APPELLATE COURT CASE NUMBER A09-2093

STATE OF MINNESOTA
IN THE SUPREME COURT

CASE TITLE:

PAULA SAVELA, individually
and as representative of the class

Appellant,

vs.

CITY OF DULUTH,

Respondent.

APPELLANT'S BRIEF

Don L. Bye
Attorney Registration Number 13924
Attorneys for Appellant
314 West Superior Street, Suite 1000
Duluth, Minnesota 55802
(218) 733-0745

Shelly M. Marquardt
Attorney Registration Number 21193X
Attorney for Appellant
314 West Superior Street, Suite 1000
Duluth, Minnesota 55802
(218) 726-0707

Mr. John (Mac) LeFevre
Attorney Registration Number 61852
Attorney for Respondent
KENNEDY &GRAVEN, CHARTERED
470 U.S. Bank Plaza
200 South 6th Street
Minneapolis MN 55402
(612) 360-0294

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LEGAL ISSUES

I. WHETHER AS A MATTER OF LAW THE COURT ERRED IN GRANTING DEFENDANT SUMMARY JUDGMENT WHEN, AS A MATTER OF LAW, THE DEFENDANT MUST PAY PLAINTIFF CLASS MEMBERS VESTED HEALTH INSURANCE BENEFIT AT THE LEVEL SPECIFIED IN THE CONTRACTS IN EFFECT ON THE DATE OF THE EMPLOYEE'S RETIREMENT?

The District Court held that the defendant did not have to continue to pay the retirees' and other class members health insurance at the contract level in effect on the date of the retirees' respective retirement dates.

Housing and Redevelopment Authority of Chisholm v. Norman, 696 N.W.2d 329 (Minn. 2005);
Adams, et al. v. ISD No. 316, 2008 WL 2573660 (Minn. App.2008).

II. WHETHER THE DISTRICT COURT ERRED IN DENYING SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFF WHERE THE AFFIDAVITS, DOCUMENTS AND SUBMISSIONS BEFORE THE DISTRICT COURT SHOW THAT THE PLAINTIFF'S HEALTH INSURANCE BENEFITS VESTED AT THE TIME OF THE PLAINTIFF'S RETIREMENT?

The District Court ruled against the appellant holding that the Defendant could unilaterally change the meaning of the term "active employees" in order to re-interpret the provisions of the CBA's in effect from January 1, 1983 through December 31, 2006 so as to abrogate the Plaintiff's vested insurance benefits.

Housing and Redevelopment Authority of Chisholm v. Norman, 696 N.W.2d 329 (Minn. 2005);
Adams, et al. v. ISD No. 316, 2008 WL 2573660 (Minn. App.2008).

STATEMENT OF THE CASE

Three Plaintiffs commenced an action against the Defendant, City of Duluth, on or about May 8, 2008 alleging that the City of Duluth had breached, or intended to breach, the contractual obligations owed to former City of Duluth employees who had retired under qualifying collective bargaining agreements between January 1, 1983 and December 31, 2006. The action sought a temporary and permanent injunction preventing the Defendant from changing the Plaintiffs' health insurance benefits. App. pp. 1, 2, and 8. On or about July 29, 2008, the District Court entered a Temporary Restraining Order and Preliminary Injunction which precluded the Defendant from altering or amending the health and medical benefits of former City of Duluth Employees who had retired during the period from January 1, 1983 through December 31, 2006. App. p. 70.

On or about May 12, 2009, the St. Louis County District Court, the Honorable Kenneth Sandvik presiding, filed a stipulated Order for Class Certification and Amended Scheduling Order. App. p. 108. This order held that the proposed Class satisfied the prerequisites of Minn.R.Civ.P. 23.01 and was certified under Minn.R.Civ.P 23.02(a)(1) and (a)(2). *Id.* Paula Savela was designated the Class Representative. *Id.* The Class consists of all retired employees of the City of Duluth, their spouses and eligible dependents (hereinafter "the Plaintiffs") who retired between January 1, 1983 and December 31, 2006 as a member of one of the following collective bargaining units: Basic Employees, Fire Employees, Police Employees, Confidential Employees, and Supervisory Employees. *Id.*

