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COURT OF APPEALS

STATE OF NEW YORK

HERBERT KOLBE, ET AL.

Appellants,

-against-

No. 235

CHRISTINE J. TIBBETTS, ET AL.,

Respondents.

20 Eagle Street
Albany, New York 12207
November 14, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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1 CHIEF JUDGE LIPPMAN: 235, Kolbe v.
2 Tibbetts.

3 MR. BAMBERGER: Good afternoon.

4 CHIEF JUDGE LIPPMAN: Counselor, go ahead.
5 Do you want any rebuttal time?

6 MR. BAMBERGER: Yes, Chief Judge Lippman.
7 May I please reserve two minutes for rebuttal?

8 CHIEF JUDGE LIPPMAN: Two minutes for
9 rebuttal. Go ahead; you have it.

10 MR. BAMBERGER: Chief Judge Lippman and may
11 it please the court, my name is Paul Bamberger, and I
12 represent Herbert Kolbe and the other retirees in
13 this matter.

14 The issue here, as in any contract case, is
15 the intent of the parties. Prior - - -

16 CHIEF JUDGE LIPPMAN: What is the intent
17 here demonstrated by the language of the CBA?

18 MR. BAMBERGER: The intent of this language
19 is - - -

20 CHIEF JUDGE LIPPMAN: They're covered
21 forever, same exact coverage? What's the intent?

22 MR. BAMBERGER: That retiree health
23 insurance - - - this retiree health insurance
24 language, the intent - - - I'm sorry. The intent is
25 that retirees are entitled to an unchanged level of

1 benefits for the life of the retiree, unless there is
2 record evidence in the - - - in the record to the
3 contrary.

4 JUDGE PIGOTT: Can you put that in English?
5 I mean, make it up. I mean, you've got individual
6 people, all right, and they retire at individual
7 times; what do they - - - what do they say the
8 contract says as far as their coverage is concerned?

9 MR. BAMBERGER: Thank you, Judge Pigott.
10 What the expectation is, is that they will get an
11 unchanged level of benefits - - -

12 CHIEF JUDGE LIPPMAN: Unchanged, meaning
13 exactly the same, or the total of the package is the
14 same?

15 MR. BAMBERGER: The total package is the
16 same.

17 JUDGE PIGOTT: So if I got a five-dollar
18 co-pay when I retire December 31st, I expect to have
19 a five-dollar co-pay until I'm seventy?

20 MR. BAMBERGER: Exactly.

21 JUDGE PIGOTT: And if I - - -

22 CHIEF JUDGE LIPPMAN: What about if it's
23 made up in other ways? What about if you lose a
24 little on the co-pay, you gain on the flexible
25 spending; does that work?

1 MR. BAMBERGER: No, Judge.

2 CHIEF JUDGE LIPPMAN: And where does it say
3 - - - or doesn't it have to say, in your view?

4 MR. BAMBERGER: It says that the coverage
5 shall be the coverage in place on the date of
6 retirement.

7 JUDGE SMITH: So if you have a plan, you
8 have a purple plan on the date of your retirement,
9 and the company later stops offering a purple plan
10 and gives you a blue plan, where you have different
11 doctors or different network provisions or different
12 other stuff, you're still entitled to the purple plan
13 even if it doesn't exist anymore?

14 MR. BAMBERGER: Yes, Judge Smith, and in
15 fact that - - - that happens all the time. And we
16 have - - - we have experience with that. As you
17 know, many plans are changing at this time, and if -
18 - -

19 JUDGE SMITH: But change as they may, your
20 - - - the retiree coverage is frozen under this
21 agreement?

22 MR. BAMBERGER: Yes, Judge Smith, and if I
23 may - - -

24 JUDGE GRAFFEO: So if existing employees
25 lose their, say, prescription coverage - - -

1 MR. BAMBERGER: Existing - - -

2 JUDGE GRAFFEO: - - - they bargain away the
3 prescription coverage - - -

4 MR. BAMBERGER: Existing employees.

5 JUDGE GRAFFEO: This is for existing
6 current employees.

7 MR. BAMBERGER: Okay.

8 JUDGE GRAFFEO: The retirees still get the
9 prescription coverage?

10 MR. BAMBERGER: Correct. The way that this
11 works is that the - - -

12 JUDGE GRAFFEO: But you know, I wish it
13 said this more clearly. I mean, if this is such a
14 critically important benefit, which it sounds like,
15 6.5.3 doesn't really totally say what you're
16 claiming. Plus it comes after a sentence talking
17 about where the retiree dies and it's transferred to
18 the spouse.

