

COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP587
STATE OF WISCONSIN

Cir. Ct. No. 2005CV11346

IN COURT OF APPEALS
DISTRICT I

ALBERT LOTH,

PLAINTIFF-APPELLANT,

v.

CITY OF MILWAUKEE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
PATRICIA D. MCMAHON, Judge. *Reversed and cause remanded.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. Albert Loth appeals from the circuit court order granting the City of Milwaukee summary judgment, dismissing his complaint, and denying his motion for summary judgment declaring the City had breached its contract with him when it adopted a resolution reducing the retirement benefits to

which he would have been entitled at retirement under the earlier resolution. We conclude that the circuit court did not correctly apply controlling legal precedent, thus we reverse and remand for further proceedings.

Background

¶2 Loth was hired as an accountant by the City of Milwaukee in November 1984. He was born in April 1945. Loth was a management employee and was never covered by a collective bargaining agreement during his tenure with the City. At the time he was hired, Loth was provided with a handbook that explained certain benefits which would be available to him when he retired. The handbook stated:

(7) MEDICAL AND DENTAL INSURANCE

1. Eligibility:

....

d. Normal Pension Retirement: Employees in active service who retire on normal pension with at least 15 years of creditable service will be entitled to the medical benefits so long as they are at least age 60 and less than age 65. The earliest date that an eligible retiree may become covered by the medical benefits will be the first of the month next following the retiree's 60th birthday, and the last date of coverage will be the last day of the month prior to the month in which the retiree becomes 65.

....

4. 1983 Cost of Coverage – Medical Benefits:

....

Normal Pension Retirement ...*

*(General City retirees 60-65 with at least 15 years' service are entitled to City paid health insurance which includes their eligible dependents.)

(Capitalization and underlining in original.)

¶3 At that time, an additional City handbook, entitled “Policies and Procedures for Health and Dental Plans,” and identified as coming from the City of Milwaukee Department of Employee Relations, Employee Benefits Division, advised that:

COVERAGE FOR RETIREES, DISABILITIES AND SURVIVING SPOUSES

Current City rules provide for City-paid (free) health coverage for general City retirees with a normal service retirement, age 60 to age 65, provided they have at least 15 years of City service....

(Bolding in original.)

¶4 These handbooks explained the substance of a resolution in effect at the time, which had been adopted in 1973 by the City of Milwaukee Common Council. The resolution stated:

Resolution relating to coverage for retirees with respect to health insurance.

Whereas. The City is desirous of extending without cost to retirees health insurance provided by Blue Cross-Blue Shield and Major Medical to certain retirees; now, therefore, be it

Resolved. By the Common Council of the City of Milwaukee that there shall be and is extended all present health insurance provided by Blue Cross-Blue Shield and Major Medical to general city employees who retire after January 1, 1974, and who meet all of the following qualifications:

- 1) Are between the ages 60-65;
- 2) Who have 15 or more years of city service; and
- 3) Who retire under the general city retirement system with an unreduced “retirement allowance;” and, be it

Further Resolved. That a surviving spouse of such retired employe shall be accorded the same benefits as she would have been eligible for under the present system; and, be it

Further Resolved. That all benefits for such coverage as provided for in this resolution shall be paid for by the City.

City of Milwaukee Resolution 73-216 (italics and arrangement in original). By November 1999, Loth had worked continuously for the City for fifteen years.

¶5 In the face of rising health insurance costs, in July 2002, the Common Council adopted Resolution 020479 to take effect January 1, 2004. This resolution significantly changed the health insurance benefits available to management retirees who had worked for the City for fifteen years by eliminating the City's obligation to pay for insurance for any general management retirees.¹

The 2002 resolution provides, in relevant part:

Whereas, The City of Milwaukee currently provides that General City Management employees who select retirement, those 55 years of age with 30 years of service or those 60 years of age with 15 years of service, can select any health insurance plan the City offers at no cost until they reach 65; and

....

Whereas, The City currently, in 2002, charges active Management Employees \$100 for single coverage in the Basic Plan or \$190 for family coverage in the Basic Plan; and

Whereas, The costs for both the City HMO health insurance and the self-funded City Basic Plan continue to increase significantly; and

¹ Some provisions, not relevant to Loth, continued to provide for retiring fire and police department employees pursuant to separate agreements covering those departments.

Whereas, Few other employers provide early retirees with full health insurance coverage till 65 at no cost; now, therefore, be it

Resolved, That the City of Milwaukee rate structure for health insurance for all Management Employees who retiree [sic] on or after January 1, 2004, be the same as it is for active Management Employees.

¶6 Loth reached age sixty on April 12, 2005, and retired on April 23, 2005. The City deducted health insurance premiums beginning with his first retirement check and continuing throughout these proceedings.

¶7 Loth sued, alleging breach of contract and promissory estoppel. He requested monetary damages, declaratory relief, and an injunction. The City denied liability, claiming that because Loth had not reached age sixty when it changed the benefits in the 2002 ordinance, Loth had not satisfied the conditions necessary to receive the previous promise of health insurance at no cost. Both parties moved for summary judgment. The trial court granted the City's motion, and dismissed Loth's complaint. It denied Loth's motion. This appeal followed.²

Standard of Review

¶8 We review *de novo* the trial court's grant or denial of summary judgment. *Green Spring Farms v. Kersten*, 136 Wis.2d 304, 315-17, 401 N.W.2d 816 (1987). Further, while the trial court's decision whether to grant declaratory relief is discretionary, we review *de novo* questions of law involved in that decision. *Commercial Union Midwest Ins. Co. v. Vorbeck*, 2004 WI App 11, ¶7, 269 Wis. 2d 204, 674 N.W.2d 665.

² Loth did not pursue his claim of promissory estoppel on appeal. Consequently, that issue is abandoned. *State v. Johnson*, 184 Wis. 2d 324, 344, 516 N.W.2d 463 (Ct. App. 1994).

¶9 This dispute centers on whether certain retirement benefits vested under the terms of an existing resolution, and whether those benefits, once vested, could be withdrawn by a later resolution. There is no substantive difference between a resolution and an ordinance, *Cross v. Soderbeck*, 94 Wis. 2d 331, 343, 288 N.W.2d 779 (1980), and we therefore interpret a resolution in the same manner as an ordinance. The interpretation of an ordinance, like statutory interpretation, presents a question of law, which we review *de novo*. *Hillis v. Village of Fox Point Bd. of Appeals*, 2005 WI App 106, ¶6, 281 Wis. 2d 147, 699 N.W.2d 636. Interpretation of contracts is also a question of law which we review *de novo*. See *Roth v. City of Glendale*, 2000 WI 100, ¶15, 237 Wis. 2d 173, 614 N.W.2d 467 (The proper interpretation of collective bargaining agreements and whether they vest a legal right of the retirees to fully-paid lifetime health benefits is reviewed, as with other contracts, as a question of law.).

Analysis

I. Right to benefits

¶10 Wisconsin law has long enforced the rights of employees, who have performed the work required, to receive benefits unilaterally promised for such work as against an employer's attempt to revoke the benefit after the work has been performed. In 1912, our supreme court held, in *Zwolanek v. Baker Manufacturing Co.*, 150 Wis. 517, 137 N.W. 769 (1912), that a profit-sharing plan unilaterally adopted by an employer is "the offer of a reward to employe[e]s for constant and continuous service," *id.* at 521, and explained that "[p]erformance constitutes acceptance of the offer, and after performance it cannot be revoked, so as to deprive a person who has acted on the faith thereof of compensation," *id.* at 523. The court also explained that while an employer may withdraw the offer, it

may not, by subsequent withdrawal, deprive the person who has already performed the requested service of the originally promised reward. *Id.* at 523

(While a mere offer, not assented to, does not constitute a contract, an acceptance of the terms of an offer of a reward by any person who complies therewith by performing the service creates a complete and valid contract, provided the performance takes place prior to the withdrawal of the offer.