On or about May 21, 2009 the Plaintiffs filed an amended Complaint alleging that the Plaintiffs have been, or will suffer, immediate irreparable and substantial harm and injury if the Defendant is permitted to reduce the Plaintiffs' health insurance benefits below the the terms of the Collective Bargaining Agreement(s) in effect at the time of the Plaintiff' retirees' respective

retirement date(s). App. p. 114. The Plaintiffs contend they are entitled, as a matter of law, to a permanent injunction enjoining the Defendant from altering the terms of the Plaintiffs' health and medical benefits under the relevant Collective Bargaining Agreements, in effect at the time of the Plaintiff retirees' respective retirement dates. *Id.* The Defendant opposed the Plaintiffs' action contending that the Defendant has a continuous and ongoing right to unilaterally alter the health benefits of retired employees in contravention of the collective bargaining agreement language and despite the provisions of Minnesota law which precludes changes in benefits of retired employees because, in part, the retired employees are no longer represented by the collective bargaining representation and have no bargaining status on their own. App. p. 157. Upon retirement, the health insurance benefit became a personal obligation and benefit between the Defendant and the individual Class Members.

In May 2009, the parties filed cross Motions For Summary Judgment. App. pp. 155 and 162. Oral arguments on Summary Judgment were heard by the District Court on or about August 7, 2009. Following oral arguments on Summary Judgment, the District Court held that there was no issue as to material fact; ruled that the relevant contract language was not ambiguous; that the disputed term "active employees" allowed the Defendant to unilaterally change the Plaintiffs health and insurance benefits to a level consistent with that provided under the Collective Bargaining Agreements applying to current active duty employees now and in the future. App pp. 509-510. The District Court also ruled *sua sponte* that the Plaintiffs had no claim under a promissory estoppel theory, even though the question was clearly <u>not</u> before the Court at Summary Judgment. *Id.*

Petitioner appealed from the decision of the District Court on the grounds that:

I. As a matter of law the District Court erred in granting summary judgment in favor of Respondent when, as a matter of law, the Respondent must pay Petitioner's and Class

Members' vested health insurance benefit at the level specified in the contracts in effect on the date of the Petitioner's and Class Members' applicable retirement dates.

ii. The District Court erred in denying summary judgment in favor of the plaintiff where the affidavits, documents and submissions before the District Court show that the plaintiff's health insurance benefits vested at the time of the Plaintiff's retirement.

iii. The District Court improperly ruled on a promissory estoppel theory which was excluded from consideration by the stipulated order of the parties prior to the cross summary judgment motions.

Following oral arguments, the Court of Appeals issued a decision affirming in part and reversing in part, the decision of the District Court. The Court of Appeals affirmed the District Court's grant of summary judgment in favor of the Respondent based on the District Court's exclusive focus on the two (2) words "active employees" without reference to use of the term in the entirety of the contracts. The Court of Appeals reversed the decision of the District Court's *sua sponte* grant of summary judgment in favor of the Respondent on the issue of promissory estoppel, which issue had previously been specifically excluded from consideration for summary judgment by stipulation and order of the District Court.

The Petitioner sought review of the Court of Appeals affirmation of the District Court's grant of summary judgment on the interpretation and application of the employment contracts. Review was granted on or about December 22, 2010.

STATEMENT OF THE FACTS

Commencing with collective bargaining agreements (hereinafter "CBAs") effective January 1, 1983 for the Police, Fire, Basic, Confidential Employee and Supervisory Employee bargaining units, the Defendant bargained life time health and medical benefits for the covered employees and eligible dependents who constitute the Class. App. pp. 466, 470, and 479. Under

the terms of the respective agreements, the covered employees would receive health and medical benefits for themselves, spouses and eligible dependents for life at the same cost and benefit level as was applicable to City of Duluth "active employees" on the date of the applicable Class Member's retirement date. App. pp. 31-32, 453, 470, 475, 477-478, and 482. In exchange for this benefit, the Duluth employees, through their respective bargaining units, gave up increased wages, retirement sick leave bank, increased vacation time and other benefits. *Id;* App. pp. 31-32, and 480. The Duluth City Council was concerned about committing to such a potentially long term obligation but approved the proposal because it was a trade off which was deemed valid at the time. *Id.* The City of Duluth first proposed the retiree health insurance provision during negotiations for the 1983 contract. App. pp. 31-32, 453-454, and 479. The City of Duluth made the retiree medical and health insurance proposal as a way to eliminate the City's obligation to their employees for the accumulated sick leave banks at the time of an employee's retirement. *Id*; App. p. 466. In 1983, Federal regulations required posting an employee's sick leave bank total as a liability which would, apparently, have required a raise in property taxes. *Id.* The increase in property taxes was viewed as a political negative by the City Council members and the City Administration. *Id.* In 1983, health insurance was available at a moderate cost and the City Council and City Administration chose to approve the retiree insurance obligation as politically expedient means of avoiding posting the employee sick leave bank liability. *Id.*

