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COURT OF APPEALS  
STATE OF NEW YORK

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MATTER OF BENTKOWSKI,  
  
Respondent,  
  
-against-  
  
CITY OF NY,  
  
Appellant.  
-----

NO. 57

20 Eagle Street  
Albany, New York  
May 15, 2025

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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Chrishanda Sassman-Reynolds  
Official Court Transcriber

1 CHIEF JUDGE WILSON: So the first matter on the  
2 calendar today is Matter of Bentskowski v. City of New York.  
3 Counsel?

4 MR. DEARING: May it please the court. I'm  
5 Richard Dearing for the City of New York. Your Honor, I'd  
6 like to request four minutes for rebuttal.

7 CHIEF JUDGE WILSON: Yes.

8 MR. DEARING: The judgment in this case rests  
9 solely on a theory of promissory estoppel that is  
10 remarkable in a number of ways. First, that it overrides  
11 the results of a robust collective bargaining system that  
12 the plaintiffs here concede that the benefits they seek, or  
13 the particular regulatory treatment they seek to be  
14 guaranteed for life, was not obtained by their collective  
15 bargaining representatives in negotiations while they were  
16 active employees. That is conceded; therefore, they are  
17 trying to override the outcome of those collective  
18 bargaining sessions. They're trying to do so for a group  
19 of some 250,000 employees of the City of New York. They're  
20 trying to do so to obtain a lifetime guarantee remar - - -  
21 which are remarkable and rare in themselves, but a lifetime  
22 guarantee not of health coverage, but of a particular  
23 regulatory treatment for their health coverage. And  
24 they're seeking to do it based on a record that is deeply  
25 inadequate.

1 JUDGE TROUTMAN: And what do you say with respect  
2 to the things that they rely upon as establishing the  
3 promise that they claim exists?

4 MR. DEARING: I think if you - - - if you - - -  
5 if they don't - - - they don't withstand any scrutiny if -  
6 - - if you take a look at them. And I'd - - - I'd like to  
7 start, if - - - if I could - - -

8 JUDGE TROUTMAN: The SPDs?

9 MR. DEARING: - - - with the SPDs, which I think  
10 are the, really the lynchpin of this case, and if they're  
11 not right about those SPDs establishing a clear and  
12 unambiguous promise - - -

13 JUDGE TROUTMAN: So what are the SPDs?

14 MR. DEARING: Right. Then the whole case fails.  
15 The SPDs are fundamentally a descriptive  
16 document, not a promise making document. It's in the title  
17 of the document, "Summary Program Description". What they  
18 do and the - - - the plaintiffs in the pa - - - last case  
19 pleaded that this is what the SPDs do. They describe the  
20 health benefits available for that year. They're issued  
21 year over year, every - - - they are always subject - - -  
22 sometimes more frequently than once a year. They're always  
23 subject to being superseded by the next SPD, which states a  
24 different state of affairs.

25 They are - - - so they are a description of the

1 current program; they are not a promise into the future.

2 JUDGE TROUTMAN: Is there something - - - is  
3 there any relevance to the fact that they change?

4 MR. DEARING: There's tremendous relevance to the  
5 fact they change frequently. In fact, SPDs are reissued  
6 again and again and again because they change. And - - -  
7 and the plaintiffs agree that basically everything else, or  
8 almost everything else in the SPDs was subject to change  
9 and - - - and - - - and has changed, but this one passage  
10 that, honestly, is quite unremarkable in context and is the  
11 one thing that was an immutable lifetime promise. It  
12 doesn't say it's a lifetime - - -

13 JUDGE SINGAS: Was there - - - is there any  
14 language that says this is subject to change, or that this  
15 is just a description which could change, or anything to  
16 that?

17 MR. DEARING: It's in the title of the document.  
18 I mean, there is language that says - - - the title is  
19 description. The - - - the first page of the document says  
20 this is information about the benefits program. It's not a  
21 agreement. It's not a contract. It's not a promise. And  
22 there is language that says that the benefits are  
23 determined via collective bargaining, they're subject to  
24 budgetary constraints. There have been - - - you know, so  
25 there is a lot of language early in the document that says

1 those things. I think the most significant thing is that  
2 the document, by its nature, and I think this point is  
3 conceded, is not a promise making document.

4 JUDGE HALLIGAN: So could it - - - could it be?

5 MR. DEARING: It could.

6 JUDGE HALLIGAN: And so if the language was  
7 unequivocal, could the City be bound by an unequivocal  
8 promise to continue the coverage forever?

9 MR. DEARING: I - - - I think it possibly could.  
10 I think the - - - the - - -

11 CHIEF JUDGE WILSON: Outside - - -

12 MR. DEARING: And I'll give you an example.

13 CHIEF JUDGE WILSON: Sorry. Out - - - outside of  
14 the collective bargaining agreement?

15 MR. DEARING: I - - - you know, I think it - - -  
16 I - - - I think there's an argument to be made that it - -  
17 - that it is entirely ousted by the field of collective  
18 bargaining. I think that's a - - - a - - - the Second  
19 Department has - - - has reached a number - - - in a number  
20 of cases said, look, if you have a contract, you - - - you  
21 can't come back and claim additional things via promissory  
22 estoppel. So I think there's an argument to be made here.  
23 At a minimum, it - - - it needs to not just be - - - be  
24 clear, ambiguous. I don't know if this concept exists, but  
25 really clear and unambiguous.

1 JUDGE HALLIGAN: So - - - so what would the  
2 standard be? Setting aside the question of whether you  
3 could have a promise outside of a collective bargaining  
4 agreement. What's the standard for thinking about  
5 promissory estoppel in the context of a government entity,  
6 would you say? Is it any different than it is between two  
7 private parties?

8 MR. DEARING: I think it is. This court's - - -  
9 this court's decisions have recognized over many years that  
10 - - - that it requires an even higher showing. It's rare,  
11 rarest of cases - - -

12 JUDGE HALLIGAN: Could you - - - could you - - -

13 MR. DEARING: - - - manifesting justice against  
14 government.

15 JUDGE HALLIGAN: Could you - - -

16 MR. DEARING: I think the collective bargaining  
17 point is, frankly, more significant. But I'm sorry, Your  
18 Honor.

19 JUDGE HALLIGAN: No, no. I just - - - could you  
20 ever have a - - - a government entity promise to do  
21 something forever and then bind every successive  
22 legislature, or administration, or something like that?

23 MR. DEARING: I think - - - I think you've tapped  
24 into - - - there is a line of cases. We cite one from this  
25 court in our brief that says, at - - - at a minimum, it

1 would require the very highest showing to find a conclusion  
2 that the government has fettered its power into the future  
3 in that way. And the - - - you know, I - - - so I think  
4 that - - - I think you could - - - I think you could rule  
5 that it can't be done. I don't think you need to go that  
6 far in this case to resolve it.

7 JUDGE SINGAS: And what - - - what about if  
8 agents of the government sort of promised that? So like  
9 there's the affirmation from the deputy mayor.