(citation and quotation marks omitted)).

¶11 In 1977, the non-revocability of an earned benefit, i.e., profit-sharing, was again enforced when an employer modified the plan which allowed the forfeiture of all benefits if the former employee took a job competing with the employer. *Rosploch v. Alumatic Corp. of Am.*, 77 Wis. 2d 76, 251 N.W.2d 838 (1977). The court noted the similarity between pension and profit-sharing plans and held that:

to hold that [the employer] could impose the no-competition amendment as an additional condition upon [the employee]'s contractual right, after he had earned his account by virtue of his performance, is tantamount to saying that benefits under the plan were merely a gratuity. That view of pension and profit-sharing plans has long been inconsistent with Wisconsin law.

Id. at 87. This policy and reasoning was reconfirmed in 1978, in *Schlosser v. Allis-Chalmers Corp.*, 86 Wis. 2d 226, 271 N.W.2d 879 (1978), where the court enforced a promise of employer-paid life insurance for salaried employees at retirement after age sixty-five against a company claim that it had the right to change the insurance benefit for those who had retired, and that employees who retired before age sixty-five were not eligible for the benefit. *Id.* at 238. The court explained that the vesting of rights to future rewards depends upon the work the employee performed, not on the employee reaching a particular age.

Nor is it material that some members may have retired before reaching age sixty-five. The rights of the employees under the plan vested on their providing the services required by Allis-Chalmers; attaining age sixty-five was simply a condition precedent under the terms of the contract. In short, these differences do not matter.

Id.

¶12 Later, in *Roth v. City of Glendale*, the court applied the same rationale explained in *Schlosser* to claims by retired City of Glendale employees for City-paid health insurance under a series of twelve successive collective bargaining agreements. *Roth*, 237 Wis. 2d 173, ¶¶1, 30-32. The court adopted a presumption that vesting of retirement rights occurs when the work is performed during the contract period, unless there is contractual language or extrinsic evidence indicating otherwise. *Id.*, ¶¶25-26. In its decision, the court noted the importance of retiree health benefits and the relevance of the *Schlosser* analysis—“*Schlosser* was not decided on the singularity of the facts but rather on general equitable principles underlying the employer-employee bargaining process,” *Roth*, 237 Wis. 2d 173, ¶31—and observed that:

Allowing employers to modify past contractual obligations, when there is no indication that benefits are for a fixed term only, renders the promise of retirement benefits illusory and defies these equitable principles.

An economic consideration that cannot be swept under the rug is that many retirees live solely on their retirement benefits. Retirees with fixed incomes are generally ill-prepared to meet additional financial obligations that were unanticipated and that may be incrementally modified without notice.

Id., ¶¶32-33.

¶13 More recently, in *Dunn v. Milwaukee County*, 2005 WI App 27, 279 Wis. 2d 370, 693 N.W.2d 82, this court affirmed the corollary principle that a

public employer may change the wages of non-represented employees prospectively by repealing the last year of a previously adopted multiple-year wage increase ordinance. *Id.*, ¶¶3, 21, 27. Significant to our holding in *Dunn* was the fact that the employees were informed before the year began that the earlier announced wage rates would not be paid. *Id.*, ¶17. In so holding, we distinguished the *Schlosser* line of retirement cases, noting that those cases “involve employees whose compliance with requirements for promised benefits was complete at a time when the employer’s promise was still in place.” *Dunn*, 279 Wis.2d 370, ¶17. In a subsequent case, however, *Champine v. Milwaukee County*, 2005 WI App 75, 280 Wis. 2d 603, 696 N.W.2d 245, *review denied*, 2005 WI 134, 282 Wis. 2d 722, 700 N.W.2d 273, we enforced the promised benefit for those who had performed the work before the promised benefit was withdrawn.

¶14 In *Champine*, we resolved a claim by nonunion employees of Milwaukee County that they were entitled to certain future retirement benefits which were repealed before the represented class of employees had retired. *Id.*, ¶1. All of the represented class worked for Milwaukee County before, during, and after the period when those benefits were in effect. *Id.*, ¶7. The County argued that the class members were not entitled to the disputed benefit because they had not retired before the benefits were withdrawn. *Id.*, ¶15. We rejected that argument. *Id.*, ¶17. We held that benefits could not be changed retroactively—i.e., after an employee has satisfied all of the work requirements during the period when the benefits were in effect. *Id.* We explained: “[T]hose members of the Class who did not retire prior to March 15, 2002, are entitled, upon retirement, to a payout consistent with the terms of the 2000 Ordinance of their sick allowance that had accrued as of March 14, 2002, and is not used prior to retirement.” *Id.*, ¶18.

¶15 The disputed benefits at issue in *Champine* were enhanced sick leave retirement benefits adopted by the County Board in 2000 and repealed in February 2002 (repeal effective March 15, 2002). *Id.*, ¶¶2, 6. The affected plaintiffs were still County employees on March 14, 2002.³ *Id.*, ¶8. Because, as we have seen, a retirement benefit “represents a form of deferred compensation that is earned as the work is performed,” we concluded that “[t]he benefit can be changed, but only as it is related to work not yet performed.” *Id.*, ¶16. This is because “[o]nce work is performed while a contract or unilateral promise is in effect, permitting retroactive revocation of that promise would be unjust and inequitable.” *Id.*, ¶17.

¶16 The principles we discussed in *Champine* apply equally here. The promise of specific retirement benefits, conditioned on performing specific work, is a form of deferred compensation. Once that work has been performed, those promised future benefits can no more be unilaterally withdrawn than can wages be reduced after the work is done. To hold otherwise would, as we have previously noted, be both unfair and unjust. It would also be contrary to long-established Wisconsin law. *See Zwolanek*, 150 Wis. at 523. Future benefits can be changed, but only for work that has not yet been performed.

¶17 Our holding in *Champine* controls the outcome of this case. Here, when Loth accepted employment with the City, the work to be performed to obtain the health insurance benefit had two characteristics: the work was to be done as a general City employee (not a union member), and the work was to be done for a

³ The class also included a limited group of retirees; their claims are not relevant to our discussion here.

minimum of fifteen years. City of Milwaukee Resolution 73-216. When Loth accepted employment with the City, his right to normal retirement did not exist until he reached age sixty.⁴ As to normal retirement, attaining age sixty was truly a condition precedent. However, at the time he was hired, he would complete fifteen years of continuous service well before he reached retirement age. If we construe Resolution 73-216 as the City urges, that is, the City could withdraw its promise after its employees had performed the requisite fifteen years of work, the promise that after normal retirement, health insurance will be paid by the City while the retiree is between the ages sixty and sixty-five was an illusory promise. As we have explained, such a construction is inconsistent with controlling Wisconsin law, which we are required to follow. *See Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) (court of appeals may not overrule, modify, or withdraw language from its published opinions).

