Supreme Court of the State of New York
Appellate Division, First Judicial Department

Ellen Gesmer, J.P.
Martin Shulman
John R. Higgitt
Llinét M. Rosado,

JJ.

Appeal No. 2038
Index No. 154962/23
Case No. 2023-04716
Motion No. 2024-1452

In the Matter of Robert Bentkowski et al.,
Petitioners/Plaintiffs-Respondents,

-against-

The City of New York et al.,
Respondents/Defendants-Appellants,

AETNA LIFE INSURANCE COMPANY,
Amicus Curaie.

Petitioners/Plaintiffs appeal from the judgment (denominated an order) of the Supreme Court, New York County (Lyle E. Frank, J.), entered September 19, 2023, which, in this hybrid proceeding-class action brought pursuant to CPLR article 78, granted the petition-complaint to the extent of permanently enjoining the City respondents/defendants from eliminating petitioners/plaintiffs retirees' existing health insurance, automatically enrolling them in a new Aetna Medicare Advantage Plan, enforcing a June 30, 2023 deadline for retirees to opt out of the new plan, and implementing any other aspect of the City's new retiree healthcare policy.

Sylvia O. Hinds-Radix, Corporation Counsel, New York (Richard Dearing, Devin Slack, Jonathan Schoepp-Wong and Chloé K. Moon of counsel), for appellants.

Walden Macht & Haran LLP, New York (Jacob S. Gardener and Hannah Belitz of counsel), and Pollock Cohen LLP, New York (Steve Cohen of counsel), for respondents.

Alston + Bird LLP, New York (Karl Geercken, Betty Weinberg Ellerin, Elizabeth A. Buckel, Sharon Steinerman and Kristen C. Kuan of counsel), for Aetna Life Insurance Company, Amicus Curaie.

GESMER, J.

Petitioners[1] are retired New York City employees, including but not limited to teachers, firefighters, paramedics, and police officers (City retirees), and the NYC Organization of Public Service Retirees, which has tens of thousands of members. They commenced this litigation seeking to prevent respondents, the City of New York and its relevant executives and agencies (collectively, the City), from, among other things, discontinuing City retirees' existing City-funded Medicare supplemental insurance plans[2] and automatically enrolling the City retirees in the Aetna Medicare Advantage Plan (MAP).[3] City retirees may opt out of the City's plan, but would then be required to pay their own Medicare Part B premiums[4] and Medicare supplemental insurance costs.

In support of petitioners' request for injunctive relief, they submitted hundreds of affidavits from City retirees, former City officials, medical professionals, and healthcare experts, as well as thousands of pages of documentary evidence. Among these documents is the affidavit of Lilliam Barrios-Paoli, who, during her 25 years working for the City of New York, served as Deputy Mayor for Health and Human Services, Commissioner of the Department for the Aging, and head of the Departments of Employment, Personnel, Housing Preservation and Development, and the Human

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[1] In this hybrid CPLR article 78 proceeding/class action for damages, equitable relief, and injunctive relief, the parties are petitioners/plaintiffs and respondents/defendants. For simplicity, I use the terms petitioners and respondents.

[2] Medicare supplemental insurance plans, sometimes referred to as "Medigap," cover the 20% of healthcare expenses not covered by Medicare.

[3] As described in the City's Summary Program Descriptions, MAPs, also known as "Medicare Part C," "replace both traditional Medicare and a Medicare supplemental plan with a single integrated program." Private insurance companies administer MAPs. The federal government pays insurers a fixed monthly sum per enrollee, based on enrollee health status. Insurers then use those funds to administer their MAPs (42 USC §§ 1395w-23, 1395w-25).

[4] Medicare Part B covers outpatient care. The City has historically covered City retirees' Medicare Part B premiums, including for those enrolled in traditional Medicare with Medigap.

Resources Administration. She states unequivocally that, for more than 50 years, the City has promised employees that they would have a choice of health plans in retirement, and that "access to traditional Medicare with a City-paid supplemental plan was always among the choices." Moreover, she states that "City Agency HR people reiterated this promise of choice to generations of prospective City employees. The guarantee of good healthcare in retirement – including the choice to participate in traditional Medicare with a City-paid supplemental plan – was an essential recruiting and retention tool."

Individual City retirees set out in their affidavits facts particular to them, which illustrated the statements made by Ms. Barrios-Paoli. For example, City retiree Robert Bentkowski worked for the City's Emergency Medical Services and the New York City Fire Department from 1989 until his retirement in 2014. By the time he retired, he had developed kidney and lung disease, for which he is still being treated. He stated that the "City made a clear and unambiguous promise that when I retired and became eligible for Medicare, the City would provide and pay for a choice of Medicare Supplemental health insurance." He states that he chose his healthcare providers based on his reliance on the City's promise and the Medicare supplemental plan he had selected. The hospital where he has been treated for complications following a kidney transplant, and where he intends to undergo a second kidney transplant, does not accept MAPs for transplant surgeries.