10 MR. DEARING: The - - - the affirmation of the  
11 deputy mayor, you know, I - - - I think it's worth talking  
12 about what kind of language you might see in an SPD that  
13 looks more promise-like. But the affirmation of the deputy  
14 mayor is fundamentally rooted in the SPD. If she's wrong  
15 in her - - - in her understanding of the SPD, which I  
16 submit she pretty clearly is, then everything in there  
17 about promise is basically out. And - - -

18 JUDGE RIVERA: Well, how can - - - I'm sorry.  
19 How could it be? She's the deputy mayor for Health and  
20 Human Services, commissioner of the Department for the  
21 Aging, and head of the Departments of Employment Personnel  
22 - - - I mean, she's saying - - - it says here she states  
23 unequivocally, for more than fifty years, this was the  
24 promise. I mean, if she was that wrong, one would think  
25 such a high-level representative would be corrected, given

1 the stakes.

2 MR. DEARING: Well, she relies on the SPD, and I  
3 think all - - - the SPD is in the record.

4 JUDGE RIVERA: Why shouldn't she? She heads the  
5 whole program.

6 MR. DEARING: She doesn't. Honestly, she never  
7 said she headed the whole program.

8 JUDGE RIVERA: She's not - - -

9 MR. DEARING: She - - - she held - - - no. She  
10 held a number of high ranking positions. She doesn't say  
11 she ever had anything to do with employee benefit, the  
12 employee benefit program in the City of New York. She  
13 doesn't say she had anything to do with SPD creation,  
14 drafting, issues - - -

15 JUDGE RIVERA: She's not the head of the  
16 Departments of Employment Personnel?

17 MR. DEARING: That's a - - - that's a position  
18 she had.

19 JUDGE RIVERA: One - - - one - - - one would  
20 think they would know what - - -

21 MR. DEARING: The benefits are run by Office of  
22 Labor Relations.

23 JUDGE RIVERA: Excuse me. One would think that  
24 such a high-level person would understand whether or not  
25 there was this kind of promise, considering that it

1 becomes, according to some of the evidence, a basis for  
2 recruitment. People made life choices supposedly based on  
3 what you now argue is a nonpromise.

4 MR. DEARING: The SPD speaks for itself. Even  
5 high-ranking officials can be wrong. The SPD speaks for  
6 itself - - -

7 JUDGE RIVERA: Yeah, but for five - - -

8 MR. DEARING: - - - and it does not include the  
9 promise - - -

10 JUDGE RIVERA: - - - for five decades?

11 MR. DEARING: The SPD - - - I - - - I - - - I  
12 agree with you that the - - - that the sentence, this one  
13 sentence of the SPD was in a lot of SPDs over a number of  
14 years, but it doesn't make it a promise. It doesn't change  
15 its content. And if you look at the - - - the - - - the  
16 statement, it's a - - - it's a description of the - - - of  
17 - - - of the way the program was.

18 JUDGE SINGAS: So the SPDs trump individuals who  
19 are speaking for the government?

20 MR. DEARING: She never says she - - - if you  
21 read that affidavit, and I think this is really important,  
22 she never says she spoke to anyone and made a promise to  
23 anybody. In fact, she - - - she writes her - - - this is  
24 on - - - this is a really important point. On page 2597 of  
25 the record, you can see paragraph 28 of her affidavit, she

1 writes that in a very buttoned up and limited way.

2 She does not say she ever promised anything to  
3 anybody. What she says is - - -

4 JUDGE SINGAS: Well, hypothetically?

5 MR. DEARING: - - - I had a lot of conversations  
6 - - -

7 JUDGE SINGAS: Hypothetically then, could - - -  
8 could an individual that is an agent of the government  
9 trump the SPD or no?

10 MR. DEARING: I don't think so. I mean, the - -  
11 - the plaintiffs said the - - - in their pleading that the  
12 SPD was the authoritative source of information about  
13 healthcare benefits in the City of New York.

14 I do just want to give you - - -

15 JUDGE RIVERA: Well, what - - - well, before you  
16 go further. So what - - - what do you think? I'm quoting  
17 from the AD, but it's right from her affidavit, "That the  
18 City agency", I'm quoting, "City agency, HR people" and she  
19 should know since she's heading up HR, "reiterated this  
20 promise of choice to generations of prospective City  
21 employees, the guarantee of good healthcare in retirement,  
22 including the choice to participate in traditional Medicare  
23 with a City-paid supplemental plan, was an essential  
24 recruiting and retention tool". Again, how would someone  
25 so - - - placed so high-level for - - - for so many years

1 be so wrong and is never corrected?

2 MR. DEARING: Well, I want to make two points.

3 JUDGE RIVERA: Yes.

4 MR. DEARING: The first one is the same point  
5 that it is - - - if you read the affidavit, it - - - her -  
6 - - her point about promise is rooted in the SPD. The SPD  
7 speaks for itself. It's in the record. You can read the  
8 passage, read it in context, and you will see that it is  
9 incorrect that it is a clear and unambiguous promise.  
10 Certainly not a clear and unambiguous promise of any  
11 lifetime benefit.

12 I'll also say to you, even as she frames the  
13 promise, she does not say it's a lifetime benefit. She  
14 stops short of that. She says they were promised that when  
15 they retired, they would have a choice. That ha - - -  
16 that's true for the retirees. When they retired, they had  
17 a sup available. She didn't ever say it was a lifetime  
18 guarantee. And no language in the SPD says it is.

19 To talk about the issue of whether she would be  
20 corrected. You know, clearly, as any attorney would, it -  
21 - - it would - - - it - - - I would prefer to - - - that -  
22 - - that there would be a direct rebuttal of that - - - of  
23 that affidavit. The bottom line remains, however, that the  
24 affidavit is deeply insufficient to get them over the  
25 finish line. And - - - and I just want to talk, if I

1           could, for a minute - - -

2                   JUDGE RIVERA: Well, before you get there. Do  
3           you - - -

4                   MR. DEARING: - - - about the choice that was  
5           made - - -

6                   JUDGE RIVERA: - - - do you - - - do you agree  
7           that regardless of what you think about whether or not this  
8           is the exact promise, do you agree that a promise of access  
9           to City-funded healthcare in retirement could be used as a  
10          - - - excuse me, as a recruitment tool?

11                  MR. DEARING: I don't disagree that it could be  
12          used.

13                  JUDGE RIVERA: Was it used as a recruitment tool?

14                  MR. DEARING: I have no basis to say - - -

15                  JUDGE RIVERA: Or - - - or was some - - -

16                  MR. DEARING: - - - one way or the other.

17                  JUDGE RIVERA: I'm sorry. What?

18                  MR. DEARING: I have no basis to say that one way  
19          or the other. But what we do know - - -

20                  JUDGE RIVERA: But what does the record show?

21                  MR. DEARING: - - - is they're still getting - -  
22          -

23                  JUDGE RIVERA: What does the record show?

24                  MR. DEARING: What?

25                  JUDGE RIVERA: I'm talking about the record

1 before us.