From its inception in 1983, it was clearly understood by the Defendant and the various bargaining unit members, that the retirees would keep their entitlement to the same health insurance coverage following retirement that the retirees had under the contract in effect on the retirees' respective retirement dates. App. pp. 454; 467, 470, 475-476, 479-480. The totality of the language, and the term "active employees" specifically, were contained in the Mayor's initial

proposal in 1982 and was incorporated into the subject contracts from its original enactment in 1983. The language as to application of the provision has not changed since its' inclusion in 1983. Over time, a number of different conditions and enhancements were negotiated with the bargaining units, but the intent of the City of Duluth and the bargaining units and, the actual implementation of the provision, remained the same; retired employees, their spouses and eligible dependents would keep their entitlement to the same health insurance coverage on the same cost basis following retirement that the retirees had under the contract in effect on the retirees' respective retirement dates. *Id*; App. pp. 478. The Class Members entitlement to health insurance coverage was consistently interpreted in this manner from its inception in 1983 through 2006. App. pp. 454, 470, 475-476, 479-480. It was accepted policy for City Administration that costs for existing retirees were fixed by the number of retirees and would, over time, decrease through the deaths of covered retirees, spouses and eligible dependents. App. p. 476. The City Administration's position was that the increased cost for Class Members' insurance was to be directed forward to new hirees and future retirees. *Id.*

The City of Duluth and the respective bargaining units continued the health insurance provisions of the CBAs with minor changes including, but not limited to, stated deductibles, co-pays and coverage limits in the CBAs for the Police, Fire, Basic, Confidential Employee and Supervisory Employee bargaining units, from January 1, 1983 through December 31, 2006. App. pp. 466,470, 475-476, 479-480. The language locking in the cost of health and medical insurance to the retiree, his/her spouse and eligible dependents in effect for "active employees" on the date of retirement did not change during that period. *Id.* From 1983 through 2006 the retiree health insurance contract language was drafted by a member of the Duluth City Attorney's office or a member of the City Administration. App. pp. 450, and 453.

Throughout this twenty-three (23) year period, and beyond, the City of Duluth, the

respective collective bargaining units and the active and retired employees, interpreted and applied the term in effect for "active employees" to mean that the retired employee, spouse and eligible dependents continued to pay only such amounts or items that were in effect for the retiree on the date, and even hour, of an employee's retirement. App. 469. Co-pays and deductibles following retirement remained exactly the same after retirement as employee, spouse and eligible dependents were paying on the employee's retirement date. App. pp. 456, 466, 470, 475, and 477. While there was annual open insurance plan enrollment for working employees, Class Members no longer had enrollment options after retirement. App. pp. 451, 475, 470, and 477-478. The Class Members had to stay with the insurance plan under which the individual was covered at the time of the respective Class Member's retirement. *Id.* At the time of retirement, an employee had to select the plan he/she would be covered under following retirement. *Id*; App. p. 20. The specific date of retirement determined what health plans were available to a retiring employee and the scheduling of commencement of benefits. *Id;* App. p. 489. The health plan selected by a retiring employee had to be a plan that was in existence and available to the retiring employee at the date and time of retirement. Even if a new and better insurance plan was anticipated and generally settled and agreed to for a future contract, but not completely ratified, it was not available to a retiring employee. App. pp. 451, 456-457, 470, 475, 477-478, and 489.