¶18 At the time Loth was hired by the City of Milwaukee, he was informed of this retirement benefit. He was provided with copies of City of Milwaukee employee handbooks which detailed the insurance coverage benefit and the age requirements and work service requirements necessary to receive these benefits after normal retirement from City employ. A handbook may alter an at-will employment relationship. *Ferraro v. Koelsch*, 124 Wis. 2d 154, 165, 368 N.W.2d 666 (1985). In *Ferraro*, our supreme court concluded that, as a matter of law, representations made in an employee handbook may modify an employment at-will relationship. *Id.* at 157-58. This employment relationship may only be

⁴ Although earlier retirement was permitted because of disability, that was a circumstance specifically excluded from the City-paid health insurance provision at issue here. *See* City of Milwaukee Resolution 73-216.

altered, however, “if the manual contains express provisions from which it reasonably could be inferred that the parties intended to bind each other to a different relationship.” *Bantz v. Montgomery Estates, Inc.*, 163 Wis. 2d 973, 979, 473 N.W.2d 506 (Ct. App. 1991).

¶19 *Ferraro* involved a claim of wrongful discharge from employment based on the failure of the employer to utilize the policies set forth in its employee handbook. *Id.*, 124 Wis. 2d at 163. The court held that an employee handbook abrogated the at-will employment relationship when the handbook included the following: (1) the employee’s acknowledgement and acceptance of the handbook’s rules and policies as a condition of continued employment; (2) discharge only for just cause; (3) mandatory progressive discipline procedures; (4) seniority-based lay-off procedures; (5) distinctions between probationary and other employees; and (6) the expectation that employees provide a two-week notice when leaving employment. *Id.* at 158-60. However, these factors do not need to be in absolute alignment for a court to determine that an express contract has been created within an employment relationship. *Wolf v. F & M Banks*, 193 Wis. 2d 439, 453, 534 N.W.2d 877 (Ct. App. 1995). Rather, “[e]ach case must be examined in light of its particular facts.” *Id.*

¶20 Here, the City passed a resolution in 1973 conferring the retirement benefit consisting of: the payment of health insurance premiums for the period of time (age sixty to sixty-five); at the full cost of health insurance coverage; for employees who had fifteen years of service completed; and who took normal retirement (age sixty or older). The City expressly incorporated this resolution into its employee handbooks and provided these handbooks to Loth during his employment with the City. The City paid these benefits to all retirees who completed this time of service requirement as set forth in the handbooks. “It is

black letter law that a promise for a promise, or the exchange of promises, will constitute consideration to support any contract of this bilateral nature.” *Ferraro*, 124 Wis. 2d at 164. Accordingly, it can reasonably “be inferred that the parties intended to bind each other” regarding this benefit. *See Bantz*, 163 Wis. 2d at 979.

¶21 In 2002, the City passed a new resolution limiting the health insurance benefits for retirees, effective March 2004. By 2002, Loth had already completed more than fifteen years of service with the City, thereby completing his service requirement to qualify for this benefit, i.e., the City had received its consideration. Accordingly, Loth is entitled to have the City perform on its promise as expressed in the handbooks’ provisions.

II. Injunction

¶22 To be entitled to an injunction, “a plaintiff must show a sufficient probability that future conduct of the defendant will violate a right of and will injure the plaintiff,” *Pure Milk Prods. Coop. v. National Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979), and that there is the threat of irreparable injury that cannot be compensated with a remedy at law, *American Mut. Liab. Ins. Co. v. Fisher*, 58 Wis. 2d 299, 305, 206 N.W.2d 152 (1973). Money damages are a remedy at law. Loth can be made whole by damages, the amount of which can be determined by the circuit court.

Conclusion

¶23 We reverse the summary judgment awarded to the City. Loth is entitled to summary judgment based on the City’s breach of its obligation to pay his health insurance premiums according to the terms of the 1973 ordinance and

related City publications referred to herein, after he retired until he reached age sixty-five. We remand to the circuit court for determination of the total health insurance premiums deducted from Loth's pension benefits during the period described above, together with interest thereon, for entry of a declaratory judgment pursuant to WIS. STAT. § 806.04 (2005-06) declaring Loth's rights consistent with this opinion, and for such other relief as may be appropriate.

By the Court.—Order reversed and cause remanded.

Recommended for publication in the official reports.

No. 2007AP587(D)

¶24 CURLEY, P.J. (*dissenting*). I respectfully dissent. I would adopt the trial court's thoughtful decision in which the court painstakingly sets out the flaw in Loth's logic and distinguishes his circumstances from those of the cases he cites. The bottom line is that Loth did not qualify for the no-premium-cost health insurance when the City adopted the 2002 resolution. The original resolution read:

Resolved. By the Common Council of the City of Milwaukee that there shall be and is extended all present health insurance provided by Blue Cross-Blue Shield and Major Medical to general city employees who retire after January 1, 1974, and who meet all of the following qualifications:

- 1) Are between the ages 60-65;
- 2) Who have 15 or more years of city service; and
- 3) Who retire under the general city retirement system with an unreduced "retirement allowance;" and,

be it

....

Further Resolved. That all benefits for such coverage as provided for in this resolution shall be paid for by the City.

Loth may have worked for the City for fifteen years and he may have intended to retire under the general city retirement system with an unreduced "retirement allowance" in 2002; however, he had not yet reached the age of 60. The trial court's order should be affirmed.

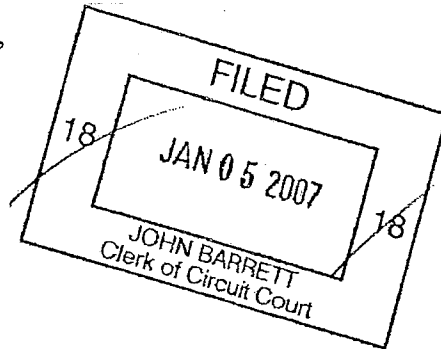
ALBERT NICHOLAS LOTH,

Plaintiff,

v.

CITY OF MILWAUKEE

Defendant.



Case No. 05-CV-11346

DECISION

BACKGROUND

Plaintiff, Albert Loth, commenced this action concerning retirement health insurance benefits. The case is before the Court on cross-motions for summary judgment. The parties agree that there are no material facts in dispute and each claims entitlement to judgment as a matter of law. For reasons set forth herein, this Court grants defendant's motion for summary judgment and denies plaintiff's motions.

FACTS

The facts are not in dispute and are accurately set forth in defendant's proposed findings of fact filed on August 31, 2006. Additional facts set forth in plaintiff's initial brief in support of his motion for summary judgment that relate to plaintiff's employment history and the various health plans offered by the City are also not disputed.

Plaintiff was a non-union, at-will employee of the City from 1984 until he retired in April 2005. At the time he was hired, what is referred to as the 1973 resolution was in effect, which provided for no-premium-cost health insurance for retired City employees 60 years of age with 15 years of service, or 55 years of age with 30 years of service. In 2002, the City adopted what is referred to as the 2002 resolution, which provided one free health insurance plan, an HMO plan, and other options that required the payment of a monthly premium. The no-premium-cost HMO plan offered limited choices for health care providers and locations. The 2002 resolution applied to employees who retired after January 1, 2004. In 2002, plaintiff was 57 years old.

Plaintiff filed this lawsuit because he contends that he is entitled to the no-premium-cost health insurance of his choosing upon retirement because he completed 15 years of service prior to the enactment of the 2002 resolution. Plaintiff's complaint asserts three claims: (1) declaratory relief; (2) breach of contract; and (3) promissory estoppel. The Court will address each in turn.

DECISION

Count I: Declaratory Relief

Plaintiff's first claim is for declaratory relief regarding his own retirement rights and the rights of others similarly situated. Declaratory judgment is appropriate in this case even though plaintiff has not joined the others similarly situated, because joinder is not necessary when the declaratory relief sought relates to the validity of a statute, ordinance, or resolution. *See Barry Labs., Inc. v. State Bd. of Pharmacy*, 26 Wis. 2d 505, 515, 132 N.W.2d 833, 836-37 (1965).