2 MR. DEARING: I - - - I grant you that - - -

3 JUDGE RIVERA: Anything to suggest it - - -

4 MR. DEARING: - - - deputy mayor - - -

5 JUDGE RIVERA: - - - was used as a recruit tool?

6 MR. DEARING: - - - the deputy mayor's affidavit  
7 says that it was. I have no basis to say whether it was  
8 one way or the other. I - - - I do want to hasten to add,  
9 though, that we are - - - this is important. They're  
10 getting healthcare paid for by the City. We're reimbursing  
11 their part B premium. If you look in the record, the chart  
12 at 4057 to 4061, side-by-side chart of the two plans. The  
13 plans are mirror images of one another.

14 JUDGE HALLIGAN: Can - - - can I ask - - -

15 MR. DEARING: So it's not - - - yes, Your Honor.

16 JUDGE HALLIGAN: Go ahead.

17 MR. DEARING: It's not - - - it's not right to  
18 say that they're not getting healthcare. What they're  
19 saying is they are claiming is a particular regulatory  
20 treatment for the healthcare.

21 JUDGE HALLIGAN: Can I ask you to - - - to  
22 explore a little bit your view on when a government  
23 employee can bind the government itself? I mean, there are  
24 probably differences. Are you a high ranking official?  
25 Are you speaking about something that's within your

1 programmatic authority, you know, are you - - - are you  
2 not? What - - - what's your position on that? In the  
3 absence, let's say, of some, you know, written document  
4 that memorializes some understanding?

5 MR. DEARING: Yeah. I - - - I - - - I - - - I  
6 frankly don't see evidence that that can happen going  
7 forward into the future in this way, particularly when  
8 there's a formalized collective bargaining process.

9 JUDGE HALLIGAN: Yeah. But I just mean as a  
10 matter of law, right? If - - - so if someone is  
11 recruiting, for example, it - - - maybe set aside the CBA  
12 wrinkle for a second. If someone is recruiting but not a  
13 senior official and makes some promise, for example, not  
14 with respect to insurance coverage, but I promise you a  
15 fifty percent salary increase next year. What's your take  
16 on - - - on the scope of authority to bind?

17 MR. DEARING: I - - - I - - - I think if it's a  
18 low-level official, they don't have the scope of authority  
19 to bind. There's a - - - there are processes in the City  
20 of New York for reaching contracts. They are - - - they  
21 are highly technical - - -

22 JUDGE HALLIGAN: Is that a function of - - - of  
23 kind of common law authority, apparent authority, or are  
24 there different rules with respect to the government?

25 MR. DEARING: I think there's probably at this

1 point, a - - - a range of statutory rules that describe the  
2 statutory - - - the - - - the authority that - - - I do  
3 want to draw one distinction, if I could briefly, because I  
4 think this is important. There is a difference between  
5 equitable estoppel - - - a number of the cases that the  
6 plaintiffs rely on are equitable estoppel cases, and  
7 promissory estoppel, which has this distinctive character  
8 of binding the government into the future. Here, it's to  
9 bind the government for lifetime promise to 250,000  
10 retirees.

11 JUDGE CANNATARO: I just, if I could, I want to  
12 explore Judge Halligan's question a little deep - - - a  
13 little more deeply. Because I think there are - - - are  
14 affidavits in the record from City employees who talk about  
15 meeting with benefits people who made, allegedly, certain  
16 promises to them about what would be available to them at  
17 retirement, maybe how long it would last for. And they're  
18 not high-ranking City - - - you know, I wouldn't consider a  
19 benefits person a terribly high-ranking City official. But  
20 that seems to be, at least in part, what the court was  
21 relying on. How is - - - does that meet the legal minimum  
22 for a promissory estoppel? Or if not, what would it be?  
23 To go back to the last question.

24 MR. DEARING: I think it's - - - I - - - I think  
25 not. That it doesn't - - - I - - - that a low-level

1 official is not in a position to do that. I also think if  
2 you examine the evidence about, you know, about what they  
3 purportedly promised, the evidence is lacking even on - - -  
4 even on its own terms. I - - - if I could, I wanted to  
5 give an example from a case called Devlin of an SPD that  
6 was found to at least present - - - not in a case where the  
7 clear and unambiguous standard applied - - - to at least  
8 present a factual question on whether there was a lifetime  
9 promise and just read you that language as - - - as a  
10 contrast with the language we have here.

11 That case said - - - it was about life insurance  
12 benefits, and the SPD said you'll get - - - we'll provide  
13 the life insurance benefit, and there's a quote, "for the  
14 rest of your life at no cost to you."

15 Another document by the same company said the - -  
16 - that you will be insured for the remainder of their  
17 lives. That's what the SPD said. You won't find any  
18 statement equivalent to that or even close to that - - -

19 CHIEF JUDGE WILSON: I still want to want to go  
20 back - - -

21 MR. DEARING: - - - in the SPD here.

22 CHIEF JUDGE WILSON: - - - to the collective  
23 bargaining question. So in the circumstance, for example,  
24 that Judge Cannataro just made, a employer or perhaps  
25 prospective employee goes to somebody affiliated with the

1 City and strikes a bargain that is different from what is  
2 in the collective bargaining agreement. Can - - - can a  
3 representative employee strike a bargain?

4 MR. DEARING: There are - - - there is a - - -  
5 there's something called direct dealing, which is - - -  
6 which is prohibited. That - - - that - - - which is to  
7 strike a - - - which is to have a bargain struck outside  
8 the collective bargaining process, not through the official  
9 union representative and official channels. And so I - - -  
10 I think at a minimum, that question would be a difficult  
11 one, if not - - - if not prohibited.

12 I don't think we have anything factually or on  
13 the record that approaches that level, but I do think it  
14 would raise - - - it raise a difficult question at a  
15 minimum.

16 JUDGE HALLIGAN: Is there anything in the CBAs  
17 themselves that - - - that notifies plaintiffs or - - - or  
18 employees that their health insurance benefits are covered  
19 by the CBA?

20 MR. DEARING: In the CBA or in the SPD?

21 JUDGE HALLIGAN: No. Is there anything in - - -  
22 to - - - does the CBA itself expressly address health  
23 insurance coverage?

24 MR. DEARING: CBAs do have provisions about  
25 health insurance coverage.

1 JUDGE HALLIGAN: Is that in the - - - in the  
2 record or no?

3 MR. DEARING: I don't know if it's in the record  
4 here because there's not a claim made under the - - - the  
5 CBA in this case. They formerly made that claim and now  
6 have abandoned it.

7 JUDGE CANNATARO: You were about to answer, or  
8 you were about to make a statement earlier and there - - -  
9 there was a question that stopped you. But I - - - I was  
10 wondering, it sounded to me as if you were going to go into  
11 the record that we have in front of us. Why it looks the  
12 way it looks?