19 MR. BAMBERGER: Yes, Judge Graffeo, I
20 agree, and the ambiguity - - -

21 CHIEF JUDGE LIPPMAN: Are you saying it
22 says it, or are you saying there's a presumption that
23 they get it?

24 MR. BAMBERGER: The ambiguity is the
25 duration - - -

1 CHIEF JUDGE LIPPMAN: No, no, but what's
2 the answer to that? Is it a presumption or does it
3 say it in the agreement?

4 MR. BAMBERGER: It's ambiguous; it does not
5 say the duration - - -

6 CHIEF JUDGE LIPPMAN: No, then why do you
7 get it, because there's a presumption?

8 MR. BAMBERGER: Yes, Judge Lippman, or - -
9 -

10 CHIEF JUDGE LIPPMAN: Where does the
11 presumption - - -

12 MR. BAMBERGER: - - - or - - -

13 CHIEF JUDGE LIPPMAN: - - - come from?

14 MR. BAMBERGER: The presumption - - - can I
15 come back to the presumption and finish the thought
16 about - - - I want to be clear that we - - -

17 CHIEF JUDGE LIPPMAN: Go ahead; do one and
18 then the other.

19 MR. BAMBERGER: We do believe that the
20 language is ambiguous as to duration.

21 CHIEF JUDGE LIPPMAN: Okay. So what
22 happens now when it's ambiguous?

23 MR. BAMBERGER: It should be remanded for
24 evidence - - - extrinsic evidence to clarify the
25 language, to clarify the intent of the parties.

1 JUDGE SMITH: If I understand what you're
2 saying, you're saying it unambiguously says your
3 coverage is frozen, but it's ambiguous as to how long
4 it's frozen for?

5 MR. BAMBERGER: We would say the whole
6 thing is ambiguous.

7 CHIEF JUDGE LIPPMAN: How long it's frozen
8 for, or what the meaning of frozen is, what's the
9 scope of frozen? What is it?

10 MR. BAMBERGER: The language is ambiguous
11 as to duration, although the plan, Judge - - - to
12 answer Judge Smith's question, the - - - the plan is
13 specifically - - - the coverage is specifically in
14 6.5.3. It says you shall get this coverage. You can
15 identify - - -

16 JUDGE SMITH: So you're saying - - - so you
17 - - -

18 MR. BAMBERGER: - - - this coverage.

19 JUDGE SMITH: I mean, my question is you
20 say that's unambiguous and it means your coverage is
21 the same?

22 MR. BAMBERGER: Yes.

23 JUDGE SMITH: Okay.

24 CHIEF JUDGE LIPPMAN: But if you're getting
25 a hearing, is it as to the scope of what "same"

1 means?

2 MR. BAMBERGER: No, the - - - the hearing
3 would be to take testimony about what was said at the
4 bargaining table about whether this was intended to
5 be for the life of the retiree.

6 JUDGE SMITH: Just duration?

7 MR. BAMBERGER: Yes.

8 CHIEF JUDGE LIPPMAN: Not scope?

9 MR. BAMBERGER: Yes, that's correct, not
10 scope.

11 JUDGE GRAFFEO: Why wouldn't it mean
12 whether it means that you get the benefit but the co-
13 pay can change?

14 MR. BAMBERGER: I'm sorry; could you repeat
15 that? I didn't understand.

16 JUDGE GRAFFEO: Why wouldn't the - - - why
17 wouldn't the - - - if you want it remitted for a
18 hearing, why wouldn't there be an investigation as to
19 whether - - - I mean, say, for instance, you're still
20 getting a drug benefit, but the co-pay you pay for
21 the drugs goes up, why isn't that still the same
22 coverage? You may be paying a little more, but it's
23 still the same coverage.