As previously stated, plaintiff contends that he is entitled to the no-premium-cost health insurance of his choosing because he completed 15 years of service while the 1973 resolution was still in effect. The 1973 resolution states:

Resolved, By the Common Council of the City of Milwaukee that there shall be and is extended all present health insurance provided by Blue Cross-Blue Shield and Major Medical to general city employees who retire after January 1, 1974, and who meet all of the following qualifications:

- 1) Are between the ages of 60-65;
- 2) Who have 15 or more years of city service; and
- 3) Who retire under the general city retirement system with an unreduced "retirement allowance;" and, be it

...
Further Resolved, That all benefits for such coverage as provided for in this resolution shall be paid for by the City.

The resolution explicitly states that employees must meet all of the qualifications; that is, the employees must be between the ages of 60 and 65, have completed 15 or more years of creditable city service, and retire from the city with an unreduced retirement allowance. There is no indication in the language of the 1973 resolution that satisfying only one of the qualifications entitles the employee to benefits.

Plaintiff contends that case law supports his position that he is entitled to the no-premium-cost health insurance of his choosing. Plaintiff relies most heavily on three cases: *Schlosser*, *Roth*, and *Champine*. None of these cases helps plaintiff's case.

In *Schlosser v. Allis-Chalmers Corp.*, 86 Wis. 2d 226, 271 N.W.2d 879 (1978), plaintiffs were retired when the employer withdrew their right to noncontributory life insurance benefits. *Id.* at 230-31, 271 N.W.2d at 881-82. The Supreme Court held that the employer could not withdraw a retirement benefit after an employee had complied with all the conditions entitling him to the benefit. *Id.* at 246-47, 271 N.W.2d at 889. In other words, the *Schlosser* plaintiffs had a vested right in the retirement benefits that were in effect at the time that they retired.

Plaintiff here, however, had not complied with all the conditions entitling him to the benefit of the 1973 resolution prior to the time the benefit was withdrawn; specifically, he was not between the ages of 60 and 65 and he had not retired at the time the 2002 resolution went onto effect. He had no vested right in any retirement benefits that were withdrawn prior to the time that he complied with all of the conditions entitling him to the benefit.

The language from *Schlosser* cited by plaintiff that stated that “attaining age sixty-five was simply a condition precedent under the terms of the contract” was taken out of context; the court made this statement in its discussion of whether the plaintiffs could be considered sufficiently similar to constitute a class for class action purposes. *Id.* at 238, 271 N.W.2d at 885. Moreover, whether the contract in *Schlosser* provided that attaining age 65 was a condition precedent has no bearing on what attaining age 65 meant under the terms of the 1973 resolution.

In *Roth v. City of Glendale*, 2000 WI 100, 237 Wis. 2d 173, 614 N.W.2d 467, plaintiffs were retired employees who were subject to a series of collective bargaining agreements.¹ *Id.* ¶ 2. Initially, the collective bargaining agreements provided health insurance benefits at no cost to retirees, but after a series of changes, retirees were required to pay a portion of the health insurance premiums. *Id.* ¶¶ 4–8. The *Roth* plaintiffs claimed that they had a vested right to no-cost health insurance pursuant to the terms of the collective bargaining agreements in force at the time of their retirements. *Id.* ¶ 9. The court held that when collective bargaining agreements are silent about the vesting of benefits, there is a presumption in favor of vesting. *Id.* ¶ 40. In other words, it is presumed that retirement benefits vest when the employee retires. Again, under the same reasoning as *Schlosser*, plaintiff here had no vested rights until he satisfied the all the qualifications and retired.

¹ The parties agreed that the four plaintiffs who were not union members received the same benefits and were treated no differently than the plaintiffs who had been union members. *Roth*, 2000 WI 100, ¶ 2.

Champine v. Milwaukee County, 2005 WI App 75, 280 Wis. 2d 603, 686 N.W.2d 245, is most unlike the present case. The plaintiffs in *Champine* were participants in a program whereby employees could accrue sick leave and withdraw the cash equivalent of this accrued sick leave upon retirement. *Id.* ¶ 3. Plaintiff here could not and did not accrue health insurance benefits during his employment. *Champine* has no bearing on the instant case.

The *Champine* plaintiffs had a benefit that accrued each pay period and was open to use immediately. The sick leave could be used during employment or cashed out upon retirement. In the instant case, plaintiff had no benefit until he satisfied all the requirements. If plaintiff had retired after working for the City before reaching the age of 60, even though he had worked for the City for over 15 years, there was no accrued benefit. If plaintiff had retired after working for the City for 14 years and 50 weeks, he would not have been entitled to the benefit he now seeks, or any proportional part of that benefit.

The cases cited by plaintiff lend no support to his assertion that he was entitled to the no-premium-cost health insurance of his choosing if he provided at least 15 years of creditable service. He was only entitled to the no-premium-cost health insurance of his choosing if he satisfied all three requirements as set forth in the 1973 resolution while the 1973 resolution was still in effect. He did not do so, and is not entitled to the benefits provided by the 1973 resolution. Plaintiff is entitled only to the retiree health insurance benefits provided in the 2002 resolution, which was the resolution in effect at the time that he satisfied all three requirements entitling him to retirement health insurance benefits.

If the Court were to accept plaintiff's contention that he is entitled to the benefits provided under the 1973 resolution after completing only 15 years of service, the alternative 55 years of age with 30 years of service option would be rendered inoperative and superfluous.

Under plaintiff's interpretation, for example, an employee could begin working for the City at age 30, complete fifteen years of service by age 45, and then claim entitlement to no-premium-cost health care upon retirement at age 55. This is certainly not the outcome the City intended when it passed the earlier resolutions, and the Court will not enforce such an outcome now. Plaintiff is not entitled to the declaratory relief he seeks.

Count II: Breach of Contract

Plaintiff's second claim is for breach of contract, based upon his position that the 1973 resolution is a contract. The 1973 resolution was passed by the Milwaukee Common Council, which is the municipal legislative body empowered with passing legislative enactments, including resolutions. *See*, City Charter §§ 4-01, 4-06 (2001). Courts employ a strong presumption that a legislative enactment "is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Dunn v. Milwaukee County*, 2005 WI App 27, ¶ 8, 279 Wis. 2d 370, 639 N.W.2d 82. Therefore, the presumption is that the legislative enactment at issue in this case, the 1973 resolution, was not intended to create private contractual or vested rights, but rather that it merely declared a policy to be pursued until the legislature ordained otherwise.

Here, nothing in the City's 1973 resolution suggests that the City intended to contractually bind itself to specific health insurance benefits for employees upon retirement, unless and until the employees satisfied the three qualifications set forth in the resolution while the resolution was still in effect. Plaintiff did not satisfy the three qualifications while the 1973 resolution was still in effect, and cannot claim the benefits set forth in the resolution.

If the 1973 resolution were considered to be a contract, then logically, plaintiff would only be entitled to the particular insurance program that was in place at that time, and only the coverage for prescriptions and procedures available at that time. Plaintiff would not be entitled to the improved health plans or to coverage that is now extended for prescriptions and procedures that were not available in 1973. This interpretation of the resolution would lead to absurd and unwanted results. Plaintiff's claim for breach of contract fails because the 1973 resolution was not a contract.