13 MR. DEARING: I was, yeah. And I appreciate the  
14 opportunity to do that.

15 JUDGE CANNATARO: Could you just address that for  
16 a second?

17 MR. DEARING: Because - - - because there's a few  
18 points to unpack there. Right? One is, there's - - -  
19 there's two sides to this equation. Right? We - - - we  
20 both agreed to - - - that the court could move to a final  
21 judgment on the record that had been created. The  
22 plaintiffs locked themselves in as a result of that to the  
23 record they have, which we think has serious problems. And  
24 as a result, we didn't put in additional factual  
25 information that could have - - - would have maybe rebutted

1 aspects of the point by point of the deputy mayor's  
2 affidavit, even though we don't think that affidavit gets  
3 them close to the finish line legally.

4 And I'll talk to you a little bit about our - - -  
5 our process, and - - - you know, and as I said in - - - as  
6 any advocate would - - -

7 JUDGE CANNATARO: Can I just cut to - - -

8 MR. DEARING: Yeah.

9 JUDGE CANNATARO: Was it a strategic decision or  
10 was it a time decision - - -

11 MR. DEARING: I'd just say, too - - - too, we  
12 were already sitting on a preliminary injunction. Right?  
13 We were - - - we - - - we - - - the Court had entered a  
14 preliminary injunction. What we knew is we had no likely  
15 path to this court's review without a final judgment. And  
16 - - - and we also knew that if we went down the road of  
17 factual development, discovery, et cetera, et cetera, et  
18 cetera, we might still be in Supreme Court right now rather  
19 than in the Court of Appeals. So I - - - I grant you that  
20 we forwent certain opportunities. And as an advocate, you  
21 always would rather, even points you don't necessarily  
22 think are relevant or decisive, have them rebutted point by  
23 point. I - - - I would rather be here in that situation if  
24 all other things were equal, but all other things were not  
25 equal.

1           We were sitting on a preliminary injunction. We  
2           had no path to get to this court at that time. And if we  
3           went down the road - - - at that point, they had twelve  
4           causes of action. Now they have three. They they  
5           jettisoned nine of them in the course of this process. If  
6           we went down the road of factual development, full  
7           discovery, motion practice, et cetera, on a twelve cause of  
8           action complaint, we probably would still be before Justice  
9           Frank right now, today, with the preliminary injunction,  
10          rather than here in this court trying to get this issue  
11          resolved.

12                   CHIEF JUDGE WILSON: Thank you.

13                   MR. GARDENER: Good afternoon, Your Honors, and  
14                   may it please the court. Jake Gardener from Walden Macht  
15                   Haran & Williams, on behalf of the respondents.

16                   Promissory estoppel is designed to prevent the  
17                   very type of injustice that is present here. The elderly  
18                   and disabled retirees in this case worked - - -

19                   JUDGE RIVERA: So what - - - what are the sources  
20                   of the promise?

21                   MR. GARDENER: The sources are - - -

22                   JUDGE RIVERA: And is he incorrect that it's  
23                   really only the SPDs?

24                   MR. GARDENER: Not at all. The - - - the - - -  
25                   as the First Department found, the promise was made not

1 just in writing in the SPDs. It was made in person and  
2 orally by the highest levels of City government. And  
3 pursuant to that policy that - - - that essential  
4 recruiting and retention tool, it was communicated - - -

5 JUDGE HALLIGAN: You mean the SPD specifically or  
6 something else?

7 MR. GARDENER: The - - - the in-person promises  
8 made. The - - -

9 JUDGE HALLIGAN: And is there any evidence in the  
10 record that those individuals that the affiants describe  
11 had authority to enter into a - - - a binding promise or to  
12 you know, in any way deviate from what the collective  
13 bargaining agreement provided?

14 MR. GARDENER: So, two points. One is the fact  
15 that they were benefits officers acting pursuant to a  
16 policy that was blessed by mayors and the deputy mayor for  
17 Health and Human Services. They were clearly acting within  
18 the scope of their authority. These weren't rogue  
19 employees talking about something that they weren't  
20 responsible for. Obviously, any City policy has to be  
21 communicated by people on the ground.

22 JUDGE CANNATARO: When you say scope of their  
23 authority, what exactly do you mean? Are these people  
24 authorized to make good on any promise with respect to what  
25 the benefits are going to be?

1 MR. GARDENER: No, Your Honor. They're only  
2 authorized to make good on - - - to be held accountable to  
3 those promises that they are authorized to make and that  
4 are within their job description. I would note not a  
5 single affidavit from anyone saying that those benefits  
6 officers were making promises outside of their  
7 authorization.

8 JUDGE HALLIGAN: So - - - so if - - - if the  
9 promises were different from what the SPDs provided, is it  
10 your view that the SPDs would control or whatever oral  
11 representations were made would control?

12 MR. GARDENER: I would - - - I would say in that  
13 situation, it might be unreasonable to rely on a promise  
14 that - - - that - - - that differs from - - - that  
15 conflicts with other sources of information, if it  
16 conflicted with a statute, if it conflicted with a  
17 collective bargaining.

18 JUDGE HALLIGAN: But - - - but here, the SPDs I'm  
19 asking about. If - - - if the SPDs provided something  
20 different from whatever the affiants attest to in terms of  
21 oral representations, which, in your view, would control?

22 MR. GARDENER: So if there was a direct conflict,  
23 I - - - I think that there are conversations that could  
24 have - - - that could be had where, if it's coming from the  
25 deputy mayor for Health and Human Services, that would

1           likely control over an SPD. But that's not an - - - an  
2           issue here because there is no inconsistency.

3                       The SPD - - -

4                       CHIEF JUDGE WILSON: Could - - - could the - - -

5                       JUDGE TROUTMAN: What about the statements of  
6           mayors that went along with these SPDs - - -

7                       MR. GARDENER: Yes.

8                       JUDGE TROUTMAN: - - - how did - - - how did they  
9           - - - what is the effect of those?

10                      MR. GARDENER: It just reflects the fact that  
11           this was - - - these weren't rogue employees making  
12           statements that they didn't know what they were talking  
13           about. This was a concerted recruiting and retention tool.

14                      JUDGE TROUTMAN: But - - - but what about with  
15           respect to in 1983, there's Mayor Koch, he speaks of times  
16           of rising healthcare costs, et cetera. Doesn't that  
17           contradict that the SPDs were making a promise for life?

18                      MR. GARDENER: Those - - - those statements,  
19           first of all, they were - - - I think they were only made  
20           in one or two SPDs over the course of fifty-nine years,  
21           mentioned just generically that rising costs could  
22           potentially impact the City's finances and employee  
23           benefits in unspecified ways. They didn't directly  
24           contradict the clear promise of Medicare plus supplemental  
25           insurance for fifty-nine years.

1 JUDGE TROUTMAN: What about the fact that the  
2 SPDs changed from year to year? Does - - - does that  
3 impact your claim that - - -

4 MR. GARDENER: So I think it's helpful to  
5 understand what the SPDs are. They are basically a  
6 bifurcated document. There's the first half that provides  
7 information about the City's health insurance program in  
8 general; it provides information about the policies  
9 underlying that program. The second half says here are the  
10 list of plans offered through the health benefits program.  
11 Now, those - - - those plans, over fifty-nine years, there  
12 was some change in the number of plans or the specific  
13 insurance carriers, very little for Medicare eligible  
14 retirees.