24 MR. BAMBERGER: Let's focus on the - - -
25 the benefit package. There was a benefit package on

1 the date that each individual retiree retired. So if
2 they retired on - - -

3 JUDGE GRAFFEO: And it was a group policy
4 at that point - - -

5 MR. BAMBERGER: That po - - -

6 JUDGE GRAFFEO: - - - I presume. They
7 weren't buying - - -

8 MR. BAMBERGER: Actually, there were - - -

9 JUDGE GRAFFEO: They weren't buying
10 individual policies - - -

11 MR. BAMBERGER: Correct.

12 JUDGE GRAFFEO: - - - for everyone, were
13 they?

14 MR. BAMBERGER: Actually, there were three
15 options that each - - -

16 JUDGE GRAFFEO: I'm sure; most employers
17 have a couple of options. But they're all group
18 plans.

19 MR. BAMBERGER: Yes, they are group plans,
20 correct, Judge Graffeo. Now - - -

21 CHIEF JUDGE LIPPMAN: Didn't you have an
22 equivalent plan?

23 MR. BAMBERGER: Well - - -

24 CHIEF JUDGE LIPPMAN: That it's the same
25 package but there's different components that get you

1 to the package?

2 MR. BAMBERGER: The only way - - -

3 CHIEF JUDGE LIPPMAN: Or does it have to be

4 - - -

5 MR. BAMBERGER: Sorry.

6 CHIEF JUDGE LIPPMAN: - - - the five-dollar
7 co-pay or eight-dollar, or whatever it is?

8 MR. BAMBERGER: The way the plans are set
9 up, there's a - - - there's a co-pay, there's a
10 deductible, and there's a provider network.

11 CHIEF JUDGE LIPPMAN: Do they all have to
12 stay exactly the same?

13 MR. BAMBERGER: Yes. And can I go back to
14 your other question before I run out of time?

15 JUDGE SMITH: Well, before you run out - -
16 - I actually have a different one. Why is all this
17 provided in the sick-pay section? Why shouldn't that
18 whole sentence, "The coverage provided shall be the
19 coverage", why doesn't that relate to the - - - to
20 the coverage that you're providing to cash in sick
21 days and nothing else?

22 MR. BAMBERGER: The contract has to be read
23 as a whole, and the contract - - - these collective
24 bargaining agreements develop over time; pieces are
25 put in.

1 But to get back to Judge Lippman's
2 question, you asked, I believe, where does the
3 inference come from.

4 CHIEF JUDGE LIPPMAN: Yes.

5 MR. BAMBERGER: It goes back to this
6 court's cases in Lynbrook, 1979, and Aeneas McDonald,
7 1998. This court has ruled, and we have relied on
8 these cases for years, that health benefits for
9 people who have already retired is not a mandatory
10 subject. If you've already retired, the union
11 doesn't negotiate for you. So there's an expectation
12 - - -

13 CHIEF JUDGE LIPPMAN: Kind of an ongoing
14 benefit that stays because you can't be represented
15 anymore by the union?

16 MR. BAMBERGER: Correct. Correct. You
17 cannot - - - the employees cannot give away what the
18 retirees have. They - - - these are custodians and
19 cafeteria workers - - -

20 CHIEF JUDGE LIPPMAN: So you have a vested
21 right to - - -

22 MR. BAMBERGER: You have a vested right,
23 and these - - - these are people who worked for
24 twenty or thirty years, traded off current earning -
25 - -

1 CHIEF JUDGE LIPPMAN: In order to get that
2 future benefit?

3 MR. BAMBERGER: To get that future benefit.

4 CHIEF JUDGE LIPPMAN: Okay.

5 JUDGE SMITH: So can I - - -

6 CHIEF JUDGE LIPPMAN: Yes, Judge Smith.

7 JUDGE SMITH: Can I come back again? I'm
8 still hung up on sick days. 6.5.3 looks like it's
9 all about sick pay. "Employers (sic) shall be
10 entitled to receive credit toward group health
11 insurance problems (sic) in exchange for accumulated
12 sick leave." Why does that last - - - why isn't that
13 last sentence just limited to the cashing out of
14 unused sick days, because the currency you're paying
15 in is insurance coverage?

16 MR. BAMBERGER: I understand, Judge Smith,
17 and as I'm sure my adversary will be addressing it.
18 Our answer is this. The people who trade off their
19 sick leave to get premiums paid also get the benefit
20 that whatever the insurance was on the date they
21 retired is locked in - - -

22 JUDGE SMITH: I understand that - - -

23 MR. BAMBERGER: - - - provided - - -

24 JUDGE SMITH: I understand that's the
25 conclusion you want, but isn't it more natural to

1 read this language when it says "the coverage
2 provided shall be the coverage" et cetera, to mean
3 the coverage provided in exchange for unused sick
4 days?