Count III: Promissory Estoppel

Plaintiff's third claim is for promissory estoppel. To maintain a claim for promissory estoppel, plaintiff has to show that (1) the promise was one which the promisor should have reasonably expected to induce action or forbearance of a definite and substantial character on the part of the promisee; (2) that the promise induced such action or forbearance; and (3) that injustice can be avoided only by enforcement of the promise. *Hoffman v. Red Owl Stores, Inc.*, 26 Wis.2d 683, 698, 133 N.W.2d 267, 275 (1965). Plaintiff's claim for promissory estoppel fails because, at a minimum, he has failed to provide evidence supporting the second element.

Plaintiff asserts that he relied on the promise of no-premium-cost health insurance in accepting employment with the City and in turning down other employment opportunities, where the salary compensation was greater. Presuming that the City's offer of no-premium-cost health insurance of the employee's choosing could actually be considered a promise to plaintiff, no evidence is provided in support of his alleged reliance on this promise. There is no dispute that plaintiff's stated reason for taking the job with the City related to his concerns about his former employment.

The only evidence offered in this record is that retirement benefits were only generally discussed at his interview and that plaintiff was already working for the City and committed to the job before he received documentation regarding retirement benefits. Plaintiff's learning of such benefits did not impact his decision as to whether or not to continue working for the City. It is not disputed that plaintiff learned of the 2002 Resolution soon after its adoption but he did not seek other employment, object to or negotiate a variation of the new rule or take any action with respect to its application to him. There is likewise no evidence that he chose to forego other employment opportunities in reliance on the promise of no-premium-cost health insurance of his choosing at any time prior to the 2002 resolution. In short, plaintiff has failed to provide any evidence that he relied on the promise of no-premium-cost health insurance of his choosing in accepting employment with the City or in refusing other employment opportunities. The extent of other City employees' reliance on the stated benefits has no bearing on plaintiff's promissory estoppel claim. The facts with respect to these other employees are disputed but they are not relevant or material to plaintiff's claim.

Moreover, the promise made to plaintiff was that the City would offer plaintiff some sort no-premium-cost retiree health insurance benefit upon retirement. Plaintiff was offered the option of a no-premium-cost HMO health insurance plan, or one of several other plans that require retirees to pay a monthly premium. After retiring, plaintiff chose one of the plans that requires him to pay a monthly premium because it was the lowest cost plan that allowed him to continue with his existing health care providers. When plaintiff moves to Florida, he indicated that he will choose the Basic Plan, which requires him to pay a monthly premium, because it is the only plan offered by the City that provides coverage in Florida. Plaintiff cannot claim that the City failed to follow through on its promise of a no-premium-cost retiree health insurance

benefit simply because the City will not permit plaintiff to choose any health care provider he wants in any state he wants. Plaintiff has made the choice to turn down the no-cost-premium health insurance plan offered by the City to accommodate his own plans. For these reasons, plaintiff's claim for promissory estoppel fails.

CONCLUSION

For the reasons previously stated, this Court grants summary judgment in favor of Defendant City of Milwaukee and this action is dismissed in its entirety, with prejudice. Plaintiff's motions are denied.

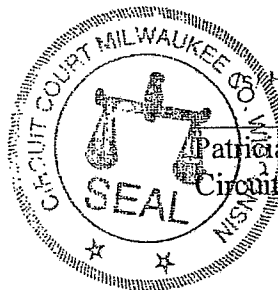
Defendant also filed a motion to strike the affidavits of Anne Bahr and Michael Haley. The Court did not rely on these affidavits in deciding this motion for summary judgment, as other employee's perceptions and decisions with regard to any alleged promises are irrelevant to plaintiff's claims. That being said, this Court will deny the motion to strike, as the proposed basis for doing so was inadequate as a matter of law.

Defendant shall submit a proposed order reflecting this Court's decision under the five-day rule.

JAN - 5 2007

Dated this _____ day of January, 2007.

BY THE COURT:



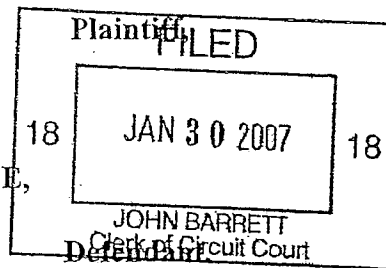
HON PATRICIA D. McMAHON

Patricia D. McMahon
Circuit Judge, Branch 18

ALBERT NICHOLAS LOTH

CASE NO: 05-CV-011346

v.
CITY OF MILWAUKEE,



Hon. Patricia D. McMahon, Br. 18

30301-Money Judgment
30303-Other Contracts
30701-Declaratory Judgment
30704-Other Injunction

ORDER AND JUDGMENT

WHEREAS Plaintiff Albert Nicholas Loth and Defendant City of Milwaukee filed cross-motions for summary judgment in the above-captioned case, and Defendant also filed a motion to strike the affidavits of Anne Bahr and Michael Haley, which affidavits Plaintiff had offered in support of his motion for summary judgment, and

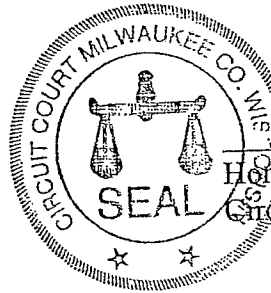
Having received and considered the motions, as well as the briefs and arguments presented in their behalf,

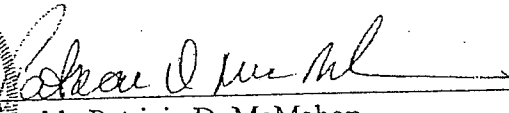
IT IS HEREBY ORDERED THAT:

1. Summary judgment is granted in favor of Defendant City of Milwaukee, and the above-captioned action is dismissed in its entirety, with prejudice; and
2. Plaintiff's motion for summary judgment is denied; and
3. Defendant's motion to strike the affidavits of Anne Bahr and Michael Haley is denied; and
4. Judgment is granted to Defendant and against Plaintiff; and

5. Plaintiff shall pay costs and attorney fees to Defendant pursuant to Sections 814.03 and 814.04 of the Wisconsin Statutes.

Dated at Milwaukee, Wisconsin, this JAN 30 2007 day of _____, 2007.




Honorable Patricia D. McMahon
Circuit Judge, Branch 18

Resolved. By the Common Council of the City of Milwaukee that there shall be and is extended all present health insurance provided by Blue Cross-Blue Shield and Major Medical to general city employes who retire after January 1, 1974, and who meet all of the following qualifications:

- 1) Are between the ages 60-65;
- 2) Who have 15 or more years of city service; and
- 3) Who retire under the general city retirement system with an unreduced "retirement allowance;" and, be it

Further Resolved. That a surviving spouse of such retired employe shall be accorded the same benefits as she would have been eligible for under the present system; and, be it

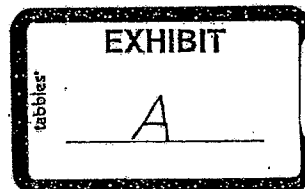
Further Resolved. That all benefits for such coverage as provided for in this resolution shall be paid for by the City.

Adopted.

FILE NUMBER 73-216

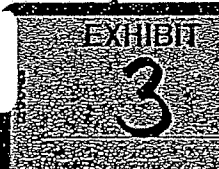
Resolution relating to coverage for retirees with respect to health insurance.