15 JUDGE TROUTMAN: So doesn't - - -

16 MR. GARDENER: But the first - - -

17 JUDGE TROUTMAN: - - - what you've just now  
18 stated go more to they're informational in nature as  
19 opposed to a promise?

20 MR. GARDENER: So they are - - - SPDs have been  
21 found in - - - in various cases that we cite as being able  
22 to make a - - - a binding promise. And at the - - - at the  
23 very least, it is just one of multiple sources. There are  
24 HR documents, there are these in-person communications.

25 JUDGE SINGAS: But there was never a promise that

1 Medigap would continue indefinitely in any of those SPDs,  
2 right?

3 MR. GARDENER: You mean the program of Medigap -  
4 - -

5 JUDGE SINGAS: Yeah.

6 MR. GARDENER: - - - or just the offer of  
7 Medigap?

8 JUDGE SINGAS: Well, how do you do you  
9 distinguish that?

10 MR. GARDENER: So I don't know that there needs  
11 to be an assurance that the concept of a Medigap plan or  
12 Medicare would exist indefinitely. But it was a promise,  
13 it was a statement. For fifty-nine years just continuously  
14 - - -

15 JUDGE CANNATARO: A promise to do what?

16 JUDGE TROUTMAN: Yes.

17 JUDGE CANNATARO: What was the nature - - -

18 MR. GARDENER: When you retire and become  
19 Medicare eligible, you'll be entitled to Medicare plus  
20 supplemental insurance.

21 JUDGE CANNATARO: That's in the SPD? That  
22 promise is in the SPD?

23 MR. GARDENER: That - - - that promise is in the  
24 SPD. It's in HR documents. And it's reiterated in - - -  
25 in - - - repeatedly throughout these retirees' employment -

1 - -

2 CHIEF JUDGE WILSON: Could you - - - could you,  
3 through bargaining, have put that promise into a collective  
4 bargaining agreement?

5 MR. GARDENER: So I'm glad you asked about  
6 collective bargaining, because I think that's one of the  
7 most powerful pieces of evidence in our favor. Clearly - -  
8 -

9 CHIEF JUDGE WILSON: Can you just try to answer  
10 that first - - -

11 MR. GARDENER: Oh, sure.

12 CHIEF JUDGE WILSON: - - - and then say whatever  
13 you want to say?

14 MR. GARDENER: Yes. It is certainly possible to  
15 address retiree healthcare benefits. It is telling that  
16 across the - - -

17 CHIEF JUDGE WILSON: Could have - - - you could  
18 have put that into a collective bargaining agreement?

19 MR. GARDENER: I don't think there's any  
20 prohibition against talking about retiree healthcare  
21 benefits in these CBAs. But the - - - the critical point  
22 is that across 102 municipal unions for fifty-nine years,  
23 not a single one of them addressed healthcare for Medicare  
24 eligible retirees. They addressed the most trivial things  
25 you can imagine, the type of stationery that would be used



1 in - - - in - - - in correspondence. But all of them for  
2 fifty-nine years didn't say a peep about Medicare eligible  
3 retiree healthcare. The reason has to be it's clear that  
4 because it was so fundamental to working for the City that  
5 you would get Medicare plus supplemental insurance, not a  
6 single one of these 102 unions thought it necessary to  
7 address that fact in a single collective bargaining  
8 agreement.

9 CHIEF JUDGE WILSON: Well, could that be because  
10 there was an administrative code provision that guaranteed  
11 something?

12 MR. GARDENER: Well, that is one of our - - -  
13 that is one of our causes of action that - - - that  
14 Administrative Code Section 12-126.

15 CHIEF JUDGE WILSON: Well, it guaranteed  
16 something. There's no - - - no dispute that it guarantees  
17 something, right? It's just a dispute about what it  
18 guarantees.

19 MR. GARDENER: That's true. But it also  
20 guarantees it for employees. All of the employee  
21 healthcare benefits were addressed in these CBAs, so they  
22 felt it necessary to talk about healthcare for employees.  
23 Didn't say anything about Medicare eligible retirees, when  
24 clearly healthcare is incredibly important to these elderly  
25 and disabled retirees. So I think the collective

1 bargaining agreements, again, if they said something that  
2 contradicted the promise, that would be a problem for us.  
3 They didn't say anything. And - - - and so I know that the  
4 court mentioned or - - - or my friend mentioned, when you  
5 have a contract on point, how can you have a promissory  
6 estoppel claim? The law is that when that contract doesn't  
7 speak to that specific issue, there is no bar to a  
8 promissory estoppel claim.

9 Here, it's - - - promissory estoppel is a  
10 fundamental - - - is about fundamental fairness. For  
11 fifty-nine years, the City, from the highest levels of  
12 government all the way down to benefits officers, assured  
13 everyone - - -

14 JUDGE RIVERA: Okay. So just to be clear. It's  
15 - - - you say language in the SPDs. You say it's these  
16 oral communications from high level and perhaps mid-level  
17 individuals. You say it's certain HR documents. Is there  
18 anything else in the record - - -

19 MR. GARDENER: Your Honor - - -

20 JUDGE RIVERA: - - - from your standpoint that  
21 establishes this promise over time?

22 MR. GARDENER: I can't think of what else there  
23 could be. It's - - - it's - - - it's conversations in  
24 person - - -

25 JUDGE RIVERA: Oh, and then - - - and then your

1 point about the CBA right now. I understand that.

2 MR. GARDENER: Correct. And the fact that I do  
3 think it's telling, although it's not affirmative evidence,  
4 the fact that not a single current or former City official  
5 was willing to say, under penalty of perjury that, A, this  
6 promise wasn't made, B, I never heard of this promise, or  
7 C, if it was made, that's outside the scope of their  
8 authority. I think that's telling. And the fact that  
9 there was complete silence just underscores the - - - the  
10 effect of the hundreds of affidavits, including from former  
11 Deputy Mayor Lilliam Barrios-Paoli and - - -

12 JUDGE RIVERA: What about his point that really  
13 all she is relying on is the SPD, so the whole case turns  
14 on the SPD?

15 MR. GARDENER: That - - - that - - - that is just  
16 incorrect. I - - - I would just point the court to the  
17 actual affidavit itself. It is not saying that this is all  
18 reliant on the SPD. The City, it just so happens that  
19 their only argument is with respect to the SPDs. The SPDs  
20 is just one type of written document, but there are oral  
21 promises made to all the retirees. That is the unrebutted  
22 evidence and that was found by the courts below.

23 JUDGE RIVERA: But what - - - what's the language  
24 from your perspective, again, because these are your - - -  
25 as you say, your friend on the other side has already made

1 his argument about the SPDs don't have any language that  
2 would even suggest a promise. What's the language you  
3 would say that, if you're not going to look at anything  
4 else, this is the language in the SPDs that assures the  
5 promise?

