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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF NYC ORGANIZATION OF PUBLIC  
SERVICE RETIREES,

Appellant,

-against-

NO. 93

CAMPION,

Respondent.

-----

20 Eagle Street  
Albany, New York  
November 19, 2024

Before:

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

Appearances:

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Christian C. Amis  
Official Court Transcriber



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

5 Counsel?

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

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

10 CHIEF JUDGE WILSON: Yes, sir.

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

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

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

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

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

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

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

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

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

22 CHIEF JUDGE WILSON: Right.

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

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

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

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

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

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

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

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

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

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

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

1 of a better word, 12-126 is.

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

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

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

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

24 JUDGE RIVERA: Uh-huh.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 JUDGE RIVERA: All right.

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

5 JUDGE RIVERA: Fair enough.

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

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

21 JUDGE CANNATARO: So any - - -

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



1 see how you get that from health insurance coverage.

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

4 JUDGE RIVERA: Okay.

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

6 MR. DEARING: Sure.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 JUDGE HALLIGAN: Yeah. Uh-huh.

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

16 JUDGE HALLIGAN: Uh-huh.

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

22 JUDGE HALLIGAN: Okay.

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

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

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

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

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

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

14 CHIEF JUDGE WILSON: Right. Right. Right.

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

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

1 MR. DEARING: That's correct.

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

6 MR. DEARING: That's correct.

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

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

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

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

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

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

22 JUDGE HALLIGAN: Yeah.

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

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

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

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

8 JUDGE RIVERA: Uh-huh.

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

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

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

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

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





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

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

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

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

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

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

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

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

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

12 JUDGE RIVERA: Yes. Yes.

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

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

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

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

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

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

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

7 MR. DEARING: Sure.

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

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

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



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

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

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

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

14 JUDGE GARCIA: Where?

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

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

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

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

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

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



1 court opinion do they address the cap?

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

5 JUDGE GARCIA: Okay.

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

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

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

21 JUDGE HALLIGAN: Okay.

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

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



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

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

15 CHIEF JUDGE WILSON: Thank you.

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

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



1 always done through its health benefits program.

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

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

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

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



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

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

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

13 MR. GARDENER: Yeah.

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

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

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

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

23 CHIEF JUDGE WILSON: Okay.

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



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

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

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

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

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

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

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

23 MR. GARDENER: Yeah.

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

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

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

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

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

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

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

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

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

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

10 MR. GARDENER: Yeah.

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

15 MR. GARDENER: Because that - - -

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

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

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

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

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

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

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

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

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

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

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

16 CHIEF JUDGE WILSON: Uh-huh.

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

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

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

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

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



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

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

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

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

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

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

3 CHIEF JUDGE WILSON: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 JUDGE RIVERA: "Any" could mean whatever you



1 offer - - -

2 MR. GARDENER: That - - -

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

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

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

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

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

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



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

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

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

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

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

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

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

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

17 JUDGE RIVERA: Right.

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

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

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

3 MR. GARDENER: That's correct.

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

5 MR. GARDENER: Right.

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

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

11 JUDGE RIVERA: I see. Okay.

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

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



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

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

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

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

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

6           Thank you, Your Honors.

7           CHIEF JUDGE WILSON: Thank you.

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

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

12          MR. DEARING: Yeah. Sure.

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

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

21          JUDGE HALLIGAN: Okay.

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

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

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

1 JUDGE HALLIGAN: Your common-sense point?

2 MR. DEARING: Yeah, exactly.

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

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

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

9 MR. DEARING: I agree with that.

10 JUDGE HALLIGAN: Okay. Thank you.

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

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

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

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

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

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

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

20 JUDGE GARCIA: Because it seems so simple.

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

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

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

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

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

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

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

22 MR. DEARING: As briefly as I can.

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

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

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

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

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

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

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

14 CHIEF JUDGE WILSON: Thank you.

15 MR. DEARING: Thank you, Your Honor.

16 (Court is adjourned)

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

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



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