5 MR. BAMBERGER: Judge, the language is - -
6 - it does say that the coverage will be the coverage
7 in effect on the date of retirement - - -

8 JUDGE SMITH: Yes, yes, but - - -

9 MR. BAMBERGER: - - - for those people - -
10 -

11 JUDGE SMITH: - - - why do we have to read
12 that to apply to every coverage that the retiree
13 gets? Why isn't it just the coverage he gets in
14 exchange for the sick days he's cashing in?

15 MR. BAMBERGER: It only applies to the - -
16 - to the plaintiffs; the four plaintiffs were people
17 who got the - - - the premium credits for their sick
18 leave. It only applies to them. Other people who
19 aren't part of that don't get it, but - - -

20 CHIEF JUDGE LIPPMAN: Counselor, let's hear
21 from your adversary.

22 MR. BAMBERGER: Thank you.

23 CHIEF JUDGE LIPPMAN: And then you'll - - -
24 get you back up.

25 MR. KRISTOFF: Thank you, Your Honor. May

1 it please the court. My name is Karl Kristoff, and
2 I'm here - - -

3 CHIEF JUDGE LIPPMAN: Counsel, do - - -

4 MR. KRISTOFF: - - - on behalf of the
5 respondents.

6 CHIEF JUDGE LIPPMAN: - - - do you accept
7 the fact that they continue with their coverage until
8 at least age seventy? Is that a given in this - - -

9 MR. KRISTOFF: No, it's not - - -

10 CHIEF JUDGE LIPPMAN: - - - situation?

11 MR. KRISTOFF: - - - actually.

12 CHIEF JUDGE LIPPMAN: Why not?

13 MR. KRISTOFF: And not only because of the
14 contract interpretation issue, but because of the
15 moratorium law. The moratorium law makes it very
16 clear - - -

17 CHIEF JUDGE LIPPMAN: What's the
18 significance of the moratorium law?

19 MR. KRISTOFF: To the extent that the
20 District bargained with the active employees to
21 diminish that co-pay benefit, at least to use the
22 defendant's view of the world, it had the ability,
23 because of the moratorium act, to apply that same
24 diminution to the retirees. It's an exception that
25 the legislature expressly carved out some nineteen

1 years ago. It's been in effect - - -

2 JUDGE SMITH: Well, but the - - -

3 MR. KRISTOFF: - - - for all of that time.

4 Yes?

5 JUDGE SMITH: As I understand the
6 moratorium act, it says you can't treat the retirees
7 worse than the current employees. It doesn't say
8 anything about you can't treat them better.

9 MR. KRISTOFF: There is an important
10 exception to that first piece. You can't treat them
11 any worse except to the extent you negotiate with the
12 active employees, and the active employees accept a
13 reduced benefit. That reduced benefit - - -

14 JUDGE SMITH: Okay. Okay.

15 MR. KRISTOFF: - - - can be applied to the
16 retirees.

17 JUDGE SMITH: Okay. That seems to me to
18 say that if you - - - if you cut down the current
19 employees' benefits, then you're not barred by law
20 from cutting down the retirees' benefits. But the
21 fact that you're not barred by law from doing it
22 doesn't mean that you did it.