Whereas. The City is desirous of extending without cost to retirees health insurance provided by Blue Cross-Blue Shield and Major Medical to certain retirees; now, therefore, be it



A.Ap. 41

DDR-0003



City of Milwaukee

Office of the City Clerk

200 E. Wells Street

Milwaukee, Wisconsin 53202

Certified Copy of Resolution

FILE NO: 020479

Substitute resolution approving a health insurance rate structure for eligible Management Employees under 65 years of age selecting retirement after January 1, 2004 that would be identical to active Management Employees. (DER)

Whereas, The City of Milwaukee currently provides that General City Management employees who select retirement, those 55 years of age with 30 years of service or those 60 years of age with 15 years of service, can select any health insurance plan the City offers at no cost until they reach age 65; and

Whereas, The City of Milwaukee currently provides that Police Management employees who select retirement after 25 years of service without regard to age can select any health insurance plan the City offers at no cost or reduced cost dependent upon the number of days of sick leave until they reach age 65; and

Whereas, The City of Milwaukee currently provides that Fire Management employees who select retirement after 22 years of service at age 49 can select any health insurance plan the City offers at no cost or reduced cost dependent upon the number of days of sick leave until they reach age 65; and

Whereas, The City currently provides a rate structure for all active employees, including all active Management employees, of paying 100% of the low cost health maintenance organization (HMO), and allows active Management employees to pay the difference for a more costly HMO; and

Whereas, The City currently, in 2002, charges active Management Employees \$100 for single coverage in the Basic Plan or \$190 for family coverage in the Basic Plan; and

Whereas, The costs for both the City HMO health insurance and the self-funded City Basic Plan continue to increase significantly; and

Whereas, Few other employers provide early retirees with full health insurance coverage till 65 at no cost; now, therefore, be it

Resolved, That the City of Milwaukee rate structure for health insurance for all Management Employees who retire on or after January 1, 2004, be the same as it is for active Management Employees.



I, Ronald D. Leonhardt, City Clerk, do hereby certify that the foregoing is a true and correct copy of a(n) Resolution passed by the COMMON COUNCIL of the City of Milwaukee, Wisconsin on July 16, 2002.

Ronald D. Leonhardt

Ronald D. Leonhardt

July 25, 2002

Per. App. 28
Date Certified

A.Ap. 42

DDR-0039

EXHIBIT

B

tabbles

Reply to Common Council File No. 020479
From DOA-Budget and Management Division

July 2, 2002

Ref: 02013(39)

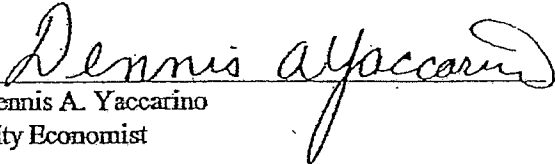
Common Council file 020479 contains a resolution approving a health care insurance rate structure for eligible management employees under 65 years of age selecting retirement after January 1, 2003 that would be identical to active management employees.

Currently, many retirees that are under 65 years old receive free health insurance. Some of the retirees pay a portion of their health care costs based on a formula that uses sick leave and service years. Most of the retirees in this category choose the more expensive basic plan.

Savings are estimated to be \$100,000 in year one of this proposal. This is based on the retirement of 50 management employees in 2003. It will take 10 years for this proposal to be fully implemented. In the end, \$1 to \$1.4 million will be produced in savings. Additional savings may be achieved in the more competitive nature of health care provider selection for management retirees.

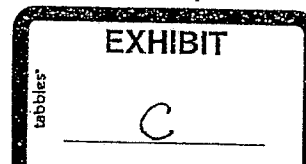
Retirees will still be able to choose a free health care provider alternative. The amount above the low costing provider will be paid by the retiree. This policy is consistent with the policies for active managers.

RECOMMENDATION: ADOPT COMMON COUNCIL RESOLUTION 020479 THAT APPROVES A HEALTH CARE INSURANCE RATE STRUCTURE FOR MANAGEMENT RETIREES BEGINNING IN 2003.


Dennis A. Yaccarino
City Economist

DY

FINANCE:020479sr.doc



A.Ap. 43

DDP-0032
Pet. App. 29

LRB-FISCAL REVIEW SECTION ANALYSIS

FINANCE AND PERSONNEL COMMITTEE

ITEM 9, FILE # 020479

JULY 11, 2002

MARK A. RAMION

File # 020479 is a resolution approving a health insurance rate structure for eligible management employees less than 65 years of age selecting retirement after January 1, 2003 that would be identical to active management employees.

Background

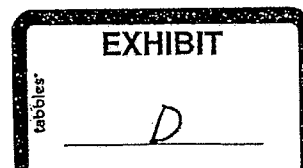
1. This resolution would authorize the establishment of a new monthly rate structure for City of Milwaukee management employees, including police and fire management employees, who take retirement on, or after, January 1, 2003 and are under 65 years of age. The change in the rate structure would make the retiree rates the same as the rates for active management employees until the retiree reaches age 65 years.
2. General city management employees, who select retirement at 55 years of age with 30 years of service or 60 years of age with 15 years of service, may select any health insurance plan that the city offers at no cost to age 65 years. This benefit was extended to management retirees through Common Council Files # 69-2528-C, 71-2469, and 73-646.
3. Police management employees, who select retirement after 25 years of service, regardless of age, may select any health insurance plan that the city offers at no cost, or reduced cost depending upon the number of accrued sick days to age 65 years.
4. Fire management employees, who select retirement after 22 years of service at age 49 years, may select any health insurance plan that the city offers at no cost, or reduced cost, depending upon the number of accrued sick days to age 65 years.

Discussion

1. This resolution proposes that all eligible City of Milwaukee management employees, including police and fire management, who retire on or after January 1, 2003, pay health care premiums with a rate structure identical to active management employees.
2. Currently (for 2002), the city offers the choice between three HMO plans and the Basic Plan in its health benefits package. The low-cost HMO is paid in full by the city. Active management employees who choose an HMO other than the low-cost HMO or the Basic Plan pay a monthly premium.

1

A.Ap. 44



DDR-0033
Pet. App. 30

3. Represented employees retire with health care benefits negotiated through collective bargaining.
4. This resolution would have has no retroactive authority for management retirees prior to January 1, 2003.
5. Approximately 189 management retirees are enrolled in the under age 65 health benefits plans. The following chart indicates the current health insurance plan selections.

Current management retiree health benefit selection, 2002:

Eligible Retirees	Single	Family
Aurora HMO	7	16
United HMO	2	16
Humana HMO	15	33
Basic Plan	31	69

6. Management retirees comprise approximately 4% of all retirees under age 65 years receiving health care benefits (approximately 5000 retirees under age 65) though the city health insurance plans.
7. General, non-represented city employees share the same rates for retirement health coverage as DC #48.

Fiscal Impact

1. The fiscal impact of this resolution is predicated upon the number of management employees who will choose to retire on or after January 1, 2003.
2. The fiscal impact of this resolution will also be determined by the cost of HMO coverage for 2003 as well as the HMO plans eventually offered for selection. The low-cost HMO (and its ensuing monthly premium rate for 2003) has not been officially selected. Additionally, the low-cost HMO for individual and for family coverage *may* be from different companies. These insurance payors and their rates are usually determined by contract in July.
3. The current number of management retirees (189) under age 65 and the percentages who choose the respective health plan are as follows:
 - Aurora (23) – 12%
 - United (18) – 10%
 - Humana (48) – 25%
 - Basic Plan (100) – 53%

These percentages could, theoretically, be applied in order to gain a general understanding of the way choices between health insurance plans are divided. However, these percentages would change as HMO health insurers could opt not to renew contracts with the city or the city with them.

4. At this time, it is not possible to estimate how many active management employees will retire in 2003 when the proposed revised health insurance rate could take effect. It might be argued that enactment of this resolution would cause some management employees to retire in 2002 while insurance coverage is still free.
5. All HMO contracts with the city are due to expire at the end of 2002. Council File # 011515 authorized the Department of Employee Relations to hire consultants to assist in preparing requests for proposals for HMO and other expiring benefit contracts for 2003.