Regardless of the established interpretation and past practice as to the meaning of the terms, and the understanding of the parties since 1983, under the administrations of recent ex-Mayor Herb Bergson and current Mayor Don Ness the City attempted to re-interpret the 1983 through 2006 contracts and deprive the class members of their vested contract rights. App. pp. 467, 469, 475, and 479-480. In or about 2008, the Defendant, under Mayor Don Ness, informed class members that the Defendant was going to unilaterally change almost all of the class

members' bargained for health and medical benefits. App. pp. 15, 21-24. The Defendant stated its intention to switch all class members to a Plan 3a which would impose substantially increased costs for health and medical benefits on the Class Members, in violation of the terms of the January 1, 1983 through December 31, 2006 CBAs. This policy change by the Defendant represents a complete reversal of the City of Duluth's interpretation of the CBAs in effect between January 1, 1983 and December 31, 2006. App. pp. 181-334, 337-415. Approximately 1400 City Employees, their spouses and dependents are covered under the relevant CBAs. The retirees' rights under these CBAs vested on their respective retirement dates. The City repeatedly justified its repudiation of the contracts and its threats to change the contract requirement obligating the City to provide health and medical insurance to the retired employees, their spouses and dependents on the grounds that it was not longer fiscally reasonable for the City to continue to honor its vested contractual obligations to class members. App. pp. 15, 21-24. The City then began increasing some billing and costs to be incurred by the retirees, their spouses and dependents. App. pp. 11,16, 18-19. The actions, and threatened future additional changes by the City led to the filing of this action.

This action was commenced by service of the Summons and Complaint For Temporary Restraining Order, Injunction, Permanent Injunction and Declaratory Judgment upon the Defendant's representative on May 9, 2008. App. pp. 1, and 2. The Complaint claimed that the Defendant has violated its contractual obligations to Plaintiffs as contained in the Collective Bargaining Agreements from January 1, 1983 to December 31, 2006 covering Class Members which were in effect at the time of the Plaintiff's and Class Members' respective retirement dates. Defendant denies it violated the Agreements. App. p. 43. The District Court, the Honorable Kenneth Sandvik presiding, issued a Temporary Restraining Order in this matter on or about July 29, 2008 enjoining the Defendant from altering or changing the health insurance

benefits of the Class Members until further order of the Court. App. P. 70.

On or about May 12, 2009, the District Court entered a stipulated Order For Class Certification and Amended Scheduling Order. App. p. 108. The stipulated Order for Class Certification and Amended Scheduling Order defined and limited the issues before the court to the contract issue.

On or about May 22, 2009, the Plaintiff filed Amended Complaint For Class Action For Temporary Restraining Order, Injunction, Permanent Injunction and Declaratory Judgment. App. pp. 114.

On or about May 27, 2009, pursuant to paragraphs 3 and 5 of the stipulated Order for Class Certification and Amended Scheduling Order the issues on Summary Judgment were limited to the enumerated contract claims (and specifically excluding the issue of promissory estoppel). The Defendant filed it's Motion For Summary Judgment. App. p. 155. On or about June 4, 2009, the Defendant filed it's Answer to the Amended Complaint. App. p. 157. The Plaintiff filed its Answer to Defendant's Motion for Summary Judgment and Cross-Motion for Summary Judgment. App. pp. 138. Oral arguments were held on the cross motions for summary judgment on August 7, 2009. The issue of promissory estoppel was not raised by the parties in their respective pleadings and was not addressed by counsel for either party at oral arguments. During oral arguments, the Plaintiff appeared to be referencing the promissory estoppel issue when arguing facts contained in affidavits in support of the Plaintiff's action which overlapped with both the contract issue and a possible promissory estoppel theory. Counsel for Defendant strenuously objected to the inclusion of any such argument even collaterally addressing promissory estoppel, and the District Court agreed. S.J. Transcript p. 16.

On or about October 13, 2009, the District Court issued Findings of Fact, Conclusions of Law, Order For Judgment, Judgment and Decree granting summary judgment in favor of the

Defendant and against the Class Members. App. pp. 503. The Court ruled that, despite the established, long-term past practice of the Defendant, the term "active employee" as used in the relevant CBA provisions no longer meant "active employees" on the date of the former employee's retirement. App. pp. 509. Rather, the District Court unilaterally changed the interpretation of "active employees" to mean individuals currently employed by the City of Duluth as of whatever date the term is considered or applied. *Id.* Also, the District Court, *sua sponte* and despite the provisions of the May 12, 2009, stipulated Order For Class Certification and Amended Scheduling Order, denied the Class Members any relief or hearing under a promissory estoppel theory. *Id.* App. 108-109.

On or about October 27, 2009, a supplemental order was entered specifically vacating the Temporary Injunction and ordering immediate entry of judgment against the Class Members. App. p. 519.