23 MR. KRISTOFF: What - - -

24 CHIEF JUDGE LIPPMAN: Isn't it really a
25 flaw - - -

1 MR. KRISTOFF: What the law does is give
2 you authority to do it, Your Honor.

3 CHIEF JUDGE LIPPMAN: Counsel, isn't it
4 really a - - -

5 MR. KRISTOFF: And the District exercised
6 that authority after it did - - -

7 CHIEF JUDGE LIPPMAN: Counsel - - -

8 MR. KRISTOFF: - - - negotiate - - - I'm
9 sorry.

10 CHIEF JUDGE LIPPMAN: - - - isn't that - -
11 - the statute really a flaw, that's all it is?

12 MR. KRISTOFF: That was an analogy that was
13 used by the trial court, and I really have a hard
14 time with it - - -

15 CHIEF JUDGE LIPPMAN: Why is that?

16 MR. KRISTOFF: - - - because there is no
17 carve-out - - -

18 CHIEF JUDGE LIPPMAN: Doesn't that make
19 common sense that that's what it is?

20 MR. KRISTOFF: No, it - - - not to me,
21 because there's no carve-out - - -

22 CHIEF JUDGE LIPPMAN: That wasn't - - -

23 MR. KRISTOFF: - - - in the statute - - -

24 CHIEF JUDGE LIPPMAN: That wasn't - - -

25 MR. KRISTOFF: It says what it says - - -

1 CHIEF JUDGE LIPPMAN: That wasn't - - -

2 MR. KRISTOFF: - - - and it doesn't - - -

3 CHIEF JUDGE LIPPMAN: Counsel - - -

4 MR. KRISTOFF: I'm sorry.

5 CHIEF JUDGE LIPPMAN: That wasn't the
6 legislative purpose, to create a flaw?

7 MR. KRISTOFF: No. Nowhere in the
8 legislative history do you find that analogy used,
9 nowhere. What the legislative history reflects are
10 two things. First, it was passed in order to permit
11 the District to save money. And secondly, it was
12 only intended to be a limitation on the District's
13 ability to totally do away with benefits. And the
14 limitation that was enacted was that if you could
15 achieve that with the active employees who have a
16 better view of what's going on in the institution and
17 its fiscal stability, you can then apply it to the
18 retirees.

19 JUDGE SMITH: Even if - - -

20 MR. KRISTOFF: That's what it says right on
21 its face.

22 JUDGE SMITH: Even if the retirees have a
23 contract that say you can't do it?

24 MR. KRISTOFF: Yes, sir, that's correct.

25 JUDGE SMITH: Okay.

1 MR. KRISTOFF: That's correct. The law
2 does trump - - -

3 JUDGE SMITH: Assume - - -

4 MR. KRISTOFF: - - - the contract.

5 JUDGE SMITH: Okay. Assume we disagree
6 with you on that, tell me why the contract doesn't
7 say you can't do it.

8 MR. KRISTOFF: Because the contract nowhere
9 defines coverage in terms of unaltered co-pays or
10 premiums or deductibles - - -

11 JUDGE SMITH: Well - - -

12 MR. KRISTOFF: - - - or any of - - -

13 JUDGE SMITH: - - - are you - - -

14 MR. KRISTOFF: - - - the factors that go
15 into the cost.

16 JUDGE SMITH: Are you conceding then that
17 this last sentence of 6.5.3 is not limited to the
18 currency paid for sick pay - - - sick days?

19 MR. KRISTOFF: Forgive the interruption,
20 Your Honor. I just want to make sure that I - - - I
21 have this - - - this correct. It refer - - -
22 coverage refers to the plan, and the plan, in the
23 context of the sick leave, may be the plan that
24 applies to folks who are having sick leave
25 conversion. But coverage is used otherwise in the

1 contract too - - -

2 JUDGE SMITH: Okay. I'm talking - - -

3 MR. KRISTOFF: - - - to describe - - -

4 JUDGE SMITH: But we're talking about - - -

5 MR. KRISTOFF: - - - status.

6 JUDGE SMITH: But we're talking about one
7 sentence here. It's a sentence that looks simple,
8 "The coverage provided shall be the coverage which is
9 in effect for the unit at such time as the employee
10 retires." The question I was asking your adversary,
11 and I'm asking you, is why do you - - - what does
12 "the coverage provided" mean? Does it mean all the
13 coverage provided to any retiree under this contract,
14 or does it mean the coverage provided to people who
15 cash in their sick days?

16 MR. KRISTOFF: It means the basic of the
17 plan that is applied - - -

18 JUDGE SMITH: You're not - - -

19 MR. KRISTOFF: - - - to people who - - -

20 JUDGE SMITH: You're not going to answer my
21 question?

22 MR. KRISTOFF: - - - who cash in their sick
23 leave.

24 JUDGE SMITH: Oh, okay. So it's - - -

25 MR. KRISTOFF: You know, it - - -

1 JUDGE SMITH: So it's limited to sick
2 leave.

3 MR. KRISTOFF: Certainly, because it's
4 located in an entirely separate section.

5 JUDGE SMITH: So we're wasting our breath
6 with all the other stuff we're talking about, because
7 all we're talking about is cashing in sick days. It
8 has nothing to do with changing the co-pay for
9 retirees who are getting the plan.

10 MR. KRISTOFF: Except to the extent that
11 the moratorium act applies.

12 JUDGE GRAFFEO: So there's nowhere in the
13 CBA that actually addresses what I'm going to say the
14 scope of benefits that retirees get? It has to be
15 the statute, not the CBA?

