it was its understanding that
20 the cap did not exceed - - - or that it did exceed the cost
21 of senior care, because that was undisputed for six months
22 of litigation. And we noted in our papers and at oral
23 argument repeatedly that there's no dispute by the parties
24 as to what that cap is.

25 So that's, of course, why the City - - - why the

1 court just gave it the back of the hand and said, that's my
2 understanding. This was - - - this was undisputed below.
3 To say that - - - that you could submit a letter past the
4 11th hour - - -

5 JUDGE RIVERA: That - - - I'm sorry - - - that
6 meaning that whatever the cap is, the parties agree that
7 Senior Care does not exceed that cap. Is that what you
8 mean?

9 MR. GARDENER: Yeah. Well, our - - - beyond
10 that. We also said that it was undisputed that the cap,
11 the H.I.P.-H.M.O. - - - there's only one plan - - -

12 JUDGE RIVERA: No. No. No. In terms of how
13 you're reading that decretal.

14 MR. GARDENER: Well, the decretal language
15 doesn't talk about the cap at all. The decretal language
16 simply says that the City has to pay up to the cap - - -

17 JUDGE RIVERA: Right.

18 MR. GARDENER: - - - for any plan the retiree
19 selects. It doesn't mention what that cap is - - -

20 JUDGE RIVERA: I'm sorry. I misunderstood you.
21 I thought you were saying there was something in the
22 decision that you interpreted - - - and I thought this was
23 what you were saying. You'll correct me. You interpreted
24 it as a judge basically saying, whatever the cap may be, it
25 - - - it doesn't matter here. It's irrelevant in that

1 sense, the actual number we put to that, because everyone
2 agrees that senior care - - - right - - -

3 MR. GARDENER: That's correct.

4 JUDGE RIVERA: - - - doesn't exceed the cap - - -

5 MR. GARDENER: Right.

6 JUDGE RIVERA: - - - so I don't have to address
7 it.

8 MR. GARDENER: And my only point was the City - -
9 - the court said that before the decretal language at the
10 end of the opinion.

11 JUDGE RIVERA: I see. Okay.

12 MR. GARDENER: And I mean, I could go on and on
13 about - - - about the cap on the merits. But in terms of
14 the preservation issue, I just think that, here, in order
15 to untangle all of the many tricky things that go along
16 with the cap, it's impossible and unfair to decide that
17 issue that affects the health of hundreds of thousands of
18 disabled and elderly senior citizens and first responders,
19 when this issue didn't come up until the very last second.
20 And there are serious issues - - - there are serious
21 questions that the court would have to grapple with, that
22 it doesn't have the record to do so with.

23 I'll note just two things here. One is the City
24 claims that there has to be an apples-to-apples comparison.
25 Well, there have been years when there have been multiple

1 H.I.P plans that are H.M.O. style plans for Medicare
 2 eligible retirees at different costs. How in the world
 3 could one of those plans set the statutory cap for Medicare
 4 eligible retirees when there are multiple plans?

5 By contrast, there has always been just a single
 6 plan known as H.I.P.-H.M.O., and that has been the cost of
 7 the plan for Medicare eligible employees and non-Medicare
 8 eligible employees and retirees.

9 Two other - - - one other thing. There are
 10 situations where you have a family where one, say the
 11 retiree, is Medicare eligible, but her spouse is not, or
 12 her child is not. Then you have a situation where you
 13 can't do apples-to-apples. You have a family of a mixed
 14 Medicare eligible and non-Medicare eligible. So that's
 15 never been the case that you can have apples-to-apples
 16 comparison because there are situations where there's one
 17 apple and there's one orange. And yet you have to have one
 18 plan set as the statutory cap. Is it the apple or is it
 19 the orange? The City has no answer for that.

20 There's a host of other tricky issues that this
 21 court can't grapple with, and we can't really adequately
 22 get into, because we were denied the opportunity to do that
 23 below. And I don't think it's fair to the retirees here
 24 and elsewhere to decide something so important when the
 25 City chose not to actually develop that below.



1 And I think the reason why it chose not to make
2 that argument below is because it knew it was a loser, and
3 for it to try to create a new argument after it read the
4 signs at oral argument that this was not going its way, I
5 think that's a dangerous precedent to set.

6 Thank you, Your Honors.

7 CHIEF JUDGE WILSON: Thank you.

8 MR. DEARING: I just want to start with cap, if I
9 can, and then I'll start - - -

10 JUDGE HALLIGAN: Can I just - - - on preservation
11 - - -

12 MR. DEARING: Yeah. Sure.

13 JUDGE HALLIGAN: - - - with respect to the cap.
14 Can I just ask you? So your letter at page 1970 to 71, I
15 take it that that rests on the interpretation of the word
16 "category" and the argument you make in your brief before
17 us, you say; is that right?

18 MR. DEARING: I - - - I'm not sure how much it
19 actually rests on "category" as much as it rests on what I
20 think is just a very simple point that - - -

21 JUDGE HALLIGAN: Okay.

22 MR. DEARING: - - - that it - - -

23 JUDGE HALLIGAN: But - - - but - - -

24 MR. DEARING: - - - the apples-to-apples point
25 that you can't - - - that you can't base - - -

1 JUDGE HALLIGAN: Your common-sense point?

2 MR. DEARING: Yeah, exactly.

3 JUDGE HALLIGAN: Okay. And I take it - - -

4 MR. DEARING: That's my recollection of it.

5 JUDGE HALLIGAN: Okay. This is the first - - -
6 you agree with your adversary that this is the first point
7 in the litigation in which this specifically is raised, or
8 the 750 number specifically is raised. Is that - - -

9 MR. DEARING: I agree with that.

10 JUDGE HALLIGAN: Okay. Thank you.

11 MR. DEARING: I just wanted - - - if I talk about
12 the cap a bit - - - I mean, I think it's actually a quite
13 easy question. And just as a reminder, when we talk about
14 this, we - - - our plan would - - - would be to provide two
15 free plans that - - - and one of them is based on mirroring
16 the benefits of senior care and then to allow senior care
17 to be available on opt-out basis.