Similarly, City retiree Phyllis Mintz worked as an assistant district attorney from January 1996 until retiring in May 2013. She stated that, throughout her employment,

> "the City repeatedly promised that when I retired and became eligible for Medicare, the City would pay for my Medicare Part B premium plus my choice of a Medicare supplemental plan. This promise was made in job

> descriptions and other documents. The benefit was also promised verbally during my orientation process, numerous times over the years by members of the human resource staff, and by human resource staff during the retirement process."

Ms. Mintz further stated that she relied on this promise in deciding to leave a much higher paying job as an associate at a large law firm to work for the City, in large part because "the tradeoff was a good one because [she] knew . . . the promise of lifetime free Medicare Part B and Medigap was worth the significant financial sacrifice." She further stated that at least three of her healthcare providers do not accept the Aetna MAP. She is considering returning to the practice of law at age 75 in order to afford to opt out of the City's plan and pay for Medigap insurance for herself and her husband.

In their affidavits, many City retirees state that they relied on language in the City's SPDs over the years which promised a choice of Medigap insurance upon retirement. Like Ms. Mintz, many further state in their affidavits that individual City employees reiterated that promise to them, including but not limited to employees of the New York City Housing Authority, Department of Design and Construction, Department of Sanitation, Health Department, Department of Education, Department of Corrections, Office of Labor Relations, Employee Retirement System, District Attorney's Office, and the City University of New York.

Like Mr. Bentkowski and Ms. Mintz, many City retirees state in their affidavits that their chosen healthcare providers do not accept the Aetna MAP. Accordingly, under the City's plan, many elderly or disabled City retirees would lose continuity of care for their often complex and serious health conditions.

The affidavits of medical professionals and healthcare experts submitted by petitioners explain that MAPs, unlike traditional Medicare with Medigap, limit enrollees

to in-network providers and require prior approval for treatment.[5] They further state that enrollees' requests for prior approvals are frequently denied, and that Aetna has the highest rate of denials in the industry, rejecting 12% of claims. The affidavits presented by petitioners describe the reasons that many providers do not accept MAPs at all, including: (1) delayed payment or no payment of patient claims, even after repeated submission of records and paperwork on the same claim; and (2) prior authorization protocols that can delay care or lead to inappropriate denials of care.

Furthermore, as petitioners' healthcare experts note in their affidavits, there is no guarantee that City retirees who have moved out of New York and wish to opt out of the City's plan will be able to find a Medigap policy for which they are eligible or that they can afford, since different states have different rules applicable to Medigap insurance policies.

Respondents dispute these claims in their brief, but did not present any evidence controverting them.

Despite petitioners' significant evidentiary submissions, the City elected to submit only minimal evidence of their own, and relied heavily on Summary Program Descriptions (SPDs) for the City's health benefits program in various years. Notably, respondents submitted not a single affidavit by any City official disputing Ms. Barrios-Paoli's statements, thus effectively conceding them. Respondents consented that Supreme Court could determine the petition and petitioners' motion for a preliminary injunction without argument or further submissions.

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[5] Traditional Medicare requires prior approvals only in some circumstances, such as for durable medical equipment and certain kinds of outpatient services.

Supreme Court properly held that petitioners are entitled to relief under their promissory estoppel cause of action (*see Odonata Ltd. v Baja 137 LLC*, 206 AD3d 567, 569 [1st Dept 2022]). The City has made clear, consistent, unambiguous representations – oral and written – over the course of more than 50 years, that New York City municipal worker-retirees would have the option of receiving health care in the form of traditional Medicare with a City-paid supplemental plan. Consequently, the City cannot now mandate the proposed change eliminating that choice.

First, the record shows a clear and unambiguous promise, made for more than 50 years, that upon an employee's retirement, Medicare would provide the first level of hospital and medical insurance benefits and the City's benefits program would provide the second level to fill in the gaps. This was demonstrated by each successive SPD and the affidavit of the City's own former Commissioner of the Human Resources Administration, as well as affidavits from several retirees naming the City employees who reiterated this promise.

The City points to one SPD from 1989 to support its assertion that it reserved its rights to alter or terminate benefits or any healthcare plan. However, the 1989 SPD purportedly containing that reservation is not in the record. Even were we to consider the 1989 SPD — which, incidentally, predates the creation of Medicare Advantage — it would be insufficient to demonstrate that the promise was either qualified or too indefinite, as the reservation of rights was not included in any other SPD (*compare Abbruscato v Empire Blue Cross & Blue Shield*, 274 F3d 90, 99-100 [2d Cir 2001] [promise "qualified" where "same document contains both the promise and the reservation of rights"]). Other statements that the City identifies do not constitute reservations of rights. The shadowy semblance of a reservation of rights and the specter

of potential change does nothing to undermine the City's longstanding, unambiguous promise to offer its retirees Medigap insurance. Based on the record adduced by the parties, there is no room to infer a qualification or a condition on the City's unambiguous promise.