On or about November 10, 2009, the Class Members filed a notice of appeal of the District Court's October 13, 2009 and October 27, 2009 decisions. App. pp. 524.

On or about December 7, 2009, the Class Members filed a motion for a temporary injunction preventing the Defendant from changing the Class Members health and medical benefits pending completion of appeal and requesting that the Class Members not be required to supply a *supersedeas* bond in support of the requested injunction in this matter.

On or about December 18, 2009, oral arguments were held on the motion for temporary injunction pending appeal. At the motion hearing, the Defendant submitted statistical analysis sheets purporting to show that granting an injunction would cause serious financial harm to the Defendant and that denial of the injunction would give the Class Members a significant financial savings. The Defendant did not provide any substantiating documentation to support the allegations contained in the analysis and the Plaintiff was denied any opportunity to obtain and

submit rebuttal evidence regarding the allegations.

On or about January 7, 2010, the District Court issued an order denying the request for Injunction Pending Appeal. The January 7, 2010 decision also ordered that if the approximately 1,400 Class Members wanted a stay pending appeal, the Class would have to post a $750,000 *supersedeas* bond. The Class Members have been unable to secure a *supersedeas* bond through any of the three (3) bonding agents contacted.

Petitioner appealed the decisions of District Court to the Court of Appeals of the State of Minnesota on the grounds that:

I. As a matter of law the District Court erred in granting summary judgment in favor of Respondent when, as a matter of law, the Respondent must pay Petitioner's and Class Members' vested health insurance benefit at the level specified in the contracts in effect on the date of the Petitioner's and Class Members' applicable retirement dates.

ii. The District Court erred in denying summary judgment in favor of the plaintiff where the affidavits, documents and submissions before the district court show that the plaintiff's health insurance benefits vested at the time of the Plaintiff's retirement.

iii. The District Court improperly ruled on a promissory estoppel theory which was excluded from consideration by the stipulated order of the parties prior to the cross summary judgment motions.

Following oral arguments, the Court of Appeals issued a decision affirming in part and reversing in part, the decision of the District Court. The Court of Appeals affirmed the District Court's grant of summary judgment in favor of the Respondent based on the District Court's exclusive focus on the two (2) words "active employees" without reference to use of the term in the context of the entirety of the contracts. The Court of Appeals reversed the decision of the District Court's *sua sponte* grant of summary judgment in favor of the Respondent on the issue

of promissory estoppel, which issue had previously been specifically excluded from consideration for summary judgment by stipulation and order of the District Court.

The Petitioner sought and was granted review solely on the issue of the Court of Appeals affirmation of the District Court's grant of summary judgment on the interpretation and application of the employment contracts on or about December 22, 2010.

STANDARD OF REVIEW

On appeal from summary judgment, the Supreme Court of the State of Minnesota must determine whether there is any genuine issue of material fact and whether the district court erred as a matter of law in granting summary judgment in favor of the Defendant. *Wartnick v. Moss & Barnett*, 490 N.W.2d 108 (Minn. 1992). In reviewing a summary judgment motion all factual disputes must be determined in favor of the non-moving party. *Wagner v. Schwegmann's South Town Liquor, Inc.*, 485 N.W.2d 730 (Minn.App. 1992).

The construction and interpretation of a contract are questions of law which the Supreme Court of the State of Minnesota reviews *de novo*. *Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853 (Minn. 1986); *Michealson v. Minnesota Mining and Manufacturing, Co.*, 474 N.W.2d 174 (Minn.App. 1991), *aff'd*, 479 N.W.2d 58 (Minn. 1992)

ARGUMENT

I. AS A MATTER OF LAW THE COURT ERRED IN GRANTING DEFENDANT SUMMARY JUDGMENT WHEN, AS A MATTER OF LAW, THE DEFENDANT MUST PAY PLAINTIFF CLASS MEMBERS VESTED HEALTH INSURANCE BENEFIT AT THE LEVEL SPECIFIED IN THE CONTRACTS IN EFFECT ON THE DATE OF THE EMPLOYEE'S RETIREMENT.