18 But it's very simple. If you look at page 1293
19 of the record, this is a document that they put in and
20 relied on and - - - and drew numbers specifically from.
21 What you'll see, there's a - - - there's a line at the top.
22 It says H.I.P.-H.M.O. It says non-Medicare single H.I.P.-
23 H.M.O. and Medicare H.I.P.-H.M.O. The cost for non-
24 Medicare is 776. The cost for Medicare is 181. It's both
25 H.I.P.-H.M.O. That's what the statute says. One is for

1 non-Medicare. One is for Medicare. It's about a fourth of
2 the cost.

3 It then goes on, on 1294, to say the following,
4 "A retiree who elects basic medical coverage other than the
5 benchmark hip that's H.I.P" - - - that's H.I.P.-H.M.O. - -
6 - and G-H-I-E-C-E-B-C-B-S - - - that's senior care plans -
7 - - is required to contribute the full difference in cost.

8 And - - - and then - - - so it says anything
9 other than those two - - - and I'll get to the senior care
10 piece of that - - - you have to pay the full difference in
11 cost. It does not say that you - - - that anything under
12 the H.I.P.-H.M.O. for non-Medicare eligible, which would be
13 every Medicare plan we offer, because that's an enormously
14 high number for a Medicare eligible plan. It doesn't say
15 that - - -

16 JUDGE GARCIA: But it's not until the eve of the
17 decision in this case that you realized that they didn't
18 agree with you, that it was this low dollar amount?

19 MR. DEARING: I - - - I - - -

20 JUDGE GARCIA: Because it seems so simple.

21 MR. DEARING: - - - I wasn't the low - - - I
22 agree. I think we should have raised it earlier. I don't
23 dispute that, and I can't say I understand why we didn't -
24 - -

25 JUDGE GARCIA: But it goes more - - - not as much

1 to litigation failing as to if this was such a simple
2 bullet, right. That this was such a simple thing. You
3 could look at this chart, and it really takes away most of
4 the liability in this case, why wouldn't you have raised it
5 earlier?

6 MR. DEARING: I think it was a big mistake,
7 honestly. But it - - - but I do think it's just that
8 simple.

9 The other thing I'd come in the court to - - - in
10 the record on this are 1282, 83, the bottom of our 8 - - -
11 the 1282 into 1283 that lays out this - - - this point, and
12 then this Foley affidavit, which is ECF Number 61, which
13 talks about benchmark plans and how to understand that and
14 collective bargaining. It's clear that it was never - - -
15 it's never been the H.I.P.-H.M.O. for actives, which
16 doesn't make any sense.

17 I just want - - - if I could, just touch on some
18 of the points on the - - - what - - - the first issue. I
19 know - - - I know that my light is on - - -

20 CHIEF JUDGE WILSON: Just briefly. Your time is
21 up, so quickly.

22 MR. DEARING: As briefly as I can.

23 Absolutely, you can have hospital and - - - by
24 one company, one contract, and medical by another. That's
25 what Senior Care has, hospital by one, medical by another.

1 That's what all three of the plans that - - - that you find
2 in the - - - in the Board of Estimate resolution had.

3 When he talks about other parts of 12-126 that
4 use the word "plan," those were all added by the state
5 legislature more than three decades after the section we're
6 talking about. It wasn't even the same legislative body.
7 It was three decades - - - and it was three decades later.

8 The committee report, I think you have a complete
9 bead on. That committee report was verbatim identical from
10 before the law was thoroughly rewritten to after the law
11 was thoroughly written. It didn't change anything,
12 including if we just take it out of the context of this
13 dispute. One of the things Mayor Lindsay objected to was
14 the idea that the first version of the bill said you could
15 only get payment if you were a member of a retirement
16 system. He said, that doesn't make any sense. They
17 thoroughly rewrote it. They eliminated that. And yet the
18 committee report still says it only applies to people in
19 retirement system. It is clearly not a committee report
20 written to summarize the bill that was actually enacted.

21 The 29-b argument in the State law, I think Your
22 Honor hit upon the part - - - point perfectly. I mean,
23 first of all, it only - - - that only pertains to part B
24 premiums. That - - - that statute doesn't have anything to
25 do with the actual provision - - - you know, the actual

1 question of payment for health insurance that we're debate
2 - - - that we're disputing in this case.

3 It's, I think, quite telling that they would
4 twist that law to say that only in a situation - - - the
5 State law was saying only in a situation where you had a
6 choice of plans, when you're looking fifty, sixty years
7 into the future, radically changing medical insurance
8 circumstances, radically changing budget circumstances,
9 that's the only situation the City could reimburse part B.
10 And in any event, our - - - our proposal is to have a
11 choice of plans. The - - - the MAPP plan, H.I.P.-H.M.O.,
12 and an optional opt-out senior care plan. So it doesn't
13 present - - - present any problem under that statute.

14 CHIEF JUDGE WILSON: Thank you.

15 MR. DEARING: Thank you, Your Honor.

16 (Court is adjourned)

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C E R T I F I C A T I O N

I, Christian C. Amis, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of NYC Organization of Public Service Retirees v. Campion, No. 93 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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