Second, the record shows detrimental reliance on the promise. Petitioners submitted unrebutted affidavits explaining that they chose to engage in public employment instead of working in the private sector, where they could have earned more money, in order to receive the promised health care. They also stated that they chose where to live after retirement based on traditional Medicare availability and selected health care providers based on their participation in traditional Medicare**,** without needing to determine whether the providers accept MAPs. Their reliance was reasonable and foreseeable, as it was based on more than 50 years of the City's representations and conduct providing traditional Medicare and Medigap insurance, which has remained far and away the most popular choice for retirees even after the City began offering MAPs as another option.

Third, petitioners have demonstrated injury. Many City retirees stated that their chosen providers and hospitals, like many healthcare providers, do not accept the MAPs. The City's plan to automatically enroll petitioners in the Aetna MAP and terminate their current Medigap coverage would result in injury to retirees whose medical providers do not accept the Aetna MAP.

Petitioners further state that opting out altogether, the other option under the City's plan, would cause them significant financial strain in funding their own Medigap coverage unless they receive reimbursements from the City of their Medicare Part B premiums, which the City has declined to do. The City did not demonstrate otherwise.

As the City argues, promissory estoppel is generally "not available against a governmental agency engaging in the exercise of its governmental functions" (*RK Solutions, LLC v George Westinghouse Info. Tech. High Sch.*, 116 AD3d 445, 445-446 [1st Dept 2014] [internal quotation marks omitted]), including situations where the agency is performing a statutory duty or rectifying an administrative error (*see Matter of Taranto v City of Glen Cove*, 212 AD3d 826, 827-828 [2d Dept 2023]; *Matter of Zamostina v New York City Employees' Retirement Sys.*, 189 AD3d 1256, 1259 [2d Dept 2020]). However, the doctrine is available against a governmental actor "with respect to its discretionary actions" in making employment-related decisions where no statute or ordinance bars the promised action (*Walter v City of New York Police Dept.*, 256 AD2d 8, 9 [1st Dept 1998]; *see also Matter of McManus v Board of Educ. of Hempstead Union Free School Dist.*, 87 NY2d 183, 186-187 [1995]; *Doctors Council v New York City Employees' Retirement Sys.*, 127 AD2d 380, 394 [1st Dept 1987], *revd on other grounds* 71 NY2d 669, 674-677 [1988]). The latter situation is presented here.

This is a singular case. The particular manner in which the parties chose to litigate this action before Supreme Court resulted in a record with significant evidentiary support for petitioners' position and very little support for respondents' position. That record and the arguments the parties chose to make on appeal lead to the conclusion that petitioners are entitled to relief under their promissory estoppel cause of action.

However, the City did not violate Administrative Code § 12-126(b)(1). There is no violation of the requirement that the City cover "the entire cost of health insurance coverage" for employees, retirees, and their dependents under that section. Such coverage, by definition, is "provided by health and hospitalization insurance contracts

entered into between the city and" insurance companies (Administrative Code § 12-126[a][iv]). No party disputes that, since this provision was added in 1967, the City has not actually covered "the entire cost" for Medicare-eligible retirees and dependents, as the federal government has funded the costs of Medicare insurance (other than the Part B premiums that retirees pay and the City reimburses) and the City has funded Medigap insurance under contracts it has entered with insurance carriers (*see* Administrative Code § 12-126[b][1]).

Furthermore, petitioners do not contend that any Medicare Advantage options previously or currently available violate the Administrative Code, even though these also are funded entirely or almost entirely by the federal government (*see* 42 USC § 1395w-23). Under these circumstances, this Court is "unwilling to infer a legislative intent" that the City must provide a Medicare supplemental plan as a choice to retirees in order to satisfy the requirement in § 12-126(b)(1) that it cover the entire cost of medical insurance (*Matter of Polan v State of N.Y. Ins. Dept.*, 3 NY3d 54, 63 [2004]; *see also Engle v Talarico*, 33 NY2d 237, 240 [1973]).

We have considered and rejected the parties' remaining arguments.

Accordingly, the judgment (denominated an order) of the Supreme Court, New York County (Lyle E. Frank, J.), entered September 19, 2023, which, in this hybrid proceeding-class action brought pursuant to CPLR article 78, granted the petition-complaint to the extent of permanently enjoining the City respondents/defendants from eliminating petitioner/plaintiff retirees' existing health insurance, automatically enrolling them in a new Aetna Medicare Advantage Plan, enforcing a June 30, 2023 deadline for retirees to opt out of the new plan, and implementing any other aspect of the City's new retiree healthcare policy, should be affirmed, without costs.

Judgment (denominated an order) Supreme Court, New York County (Lyle E. Frank, J.), entered September 19, 2023, affirmed, without costs.

Opinion by Gesmer, J.P. All concur.

Gesmer, J.P., Shulman, Higgitt, Rosado, JJ.

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Motion to file amicus curiae brief, granted.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: May 21, 2024

Susanna Molina Rojas
Clerk of the Court