16 MR. KRISTOFF: No, the - - - it would - - -
17 as the court below viewed it, it didn't really have
18 to even reach the moratorium act because they
19 considered the CBA - - -

20 CHIEF JUDGE LIPPMAN: Counselor - - -

21 MR. KRISTOFF: - - - as - - -

22 CHIEF JUDGE LIPPMAN: - - - do you - - -

23 MR. KRISTOFF: - - - sufficiently - - -

24 CHIEF JUDGE LIPPMAN: Do you - - -

25 MR. KRISTOFF: - - - clear - - -

1 JUDGE GRAFFEO: So what's the language - -
2 -

3 MR. KRISTOFF: - - - to require the result.

4 CHIEF JUDGE LIPPMAN: Do you acknowledge
5 that the coverage has to be basically the same?

6 MR. KRISTOFF: Yes.

7 CHIEF JUDGE LIPPMAN: Even though - - -

8 MR. KRISTOFF: Under the contract, Your
9 Honor.

10 CHIEF JUDGE LIPPMAN: - - - what you're
11 saying - - - so you are saying the contract provides
12 the coverage the same. Is the issue here what the
13 scope of that coverage is? Meaning that you could
14 repackage it in a way that doesn't diminish the
15 benefits, even though it doesn't have exactly the
16 five-dollar or the eight-dollar?

17 MR. KRISTOFF: Yes, Your Honor.

18 CHIEF JUDGE LIPPMAN: So you really do
19 accept the basic premise they're entitled to the same
20 coverage under the agreement; that was the bargain
21 you made. But your - - - the real difference between
22 - - - you're saying it can be packaged differently -
23 - -

24 MR. KRISTOFF: Right.

25 CHIEF JUDGE LIPPMAN: - - - over time and

1 you could still maintain the essential coverage,
2 meaning the scope, but it's broken up differently.
3 That's, in essence, your position.

4 MR. KRISTOFF: Yes, with - - - if the
5 contract stands alone and the moratorium act doesn't
6 apply, that's precisely the analysis. But if we were
7 to assume, for the sake of argument - - -

8 CHIEF JUDGE LIPPMAN: So the coverage - - -

9 MR. KRISTOFF: - - - that somehow the
10 contract - - -

11 CHIEF JUDGE LIPPMAN: So the contract - - -
12 the contract provides the coverage is the same - - -

13 MR. KRISTOFF: Right.

14 CHIEF JUDGE LIPPMAN: - - - period.

15 MR. KRISTOFF: There's basic medical
16 coverage - - -

17 CHIEF JUDGE LIPPMAN: Okay.

18 MR. KRISTOFF: - - - there's
19 hospitalization - - -

20 CHIEF JUDGE LIPPMAN: Yeah, okay.

21 MR. KRISTOFF: - - - there's prescriptions
22 - - -

23 CHIEF JUDGE LIPPMAN: Now - - -

24 MR. KRISTOFF: - - - but it doesn't talk
25 about those - - -

1 CHIEF JUDGE LIPPMAN: Okay.

2 MR. KRISTOFF: - - - underlying elements.

3 JUDGE GRAFFEO: Can you get rid of the
4 prescription coverage altogether?

5 MR. KRISTOFF: Not under the contract. We
6 could possibly, under the moratorium law, but not
7 under the contract. If the contract stands alone,
8 the moratorium law doesn't exist, you would not be
9 able to do that.

10 JUDGE SMITH: So you keep say - - - you
11 agreed with the Chief that the coverage is the - - -
12 for retired employees is the same; the same as what?
13 The same it was the day they retired, or the same as
14 the current employees get?

15 MR. KRISTOFF: Well, under the - - - well,
16 there's two answers. Under the contract, it would be
17 that the same as was extant at the time the - - - in
18 the unit at the time of the retirement. That doesn't
19 mean it's going to be extant for all time. It just
20 says at that point in time. It doesn't say that
21 it'll be extant forever. There's nothing in the
22 contract that says that.

23 JUDGE SMITH: What - - -

24 MR. KRISTOFF: And I would think there
25 should be.

1 JUDGE SMITH: Which clause of the contract,
2 to your mind, provides, in general, for retiree
3 health coverage?

4 MR. KRISTOFF: 6.4.6, and then 6.5.3 is the
5 coverage sentence that everyone is focusing on here.

6 JUDGE SMITH: Yeah, but I thought - - - I
7 thought I had talked you into the idea that that
8 limit was limited to sick days, although I had a
9 harder time than I thought I would.

10 MR. KRISTOFF: I'm sorry, Your Honor. As
11 it applies under 6.5, that's the way - - - that's the
12 reading of it, yes.