Summary judgment must be reversed if the terms of a contract or any of its controlling provisions at issue are ambiguous or uncertain. *Matter of Turners Crossroad Development Co.*, 1979, 277 N.W.2d 364. The evidence offered to support or defeat a motion for summary judgment must be evidence that would be admissible at trial. *LaFontaine v. Empire Fire and Marine Ins. Co.*, App.1991, 474 N.W.2d 209. On motion for summary judgment, the district court must view evidence in the light most favorable to the nonmoving party. *Grondahl v. Bulluck*, 1982, 318 N.W.2d 240. All inferences from circumstantial evidence and all doubts must be resolved against the movant for summary judgment, without undertaking to determine credibility. *Forsblad v. Jepson*, 1972, 292 Minn. 458, 195 N.W.2d 429; *Northland Ins. Co. v. Bennett*, App.1995, 533 N.W.2d 867; *Safeco Ins. Co. of America v. Dain Bosworth Inc.*, App.1995, 531 N.W.2d 867, review denied; *Fabio v. Bellomo*, 1993, 504 N.W.2d 758; *Koelln v. Nexus Residential Treatment Facility*, App.1993, 494 N.W.2d 914, review denied; *Gaspord v. Washington County Planning Commission*, 1977, 312 Minn. 591, 252 N.W.2d 590; *North Central Public Service Co. v. Village of Circle Pines*, 1974, 224 N.W.2d 741.

The provisions of the various subject CBAs define the health benefits available to the Class Members. The CBAs covering January 1, 1983 through December 31, 2006, require the Defendant to pay the class members hospital and medical insurance in effect on the date of the respective employee's retirement. App. pp. 181-334, 337 -375.

The 1983 AGREEMENT Between the City of Duluth and CONFIDENTIAL

EMPLOYEES states:

"ARTICLE 15 - HOSPITAL-MEDICAL INSURANCE
- RETIRED EMPLOYEES

Any employee who retires from employment with the City on or after January 1, 1983, after having been employed by the City for such total time so as to be qualified by such employment to receive retirement benefits from the Public Employees Retirement Association, the Duluth Firemen's Relief Association, or the Duluth Police Pension Association and who is currently receiving a retirement or disability pension from any such fund, shall receive hospital-medical insurance coverage to the same extent as active employees, subject to the following conditions and exceptions:

1. The City will provide any such eligible retired employee without claimed dependents the following coverage without cost to such retiree.

(a) The approved fee-for-service coverage provided active employees.

2. For any such eligible retired employee with claimed dependents, the City will provide without cost to such retiree, the approved fee-for-service coverage provided active employees; however, the approved fee-for-service coverage shall be subject to an annual deductible amount of $650 for such claimed dependents. If such claimed dependents or such retired employees receive no covered benefits during a calendar year, any portion of the deductible amount which is accrued for services rendered in the last three calendar months of that calendar year shall be applied toward the deductible amount for the following calendar year.

3. **Such coverage** shall be for the life of the retiree, but if the retiree dies before his or her spouse, such coverage shall be continued for such spouse until he or she dies or remarries, but any such coverage for such surviving spouse shall not include coverage for any dependent of such surviving spouse."

* * *

App. 227. (Emphasis added.)

The 1991-92-93 AGREEMENT Between the CITY OF DULUTH and CITY OF DULUTH SUPERVISORY ASSOCIATION (hereinafter "1991-1993 Supervisory Contract") states in relevant part:

"ARTICLE 14 - HOSPITAL - MEDICAL INSURANCE RETIRED

EMPLOYEES

14.1. Any employee who retires from employment with the City, and is receiving, or has applied for and will, within sixty (60) days of retirement, receive retirement pension benefits from the Public Employees Retirement Association, or the Duluth Firemen's Relief Association, or who retires and is vested to receive a retirement pension from the Duluth Firemen's Relief Association or the Police and Fire Fund of PERA, shall receive hospital-medical insurance coverage to the same extent as active employees, subject to the following conditions and exceptions:

a. Any person seeking benefits pursuant to this Article who is eligible for Medicare Coverage IIB" must obtain it, or lose any benefits hereunder until he or she obtains Medicare Coverage IIB

b. The City will provide any such eligible retired employee without claimed dependents the approved fee-for-service coverage provided active employees, without cost to the retiree.