6 MR. GARDENER: Sure. So for over fifty years,  
7 the SPDs and other HR documents said the following: When  
8 you or one of your dependents becomes eligible for Medicare  
9 at age sixty-five and thereafter, your first level of  
10 health benefits is provided by Medicare. The health  
11 benefits program provides a second level of benefits  
12 intended to fill certain gaps in Medicare coverage. That  
13 is, Medicare and Medicare Supplemental Insurance. Everyone  
14 who was working for the City would clearly understand that  
15 to mean that when you or one of your dependents becomes  
16 eligible - - -

17 JUDGE CANNATARO: If - - - if that is a promise,  
18 as you say, then what would be a description as - - - as in  
19 SPD? What - - - it's hard for me to imagine what other,  
20 less committal language you could use that would constitute  
21 a description of the coverage that exists, which is, I  
22 guess, what the SPD is trying to do, right?

23 MR. GARDENER: The - - - the fact that the first  
24 part of that representation speaks to what happens when you  
25 reach sixty-five and thereafter.

1 JUDGE CANNATARO: Yes.

2 MR. GARDENER: I - - - I would - - -

3 JUDGE CANNATARO: Well, no, it says when you  
4 reach sixty-five, you're going to be covered by Social  
5 Security, which is your first level of health benefit, and  
6 it's provided by Medicare. And then, it says the - - - the  
7 - - - the program provides a second level of benefits  
8 intended to fill certain gaps in Medicare coverage.

9 That, to me, sounds very descriptive. There's  
10 nothing about you will have this or this will last that  
11 long. I mean, I think that's - - - especially when you're  
12 talking about promissory estoppel, which is equitable in  
13 nature and really has to be quite clear and unambiguous.  
14 There is none of those words that we traditionally  
15 associate with promissory estoppel.

16 MR. GARDENER: Your Honor, even if that's true,  
17 and I - - - and I obviously disagree with that, that  
18 doesn't at all address the fact that for fifty-nine years,  
19 the City told these retirees before they worked for the  
20 City, throughout their employment, and throughout their  
21 retirement, that when they became Medicare eligible and  
22 retired, they would receive Medicare plus supplemental  
23 insurance. So - - -

24 CHIEF JUDGE WILSON: It doesn't quite use those  
25 words, right? You just read them. It doesn't quite say

1 that.

2 MR. GARDENER: I'm - - - sorry. I was talking  
3 about the actual oral promises - - -

4 JUDGE CANNATARO: Representations.

5 MR. GARDENER: - - - the in-person - - - in-  
6 person promises.

7 CHIEF JUDGE WILSON: So then, but - - -

8 JUDGE HALLIGAN: How can - - - how can those be  
9 relevant for anyone other than the individual that they  
10 were made to? I mean, an oral representation is by its  
11 nature, you and I talking, right? So what is its relevance  
12 beyond - - - beyond the specific retirees that are  
13 attesting in the affidavits?

14 MR. GARDENER: Because the - - - the affidavits  
15 of Ms. Barrios-Paoli, by the President of the New York City  
16 Organization of Public Service Retirees, and by the  
17 retirees themselves talk not of individual conversations,  
18 but at - - - at information sessions, at recruiting  
19 sessions.

20 JUDGE HALLIGAN: Okay. But - - - but even - - -  
21 even beyond that, why wouldn't you have to establish who it  
22 was that actually attended particular recruiting sessions  
23 or benefits conversations and whether or not the  
24 representations that each and every one of them were the  
25 same. It seems to me that that's different than the SPDs

1 or perhaps statements on a website which are more broadly  
2 distributed and accessible.

3 MR. GARDENER: The fact that the - - - the  
4 affidavits that were unrebutted, speak of the same type of  
5 promises made at every possible opportunity underscore - -  
6 -

7 JUDGE HALLIGAN: So you're asking us to infer  
8 that every retiree received an oral representation? That -  
9 - - that seems like a bit of a leap.

10 MR. GARDENER: I - - - I don't think it's a leap  
11 from the affidavit of Lilliam Barrios-Paoli, who talked  
12 about how - - -

13 CHIEF JUDGE WILSON: What about - - - what about  
14 detrimental reliance?

15 MR. GARDENER: Detrimental reliance, again - - -

16 CHIEF JUDGE WILSON: You don't think there's  
17 anyone who ever took a job with the City who didn't care  
18 about healthcare, because perhaps they had a spouse who got  
19 coverage, and that's - - -

20 MR. GARDENER: But Your Honor, even if that's  
21 possible, although I - - - I - - - I think it's pretty  
22 clear that the retirement benefits you get by working for  
23 the City is one of the key reasons why people work for the  
24 City. But even if that's true, one of the types of  
25 detrimental reliance that clearly applies to everyone is

1 that if they were led to believe that they would get  
2 Medicare plus supplemental insurance, they clearly had no  
3 opportunity to budget to pay for Medicare supplemental  
4 insurance on their own. These retirees live on razor thin  
5 budgets - - - sorry, pensions. They carefully budget their  
6 retirement.

7 JUDGE HALLIGAN: But again, that assumes that  
8 each and every retiree is using their own benefits and not  
9 - - - not a spouse's benefits, which can't - - - can't be  
10 the case. I don't know. I'm just trying to understand why  
11 there's not an individualized showing that's required,  
12 either with regard to an oral representation or as the  
13 Chief Judge says, detrimental reliance.

14 MR. GARDENER: So Your Honor, at - - - at the  
15 most, that means that there are some number of retirees who  
16 were made the promise and detrimentally relied on the  
17 promise. The way to - - - obviously, it's impractical to  
18 get tech - - -

19 JUDGE CANNATARO: But Counsel, I'm sorry. If  
20 there are some - - - if you're willing to concede that  
21 there are at least some employees who were made promises  
22 and who detrimentally relied on it, I could understand that  
23 justifying the relief that you're seeking or - - - or  
24 substantiating a promissory estoppel claim as to those  
25 individuals. But again, when you're dealing with an

1 equitable cause of action like this, you need to make that  
2 sort of baseline showing for every person that you're  
3 giving relief to, don't you? Or can we just give it out  
4 like on a - - - on a class basis?

5 MR. GARDENER: So this was an essential  
6 recruiting and retention tool. This wasn't made in one-off  
7 conversations by rogue employees here or there. It was  
8 made to - - -

9 JUDGE CANNATARO: You think every employee  
10 received that speech?

11 MR. GARDENER: During the - - - during the course  
12 of their career, they have to have worked at least a decade  
13 or fifteen years. The fact that these conversations were -  
14 - -

15 JUDGE CANNATARO: I was a City employee for a few  
16 years. I - - - I - - - I might have been given that  
17 speech, but I don't remember that I was given that speech.