13 JUDGE SMITH: But 6.4.6, which does seem -
14 - - is the title "Health Insurance for Retired
15 Employees", so it looks like it might have something
16 to do with this - - -

17 MR. KRISTOFF: Yes, indeed.

18 JUDGE SMITH: - - - and it says, "Retired
19 employees shall be eligible to continue group health
20 insurance." And basically, that's all it says. It
21 doesn't say it's the same coverage they get the day
22 they retire.

23 MR. KRISTOFF: Precisely. And the
24 definition of the word "coverage", no matter where it
25 is used, does not in any way, shape or form

1 contemplate that those co-pays exist forever.

2 CHIEF JUDGE LIPPMAN: Counsel, but this is
3 what I don't understand. You seem to be a little bit
4 contradictory. From the big picture, when you read
5 the contract as a whole, they get the same coverage.
6 Your only argument is what the mix of that coverage
7 is. So Judge Smith is trying to ask you about the
8 particular provision relating to the sick leave and
9 what that applies to. But when you read it as a
10 whole, you read it, you get the same coverage,
11 period; the issue is the scope of coverage. And you
12 read it because of the other provision, 6.4.6; is
13 that what it is?

14 MR. KRISTOFF: Yes, Your Honor.

15 CHIEF JUDGE LIPPMAN: Okay.

16 MR. KRISTOFF: And particularly because
17 there is no carve-out. There is no specific language
18 in the contract that says "forever".

19 JUDGE GRAFFEO: Okay. Then here's what I'm
20 confused about. What's the scope of coverage for
21 retirees that aren't using sick leave to pay their
22 premiums versus those who fall under the sick leave
23 provision?

24 MR. KRISTOFF: Same scope.

25 JUDGE GRAFFEO: Same exact scope?

1 MR. KRISTOFF: Yeah - - - well, it would be
2 the - - -

3 JUDGE GRAFFEO: So it doesn't - - -

4 MR. KRISTOFF: - - - it would be the same -
5 - -

6 JUDGE GRAFFEO: - - - it doesn't matter - -
7 -

8 MR. KRISTOFF: - - - basic elements of
9 coverage - - -

10 JUDGE GRAFFEO: - - - whether they're using
11 sick leave or not?

12 MR. KRISTOFF: - - - but the insurance
13 market is dynamic. Coverages change; plans change.
14 If we look at the record in this case, you'll see
15 from - - -

16 CHIEF JUDGE LIPPMAN: Yeah, but - - -

17 MR. KRISTOFF: - - - contract to contract
18 that whole plans were displaced.

19 CHIEF JUDGE LIPPMAN: But clarify this for
20 us. The question Judge Graffeo is asking you, sick
21 leave is not, in isolation, different than anything
22 else. The whole contract's the same, same coverage,
23 not just about the people who are doing the sick
24 leave - - -

25 MR. KRISTOFF: Yes, I'm only reading the

1 sick leave coverage in the context of the article in
2 which it appears, nothing more.

3 JUDGE PIGOTT: Mr. Kristoff, before you go

4 - - -

5 MR. KRISTOFF: Yes, Your Honor.

6 JUDGE PIGOTT: - - - and we'll go back to
7 Mr. Bamberger and my retiree that's paying the five-
8 dollar co-pay. I get the impression that the cashing
9 in - - - when you're retiring, you've got sick leave
10 that you've never used. You know, it could be a lot
11 of hours, and let's assume it is. And you can get
12 that in a lump sum of money. I mean, they can write
13 you a check, right?

14 MR. KRISTOFF: No, it would not. You'd
15 have a constructive receipt problem. It would be a
16 big tax issue if you did that.

17 JUDGE PIGOTT: Well, no, I'm not - - -

18 MR. KRISTOFF: We - - -

19 JUDGE PIGOTT: I'm not - - -

20 MR. KRISTOFF: There's a fund that's
21 created, and the fund is used to pay for health
22 insurance.

23 JUDGE PIGOTT: I'm not fighting the income
24 - - - the Internal Revenue Service. What I'm saying
25 is you're entitled to this money because you didn't

1 use your sick time. And this provision is - - -

2 MR. KRISTOFF: If the contract says so,
3 Your Honor. There's no automatic entitlement.

4 JUDGE PIGOTT: I'm reading - - -

5 MR. KRISTOFF: Only if the contract says
6 so.

7 JUDGE PIGOTT: That's what I'm reading.

8 MR. KRISTOFF: Yes, that's correct. Under
9 6.5, you're absolutely right.

10 JUDGE PIGOTT: All right. So you're
11 entitled to this money, and that - - - that phrase -
12 - - that thing says you can use it to pay your
13 premiums. That's all - - - that's the only thing
14 it's talking about, right, is how you're paying your
15 premiums.