c. For any such eligible retired employee with claimed dependents at the time of retirement from the City, City will provide to the employee and qualifying dependents who were the employee's dependants at the time of retirement from the City, without cost to such retiree, the approved fee-for-service dependant coverage provided to active employees; however, the approved fee-for-service coverage shall be subject to an annual deductible amount of $650 for claimed dependents. If such claimed dependents of such retired employee receive no covered benefits during a calendar year, any portion of the deductible amount which is accrued for services rendered in the last three calendar months of that calendar year shall be applied toward the deductible amount for the following calendar year.

d. **Such coverage shall be for the life of the retiree, but if the retiree dies before his or her spouse, such coverage shall be continued for such spouse until he or she dies or remarries, but any such coverage for such surviving spouse shall not include coverage for any dependent of such surviving spouse.**

App. p. 476. (Emphasis added.) The 1991-1993 Supervisory Contract, paragraph 14.1, provided that any eligible retiree shall receive hospital-medical insurance coverage without cost to the retiree. App. p. 476. The City will provide an eligible retired employee with claimed dependents at the time of retirement the approved fee-for-service dependent coverage subject to an annual deductible amount of $650 for claimed dependents without cost to such retiree. *Id.*

Comparable language was in effect in the other CBAs covering the years from 1983

through 2006.[1] App. pp 275-302. The 2004 - 2005 - 2006 AGREEMENT BETWEEN THE CITY OF DULUTH AND LOCAL 66 OF A.F.S.C.M.E. FOR BASIC UNIT EMPLOYEES (hereinafter "2004-2006 Basic Unit Contract") states in relevant part:

* * *

> "2.10. Employee means a member of the formally recognized bargaining unit represented by the Union.
>
> * * *
>
> ARTICLE 23 - HOSPITAL MEDICAL INSURANCE - RETIRED EMPLOYEES
>
> 23.1. Any employee who retires from employment with the City on or after January 1,1983, after having been employed by the City for such total time so as to be qualified by such employment to receive retirement benefits from the Public Employees Retirement Association, the Duluth Firemen's Relief Association, or the Duluth Police Pension Association, and who is currently receiving a retirement or disability pension from any such fund, shall receive hospital-medical insurance coverage to the same extent as active employees, subject to the following conditions and exceptions:
>
> > (a) The City will provide any eligible retired employee without claimed dependents the approved fee-for-service coverage or plan 2 coverage, **whichever is designated by the employee at the time of retirement**, provided active employees, without cost to the retiree.
> > (b) Effective December 31, 1987, for any such eligible retired employee with or without claimed dependents, the City will provide, without cost to the retiree, the approved fee-for service coverage or plan 2 coverage, **whichever is designated by the employee at the time of retirement**, provided active employees. Effective with the approval of this contract by the City Council, for any such eligible retired employee with or without claimed dependents, the **City will provide without cost to the retiree, the approved fee-for-service, (Plan 1), H.M.P. (Plan 2), Comprehensive Plan (Plan 3) or Plan 4 coverage provided to active employees. However, the approved fee-for-service coverage shall be subject to an annual deductible amount of $650.** If no covered-plan participant receives benefits during a

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[1]Because of the large number of contracts involved covering the years from 1983-2006 for the five bargaining units involved in this action, the Plaintiffs have reproduced representative extracts from samples of the subject contracts for the purposes of the brief. Copies of the relevant language in all the subject contracts are contained in Exhibits A - D and E at Appendix pages 181-134, and 337-375 which were submitted in support of the Plaintiffs' Motion for Summary Judgment.

calendar year, any portion of the deductible amount which is accrued for services rendered in the last three calendar months of that calendar year shall be applied toward the deductible amounts for the following calendar year.

* * *

(d) **Such coverage** shall be for the life of the retiree, but if the retiree dies before his or her spouse, such coverage shall be continued for such spouse until he or she dies or remarries, but any such coverage for such surviving spouse shall not include coverage for any dependent of such surviving spouse.

(e) Employees hired after February 1, 2001 and who retire and qualify for retiree health coverage **shall receive benefits under the comprehensive plan (Plan 3) only.** Any employee who qualifies for retiree hospital-medical insurance may voluntarily elect to retire under Plan 3, the comprehensive plan.