Further Information

1. The number of management retirees during 2002 may be enhanced relative to an anticipated loss, commencing in 2003, of a retirement benefit: fully-paid health care insurance premiums of any insurance plan for eligible retirees age 55-65 years of age.
2. *The 2003 budgetary impact of this resolution will be minimal. This resolution is primarily a policy change that will have its greatest financial impact over a longer period of time as the pool of eligible retirees in this category (management) grows.*

Prepared by: Mark A. Ramion, X8680
LRB-Fiscal Review Section
July 10, 2002

Cc: Marianne C. Walsh
Laura Engan
W. Martin Morics
Jeffrey Hansen
Florence Dukes
Michael Brady
Edwin Reyes
Dennis Yaccarino



Department of Employee Relations

John O. Norquist
Mayor

Florence Dukes
Director

Frank Forbes
Labor Negotiator

Michael Brady
Employee Benefits Director

June 5, 2003

Dear General City Management Employee:

RE: Notification Of Change in Retiree Health Insurance For General City Management Employees

City of Milwaukee General City management employees who retire on and after January 1, 2004, and are under 65 years of age will pay for health insurance the same as active management employees. Common Council File No 020479, approved on July 16, 2002 states:

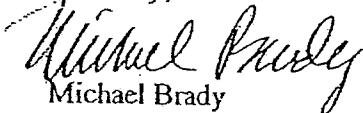
"The City of Milwaukee rate structure for health insurance for all management employees who retire on or after January 1, 2004 be the same as it is for active management employees."

This means that General City management employees under 65, with at least 30 years of service and age 55 and older or with at least 15 years of service and age 60 and older, who retire on or after January 1, 2004 will have the choice of one free health plan and the other choices that are available to active management employees at the same cost as those plans are available to active management employees. The 2004 rates and employee share for the HMO Plans and Basic Plan will not be available until mid July.

When retirees turn 65 years of age, they will pay 75% of the cost of a Medicare supplement plan, the same as all retirees already do today. There are separate rate sheets for the Medicare supplement plans.

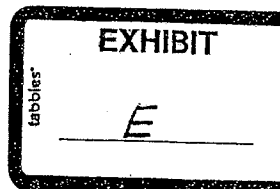
If you have any questions regarding this change you can call the Employee Benefits Office at 286-3184 or Michael Brady, Employee Benefits Director at 286-2317.

Sincerely,


Michael Brady
Employee Benefits

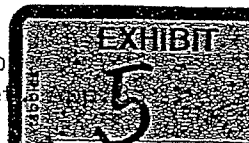
A.Ap. 47

Copy of Common Council File No 020479, July 16, 2002 on other side



DDR-0038

200 East Wells Street, Room 706, Milwaukee, WI 53202, Phone (414) 286-3751, FAX 286-0800, TDD 286-2960
Employee Benefits and Labor Relations - Room 701 - Labor Relations Phone (414) 286-2356, Fax 286-0900
Medical Benefits Phone (414) 286-3184 - Worker's Compensation (414) 286-2020, Fax 286-2106



PEt. App. 33

City of Milwaukee

Office of the City Clerk

200 E. Wells Street
Milwaukee, Wisconsin 53202
Certified Copy of Resolution

FILE NO: 020479

Substitute resolution approving a health insurance rate structure for eligible Management Employees under 65 years of age selecting retirement after January 1, 2004 that would be identical to active Management Employees. (DER)

Whereas, The City of Milwaukee currently provides that General City Management employees who select retirement, those 55 years of age with 30 years of service or those 60 years of age with 15 years of service, can select any health insurance plan the City offers at no cost until they reach age 65; and

Whereas, The City of Milwaukee currently provides that Police Management employees who select retirement after 25 years of service without regard to age can select any health insurance plan the City offers at no cost or reduced cost dependent upon the number of days of sick leave until they reach age 65; and

Whereas, The City of Milwaukee currently provides that Fire Management employees who select retirement after 22 years of service at age 49 can select any health insurance plan the City offers at no cost or reduced cost dependent upon the number of days of sick leave until they reach age 65; and

Whereas, The City currently provides a rate structure for all active employees, including all active Management employees, of paying 100% of the low cost health maintenance organization (HMO), and allows active Management employees to pay the difference for a more costly HMO; and

Whereas, The City currently, in 2002, charges active Management Employees \$100 for single coverage in the Basic Plan or \$190 for family coverage in the Basic Plan; and

Whereas, The costs for both the City HMO health insurance and the self-funded City Basic Plan continue to increase significantly; and

Whereas, Few other employers provide early retirees with full health insurance coverage till 65 at no cost; now, therefore, be it

Resolved, That the City of Milwaukee rate structure for health insurance for all Management Employees who retire on or after January 1, 2004, be the same as it is for active Management Employees.



I, Ronald D. Leonhardt, City Clerk, do hereby certify that the foregoing is a true and correct copy of a(n) Resolution passed by the COMMON COUNCIL of the City of Milwaukee, Wisconsin on July 16, 2002.

Ronald D. Leonhardt

Ronald D. Leonhardt

A.Ap. 48

July 25, 2002
Pet. App. 34
Date Certified

000 0000

2006 MONTHLY RATE CHART FOR GENERAL CITY RETIREES

These rates are effective January 1, 2006

RATE CHART XVIII

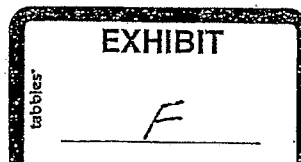
This Chart applies to all Retirees whose positions are represented by any of the following units:
For General City Retirees under 65 retired prior to 1/1/05 & Management retired prior to 2004.

COMPUTATION METHOD OF "CITY SHARE"

The CITY will pay, monthly, up to 100% of the Basic Plan single or Basic Plan family premium cost to the City. For 2006, this contribution ("City Share") will be no more than \$1,014.34 (Single) or \$1,800.78 (Family) toward the cost of Health Plan of your choice. We will deduct the new rates effective with your December, 2005 pension check. This is official notification of health plan rates for 2006. DO NOT discard this rate chart.

Chart I - 2006 Monthly Health Plan Rates

HEALTH PLAN	Plan Code 1		Plan Code 3			
	SINGLE PREMIUM	CITY SHARE	SINGLE RETIREE SHARE	FAMILY PREMIUM	CITY SHARE	FAMILY RETIREE SHARE
CompcareBlue - Aurora Family Network	\$620.90	\$1,014.34	No Cost	\$1,695.00	\$1,800.78	No Cost
CompcareBlue - Broad Network	\$827.85	\$1,014.34	No Cost	\$2,259.95	\$1,800.78	\$459.17
Basic Plan	\$1,014.34	\$1,014.34	No Cost	\$1,800.78	\$1,800.78	No Cost



2006 MONTHLY RATE CHART FOR RETIREES & SURVIVING SPOUSES

These rates are effective January 1, 2006

RATE CHART XVI

This Chart applies to all Retirees whose positions are represented by any of the following units and retired on or after 1/1/04:

General City Management

Chart I - 2006 Monthly Health Plan Rates

HEALTH PLAN	SINGLE PREMIUM	CITY SHARE	SINGLE RETIREE SHARE	FAMILY PREMIUM	CITY SHARE	FAMILY RETIREE SHARE
CompcareBlue - Aurora Family Network	\$ 620.90	\$ 620.90	No Cost	\$ 1,695.00	\$ 1,695.00	No Cost
CompcareBlue - Broad Network	\$ 827.85	\$ 576.65	\$ 251.20	\$ 2,259.95	\$ 1,574.05	\$ 685.90
Basic Plan	\$ 1,014.34	\$ 755.74	\$ 258.60	\$ 1,800.78	\$ 1,402.16	\$ 398.62

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IN THE CIRCUIT COURT OF MILWAUKEE COUNTY

STATE OF WISCONSIN

ALBERT NICHOLAS LOTH,

Plaintiff,

v.