16 MR. KRISTOFF: Correct.

17 JUDGE PIGOTT: It has nothing to do with
18 the coverage.

19 MR. KRISTOFF: That's - - - well, other
20 than - - - if you're asking premiums for what, it's
21 for the coverage.

22 JUDGE PIGOTT: Right. Right. Okay.

23 CHIEF JUDGE LIPPMAN: Okay, thanks,
24 counsel. We'll take your adversary on rebuttal.

25 MR. KRISTOFF: Thank you, Your Honor.

1 issue - - - okay. Your only difference is duration
2 we don't get because it's not clear enough, but
3 coverage we do. We don't want to remand for scope of
4 coverage.

5 MR. BAMBERGER: Correct.

6 JUDGE GRAFFEO: And my question, following
7 the Chief, is you don't agree that those retirees who
8 are not using sick leave credits get the same - - -

9 MR. BAMBERGER: We'll take it.

10 JUDGE GRAFFEO: - - - guarantee as - - -

11 MR. BAMBERGER: We'll take it if - - -

12 JUDGE GRAFFEO: - - - as retirees that are
13 using 6.5?

14 MR. BAMBERGER: Going back to the remand,
15 again, if that's what the past practice was, yes.
16 But that language doesn't say that.

17 JUDGE GRAFFEO: Because the language that
18 you're relying on only applies to those retirees that
19 are using sick leave - - -

20 MR. BAMBERGER: On its face - - -

21 JUDGE GRAFFEO: - - - credits - - -

22 MR. BAMBERGER: - - - yes.

23 JUDGE GRAFFEO: - - - to pay their premium.

24 MR. BAMBERGER: And - - -

25 CHIEF JUDGE LIPPMAN: So are the other

1 people - - -

2 MR. BAMBERGER: - - - if it's past practice

3 - - -

4 CHIEF JUDGE LIPPMAN: - - - not entitled to

5 the same coverage?

6 MR. BAMBERGER: Only if there was a past

7 practice that clarified that.

8 JUDGE PIGOTT: Before you go - - -

9 MR. BAMBERGER: So - - -

10 JUDGE PIGOTT: - - - and I realize you're
11 trying to get a word out too.

12 MR. BAMBERGER: Thank you.

13 JUDGE PIGOTT: But back to my five-dollar
14 co-pay guy. If he's got the insurance with Fly By
15 Night Insurance, and - - - I want to get away from
16 the blue and the purple - - - and the whole school
17 district goes to the purple plan that Judge Smith
18 had, can he say I still want Fly By Night? I mean,
19 you've got - - - I don't care what the premium is,
20 you've got to pay for this - - - my coverage for this
21 carrier - - -

22 MR. BAMBERGER: Judge Pigott, the benefit
23 levels must remain the same. If that can be provided
24 by another provider or by some kind of flex plan,
25 that's fine. There - - - we - - -

1 CHIEF JUDGE LIPPMAN: One thought,
2 counselor.

3 MR. BAMBERGER: One thought.

4 CHIEF JUDGE LIPPMAN: Your time is up.
5 Clarify all of this for us. Go ahead, counselor.

6 MR. BAMBERGER: For one thought, I'd like
7 to address the moratorium.

8 CHIEF JUDGE LIPPMAN: Okay, go ahead.

9 MR. BAMBERGER: Unions have always been
10 allowed to negotiate benefits higher than statutory
11 rights. And in Antinore, which was addressed in one
12 of the amicus briefs filed by CSEA - - - Antinore
13 says you can have Section 75 Civil Service Law
14 protection, but the union can negotiate something
15 better. And here we have a contract that's better.

16 JUDGE PIGOTT: Well, something different.

17 MR. BAMBERGER: Something different or
18 better.

19 CHIEF JUDGE LIPPMAN: Okay. Thank you
20 both.

21 MR. BAMBERGER: Thank you very much.

22 CHIEF JUDGE LIPPMAN: Appreciate it.

23 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Herbert Kolbe, et al. v. Christine J. Tibbetts, et al., No. 235 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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Date: November 23, 2013