18 MR. GARDENER: Well, Your Honor, we - - - we  
19 brought this as an Article 78 - - - hybrid Article 78  
20 proceeding and a putative class action. We were prepared  
21 to move forward through the class action. My friend here -  
22 - -

23 JUDGE TROUTMAN: Was there a class certified?

24 MR. GARDENER: There wasn't. My friend here  
25 wasn't trial counsel. I was. And I think my friend

1           misrepresented what happened at the trial court level.  
2           After we had - - - after we submitted our petition and  
3           memorandum of law in support of the petition, the City  
4           answered and submitted their memorandum of law. Then we  
5           had a hearing on the petition. The court asked us how they  
6           want - - - how we wanted to proceed, given the fact this  
7           wasn't just an Article 78, it was also a putative class  
8           action. And trial counsel, including myself, said, we will  
9           get back to you, Your Honor. A month passed with constant  
10          conversations with the City, and in that month we were  
11          litigating a parallel retiree healthcare case, also  
12          involving promissory estoppel, where the City took the  
13          position that wherever government operations are involved,  
14          there's no need for - - - it's unnecessary and  
15          inappropriate to have a class action. And the City said  
16          that it would provide relief to all - - - it would provide  
17          relief uniformly to all retirees, if - - - if the judge  
18          issued a decision.

19                   JUDGE HALLIGAN: In - - - in this case?

20                   JUDGE RIVERA: Is that - - - is that a version of  
21          saying that they said, if we're found to have made the  
22          promise, we'll honor the promise?

23                   MR. GARDENER: Yes. And that - - - and that was  
24          in the other case. But I'm just saying that that happened  
25          in that month period when we were going back and forth with

1 trial counsel. And in response to the court's direct  
2 question, how do you want to proceed on this putative class  
3 action, we talked. The City, of course, doesn't want to  
4 take the diametrically opposed position to the one it had  
5 just taken on July 14th. And so on August 8th, the parties  
6 submitted a stipulation that said, no, we - - - we don't  
7 need any - - - we don't need to - - - to submit anything  
8 further. There's no need for other proceedings or  
9 submissions.

10 JUDGE RIVERA: Can I - - -

11 JUDGE CANNATARO: Counsel - - -

12 JUDGE RIVERA: - - - just to be clear on - - - on  
13 this other point that was being made about reliance. My -  
14 - - I - - - I thought your position was that every person  
15 who would be in this class is someone who wants this health  
16 coverage care now? It's not that they have any other  
17 healthcare coverage that they would depend on?

18 MR. GARDENER: That's correct, Your Honor.

19 JUDGE RIVERA: Okay. All right. Thank you.

20 MR. GARDENER: Yeah.

21 JUDGE GARCIA: Counsel, just - - - maybe, this  
22 ties up a few of the questions that have been asked, but  
23 the Appellate Division described this as a singular case,  
24 right? And they went through, I think, three factors.  
25 Promissory estoppel in this context raises a number of

1 issues, and I think that's what these questions have been  
2 getting at. If we were to rule in your favor, how would  
3 this case and that ruling affect future cases of people  
4 alleging promissory estoppel in various contexts? And how  
5 singular would this model be?

6 MR. GARDENER: I think, as I said in our brief,  
7 this is a singular case in a number of respects. One is  
8 the record. You have hundreds of unrebutted affidavits  
9 from retirees and City officials confirming the promise and  
10 - - - and detrimental - - - detrimental reliance. Those  
11 are factual findings that cannot be challenged here in this  
12 court. Two, you have - - - you're talking about not just  
13 any promise. This isn't sort of a commercial promise of  
14 the type that the City - - - the cases that the City relies  
15 on. This is about health insurance for people in their  
16 seventies, eighties, and nineties, who are elderly and  
17 disabled. They relied on that promise that was made for  
18 over fifty years, orally and in writing. And there's just  
19 a number of factors. It was made to recruit and retain  
20 these individuals. And so if - - - if - - - if a city out  
21 there wants to avoid the - - - the repercussions of a  
22 decision by this court affirming, it can easily do that by  
23 simply not promising everyone for fifty years,  
24 unequivocally.

25 JUDGE SINGAS: I mean, I - - - I guess one of - -

1 - some of our concern is that this promise that you're  
2 suggesting exists based on language that isn't as strong as  
3 you're making it out to be. And the question is, shouldn't  
4 government be allowed to offer information to retirees and  
5 allow people to come in and have information sessions and  
6 learn about their healthcare benefits without being chilled  
7 to think that whatever I say now and whatever happens in  
8 this office will now bind the City indefinitely on language  
9 that isn't as precise as you're sort of intimating that it  
10 is.

11 MR. GARDENER: Absolutely, Your Honor. But what  
12 the government can't do is adopt an essential recruiting  
13 and retention policy that misleads people to - - - you  
14 know, people who are high quality, who otherwise wouldn't  
15 come work for the City, but to lure them in with the  
16 promise and then wait until they're elderly and disabled,  
17 past the point where they can go back to work or - - - or  
18 afford this insurance, and then do what Mayor Adams said  
19 when he was running for office: engage in a bait and  
20 switch.

21 That, the City - - - that, a city cannot do. But  
22 it can definitely explain this is their benefits now. This  
23 is not - - - I can't say that this will be the benefits  
24 that will be in place when you're sixty-five and  
25 thereafter. But that is exactly the promise made by every

1 single - - -

2 JUDGE RIVERA: There - - - there's no document  
3 that says these - - - this health coverage is contingent on  
4 the budget; this coverage is not guaranteed upon  
5 retirement; or this health coverage may change during any  
6 period of time?

7 MR. GARDENER: No, Your Honor. There - - - there  
8 isn't a single document. The - - - the City poured through  
9 the SPDs for fifty-something years, the other HR documents  
10 that we presented, couldn't find a single reservation of  
11 rights in those documents. And there's no evidence in the  
12 record to suggest that in the promises that were made in  
13 person, that the City officials ever communicated, but  
14 obviously, this comes with the caveat that it depends on  
15 our - - - you know, financial situation.

16 JUDGE CANNATARO: Counsel, can I just check with  
17 you very quick - - - over here - - - about the CBA? The -  
18 - - we don't have any CBAs in this record, do we?

19 MR. GARDENER: So not in - - - not in this  
20 record, in *Campion*. The decision - - - the - - - the case  
21 that was before this court several months ago contains the  
22 CBAs. And it's - - - but it's undisputed by the parties  
23 that the CBAs - - -

24 JUDGE CANNATARO: Don't mention retiree benefits  
25 at all?

1 MR. GARDENER: Correct. And - - - and if it did,  
2 that would be, I think, fatal to our argument. If the CBA  
3 said we negotiated, here's what you're getting as a  
4 Medicare eligible retirees. But obviously, that benefit is  
5 critical to - - - to working for the City. Again, like I  
6 said before, the fact that 102 unions over the course of  
7 fifty years didn't once mention this is what you're going  
8 to get when you're elderly and disabled, I think  
9 underscores the fact that it was just widely understood by  
10 everyone that - - - that what you get is Medicare plus  
11 supplemental insurance.