Case No. 05-CV-011346

CITY OF MILWAUKEE,

Defendant.

Deposition of ALBERT N. LOTH

Thursday, July 13, 2006

2:00 p.m.

at

Whyte Hirschboeck Dudek, S.C.

555 East Wells Street

Milwaukee, Wisconsin

A.Ap. 51

Reported by David J. Sikora, RPR, CRR, RMR

Deposition of Albert N. Loth, 7/13/2006

Page 18

1 Q This was in a general orientation session involving
2 more than one person, is that it?
3 A Yes.
4 Q Do you remember how many people were there?
5 A I would say 15 to 20.
6 Q Do you know who conducted the session?
7 A I don't recall.
8 Q I gather it was not the same Anne Bahr that you
9 mentioned earlier.
10 A Oh, no. No. She was an employee of the city
11 comptroller's office. The person that conducted
12 this I know was an employee of the department of
13 employee relations.
14 Q Did anything happen, or did you learn any
15 information in the course of this orientation
16 session that led to your changing your position in
17 any way as to whether you want to continue as a city
18 employee?
19 A No.
20 Q Let me --
21 MR. LEVY: I should ask you to mark this
22 first.
23 (Exhibit Number 2 was marked for
24 identification)
25 MR. LEVY:

Page 19

1 Q Let me show you what has been marked for
2 identification as Loth Deposition Exhibit 2. Ask
3 you whether you recognize that document.
4 A This was -- because it's dated January of 1974, and
5 I didn't start till 1984, so I was not present at
6 the time this was issued. But I did see it at a
7 later date.
8 Q Do you know -- I'm sorry, I didn't mean to cut you
9 off.
10 A I cannot tell you exactly when I saw this. But I
11 have seen it.
12 Q Do you know how it is it came to your attention?
13 A I don't recall exactly. It may have been given to
14 me by Anne Bahr. But I'm not 100 percent certain of
15 that.
16 Q Did this document have any impact on your decision
17 as to whether or not to continue working for the
18 city?
19 A No.
20 Q And was there ever a time when you were subject to a
21 collective bargaining agreement while an employee of
22 the City of Milwaukee?
23 A No.
24 Q Did you understand that your benefits as a
25 nonunionized employee would be different than those

Page 20

1 of the unionized employees?
2 A Yes.
3 (Exhibit Number 3 was marked for
4 identification)
5 MR. LEVY:
6 Q Mr. Loth, I've handed you a copy of what has been
7 marked for identification as Loth Deposition Exhibit
8 3. I will represent to you that these are selected
9 pages from a document that was provided to the City
10 of Milwaukee in response to its discovery requests
11 which you answered several months ago. And that the
12 page numbers in the bottom right hand corner,
13 PL 0001, and so forth, were placed on it as part of
14 your responses, and not by anybody from the city.
15 So you'll see it's a shortened version of the
16 document. We have the full original if you need it.
17 Do you recall when, if at all, you first saw this
18 document?
19 A I believe I saw this document within the first month
20 or two of starting employment with the City of
21 Milwaukee.
22 Q And do you know how you acquired a copy of this
23 document? Let me first ask, did you get a copy for
24 yourself?
25 A Yes, I did.

Page 21

1 Q Do you know how you got a copy?
2 A I'm not specifically certain. I thought I received
3 a copy of it as part of that orientation or training
4 session. But I'm not positive of that. But I did
5 have a copy of it.
6 Q Would it be fair to say that you were already
7 working for the city, and committed to the job
8 before you got a copy of it?
9 A Yes, that's correct.
10 Q And did you do anything to change your situation
11 with the city as a result of receiving this
12 document?
13 A No.
14 Q Now, I notice that the document includes provisions
15 for medical and dental insurance starting on page
16 eight. And I will tell you that what I've tried to
17 do is provide you with a copy of all the pages that
18 talk about medical and dental insurance in that
19 section. So if you have any problem, if you want to
20 take a minute to look at it, let's make sure we both
21 are on the same wavelength about what pieces you
22 have in front of you, okay?
23 A I understand.
24 Q I notice that Item (7) I. d. Talks about pension
25 retirement benefits, is that right?

(7) Continued

d. All Plans:

1. The City will not pay for any services or supplies that are unnecessary according to acceptable medical procedures.
2. The City will have the right to require employees to execute a medical authorization to examine employee medical and/or dental records for auditing purposes.
3. The City will have the right to establish such procedures as it may deem necessary to restrict excessive costs in application of the benefits provided.

3. Enrollment:

- a. New Employee: An employee newly appointed to City employment will first become eligible for medical and dental benefits upon completion of 30 consecutive calendar days of active service as a full-time (40 hours per week) or half-time (20 hours or more per week) employee. There will be a 270-day waiting period for pre-existing conditions, applicable to new employees enrolling in the Basic Plan (Blue Cross/Blue Shield - BC/BS).

Election of benefits will be made on a form prescribed by the City no later than 30 consecutive calendar days following the date upon which eligibility was first established. If the employee fails election within this time limit, the election will be made only on such terms and conditions as are established and maintained from time to time by the City and/or the health insurance plan provider.

- b. Current Employees: During November of each calendar year, or during such other open enrollment time period as the City from time to time may designate, employees in active service and currently receiving benefits may elect to be covered by a different plan in lieu of their current coverage. Such election is to be made in writing no later than November 30 of the calendar year, or the last day of the designated open enrollment period on a form prescribed by the City. In the event the employee elects to change his coverage, the new coverage will become effective on January 1 of the calendar year next following the date the election was made. The employee will be required to maintain enrollment under the plan elected for the full duration of such calendar year, so long as the employee remains in active service.
- c. Single/Family Enrollment Status: Employees' single or family status will be determined by the City. Employees requesting a change in their enrollment status will submit such request on a form provided by the City.

(7) Continued

4. 1983 Cost of Coverage - Medical Benefits: The City will contribute the following amounts per month toward meeting the costs of medical benefits, depending upon the employees' employment and enrollment status:

	<u>Employed Prior To 4/1/83</u>	<u>Employed on or After 4/1/83</u>
	<u>Single or Family Plan</u>	<u>Single or Family Plan</u>
Full-time Active	100% of basic plan	A flat rate of \$77.54 (single plan) or \$193.07 (family plan), or the cost of the plan selected but not to exceed the flat rate
Half-time Active (Limited Benefit Employees)	50% of plan selected	Up to 50% of the plan selected but not exceeding 50% of the flat rate of \$77.54 (single plan) or \$193.07 (family plan)
Duty Disability Status	100% of plan to age 60.	100% of plan to age 60.
Ordinary Disability Retirement	Approximately 25% of plan selected	Approximately 25% of plan selected
Normal Pension Retirement	Approximately 25% of plan selected*	Approximately 25% of plan selected*

*(General City retirees 60-65 with at least 15 years' service are entitled to City paid health insurance which includes their eligible dependents.)

If the per capita subscriber cost for the plan elected exceeds the maximum City contribution provided above, then the employee will have the amount of such excess cost deducted from his/her paycheck on a monthly basis.