12 So I think the CBAs, again, is - - - is one of  
13 the most powerful pieces of evidence in our favor. But if  
14 the CBAs - - - if there was a single CBA that said, when  
15 you're Medicare eligible, you're going to get - - - you  
16 could get this, you could get that, the City, obviously,  
17 would have submitted that, and that would have been  
18 devastating to our case. If the City had submitted  
19 evidence of - - - you know, a statement by anyone saying,  
20 by the way, just warning you, as we always do, that we  
21 can't guarantee that these - - - this insurance that we've  
22 represented to you, you're going to get, will necessarily  
23 be the insurance you get when you're elderly or disabled.

24 JUDGE CANNATARO: Well, but in a promissory  
25 estoppel case where we're looking for some sort of

1 affirmative commitment from the person who is to be bound,  
2 wouldn't the better evidence be that there was some promise  
3 made to provide the benefits in a CBA, as opposed to the  
4 absence of any mention of the benefits?

5 MR. GARDENER: Absolutely, Your Honor. And - - -  
6 and - - - and - - - and those were covered in my  
7 discussions of the - - - the affidavits.

8 JUDGE CANNATARO: The other things?

9 MR. GARDENER: Yes, exactly.

10 JUDGE CANNATARO: Okay.

11 CHIEF JUDGE WILSON: Thank you.

12 MR. GARDENER: Thank you, Your Honors.

13 MR. DEARING: Judge Garcia, I want to - - - I  
14 want to respond to one of your questions. What would the  
15 implications be? They would be broad and profound. And I  
16 think the two things to remember, there are - - - the - - -  
17 the - - - the cake is baked around this state, not just the  
18 City of New York governmental - - - governments around this  
19 state on SPDs, many, many years going back and CBAs many,  
20 many years going back. If you say now that - - - that this  
21 equivocal language in an SPD can constitute a - - - now a  
22 override the product of the CBA and result in a lifetime  
23 promise, I - - - I - - - the ramifications for already  
24 existing CBAs and SPDs will be broad.

25 JUDGE RIVERA: But their position is it's not

1 just the SPDs.

2 MR. DEARING: Well, I want to address that. I  
3 think - - -

4 JUDGE RIVERA: Are you saying there's something -  
5 - -

6 MR. DEARING: - - - because I think - - -

7 JUDGE RIVERA: - - - unique, so yes?

8 MR. DEARING: I believe Mr. Gardener said all the  
9 retirees got oral promises. We point out - - - I - - - I  
10 would direct the court to our reply brief, a series of  
11 footnotes in our reply brief. I think they're on pages 4  
12 and 5. We point out just of the affidavits in this case,  
13 not - - - not even to mention the other 249,700 retirees  
14 who never put in an affidavit, just in the affidavits in  
15 this case, about 130 affidavits don't say anything about  
16 ever - - - an oral promise ever having been made to them.

17 CHIEF JUDGE WILSON: Could I ask you for a second  
18 to address the Moratorium Act?

19 MR. DEARING: Sure.

20 CHIEF JUDGE WILSON: Because it seems to me that  
21 as to teachers, it is intended to have some effect?

22 MR. DEARING: It is. And it's - - - and I - - -  
23 I think the biggest issue and the simplest way to resolve  
24 the Moratorium Act claim, as Your Honor points out, it's  
25 just for school district retirees, is - - - and this goes



1 to my point about the - - - the record closing and how  
2 there were tradeoffs, I think, made by both sides. They  
3 never - - - they didn't carry their burden on moratorium.  
4 They didn't introduce any analysis - - - any analysis of  
5 the plan - - - the totality of the plan versus totality of  
6 senior care on a group-wide basis.

7 JUDGE HALLIGAN: Was it squarely - - - was it  
8 squarely ruled upon below?

9 MR. DEARING: No. The - - - Justice Frank said  
10 he was not ruling upon - - - it hasn't been ruled upon. It  
11 was rejected by the Appellate Division, was not ruled upon  
12 by Justice Frank. I honestly don't think there's any way  
13 you could grant judgment for them on this stage.

14 JUDGE RIVERA: Why not remit it and let the  
15 record get developed?

16 MR. DEARING: I think - - - I think, because - -  
17 - I think the - - - the - - - it's - - - it's pretty  
18 straightforward. They didn't carry their burden. I would  
19 look - - - I think, for guidance you can look to Kolbe and  
20 it's - - - that - - - that case is about a collective  
21 bargaining agreement. But it talks about what - - - how  
22 you might interpret a provision that - - - that - - - that  
23 guarantees a form of equivalent coverage or equivalent  
24 level of coverage as this statute does. It - - - it - - -  
25 it cites approvingly two cases, the Poole case from the

1 Connecticut Supreme Court and the Deal (ph.) case from the  
2 Seventh Circuit that lay that out. And I just say, if you  
3 look at that framework, they didn't make any effort to  
4 carry their burden. So that - - - that claim should be  
5 dismissed.

6 JUDGE RIVERA: Is there any language in any of  
7 the documents that retiree healthcare benefits are  
8 dependent on the budget?

9 MR. DEARING: A number of them say their - - -  
10 their - - - the benefit levels are dependent on the budget,  
11 dependent on collective bargaining. These are in SPD after  
12 SPD; we cited this in our brief. The - - - I - - - I just  
13 want to button up something on the - - - on the oral  
14 promises.

15 As I said, 130 affidavits don't mention it. Not  
16 to say anything of the - - - the other 249,000. Many of  
17 the others, and these are in our footnotes too, just say  
18 that orally they reiterated what was said in the SPD. As  
19 Your Honor says, you want benefits people to be able to - -  
20 - to communicate about what SPDs say, and they shouldn't do  
21 so at the peril of - - - you know, particularly when we  
22 have - - - we have shown, I think, that the SPD didn't make  
23 a promise, the peril of those communications being  
24 understood now as some kind of lifetime promise that binds  
25 the City.

1           Mr. Gardener referred to a policy, quote,  
2           "policy". I don't think you will see in Barrios-Paoli's  
3           affidavit that she said there was a policy of making this  
4           promise orally to people. She doesn't use that word. She  
5           also doesn't say she had any duties or control or input  
6           over benefits policy. And the only - - - the only last  
7           thing I would say is - - - is just a note about - - - in  
8           the SPDs, they started out as the centerpiece of this case  
9           and now are a footnote. They've shift - - - they - - -  
10          they understood, I think, early in this case, that if they  
11          only had one path to possibly win and it was the SPDs, I  
12          think, as this case has unfolded, they have seen more and  
13          more that they will not win under that path. They've tried  
14          to pivot out of it. That case, it cannot work in that  
15          form. And they've done the same thing on the CBA.

16                 In *Campion*, they said the CBA provided them the  
17          benefit they were looking for. Now they say it was so  
18          fundamental no CBA ever had to whisper a word about it.  
19          They do not have a sustainable case, and the court should  
20          dismiss it.

21                         CHIEF JUDGE WILSON: Thank you.

22                                 (Court is adjourned)

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

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Bentkowski v. City of NY, No. 57 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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