23.2 Those employees hired after the date of the City Council approval of this agreement and who cease employment with the City shall receive hospital-medical insurance paid for by the Employer subject to the following schedule:

YEARS OF SERVICE COMPLETED	PERCENT SHARE OF PREMIUM CONTRIBUTIONS EMPLOYEE	EMPLOYER
5	75	25
6	70	30
7	65	35
8	60	40
9	55	45
10	50	50
11	45	55
12	40	60
13	35	65
14	30	70
15	25	75
16	20	80
17	15	85
18	10	90
19	5	95
20 and thereafter	0	100

23.3 a. Employees hired prior to approval of this contract by the City Council shall have the option of selecting either the provisions of Article 23.1 or Article 23.2 **at the time of cessation of employment with the city.**

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23.5 For employees retiring under the provisions of this section of the contract, and are eligible for Medicare, the City may provide a medicare supplement in a form approved by the City and the Union."

(Emphasis added.) App. pp. 331-334. The language in 2004-2006 Basic Unit Contract demonstrates the significant differences and limitations that applied to employees who retired at different times. The distinction in application of health benefits to various retirees is spelled out so specifically because prior to and during the 2004-2006 Basic Unit Contract, the Defendant City interpreted and applied the retiree health benefit provisions of prior contracts in the same manner as the Plaintiffs - i.e. the retiree kept the same coverage, at the same cost, as the retiree had at the date of retirement. The plain language of Article 23, and specifically paragraph 23.3, of the 2004-2006 Basic Unit Contract, establishes that the parties clearly then understood that retiring employees kept the option of taking one of the four (4) enumerated plans with them into retirement while new employees working under the Contract were limited to taking Plan 3 benefits with them on retirement. Thus, it is clear that the City believed that the retiree's health benefits vested on the date of retirement and could not be changed by the terms of future contracts.

The Defendant's inclusion of the various provisions defining the extent, cost and application of retiree health insurance to specific groups of retirees based either on date of hire or date of retirement, supports the Plaintiffs' claim that for over twenty (20) years the Defendant accepted and operated with the understanding that the health insurance in effect for earlier, or other groups of retirees became vested and fixed at the time of the employees' retirement. Having vested at retirement, the Defendant knew that it could not change or modify the retirees' health benefits thereafter. The language of the 2004 - 2005 - 2006 AGREEMENT BETWEEN THE CITY OF DULUTH AND LOCAL 66 OF A.F.S.C.M.E. FOR BASIC UNIT EMPLOYEES (hereinafter "2004-2006 Basic Unit Contract"), confirms the class members' position. The limitation in the 2004-2006 Basic Unit Contract allowed employees hired after February 2001 to retire only with health insurance benefits under Plan 3. App. pp. 331-334.

Paragraph 23.1(a) of the same contract further differentiates between the specific health benefits available to retirees by noting that effective December 31, 1987, the eligible retiree, with or without claimed dependents, shall receive the approved fee-for service coverage or plan 2 coverage, whichever is designated by the employee at the time of retirement. App. p. 332. Paragraph 23.3.(b) of the 2004-2006 Basic Unit Contract then recognizes that a retiring employee hired after 2001 but before ratification of the 2004-2006 Basic Unit contract may select either the fee-for-service Plan 1, the H.M.P Plan 2 or Plan 4 coverage, in lieu Comprehensive Plan 3 provided the retiree pays the difference in cost of the monthly premiums between the plan chosen and the employer share of Comprehensive Plan 3 shown in Article 20.4. App. p. 333. The fact that Paragraph 23 of the 2004-2006 Basic Unit Contract makes clear distinction between retiree eligibility among the four (4) different plans based on hire dates and retirement dates shows that the Defendant did not then believe that all retirees could be forced onto the same plan as current employees.

Defendant admits a continuing obligation to provide health care benefit to the Plaintiffs. But the Defendant wants judicial authority to unilaterally change the retirees health benefit without valid negotiation through legal process. The prime question is then, "when does the retirees' entitlement vest for each individual employee?" That question was answered by *Housing and Redevelopment Authority of Chisholm v. Norman*, 696 N.W.2d 329 (Minn. 2005) and *Adams, et al. v. ISD No. 316*, 2008 WL 2573660 (Minn. App.2008), it vests on the employee's retirement date. In the current matter, the vesting of the retiree's health benefit on the retirement date is buttressed by the specific language contained in the numerous contracts at issue. The specific, repeated use of contract language such as the terms "at date of retirement", "cessation of employment" and "without cost to the retiree" and "life of the retiree" demonstrate the intent of the City that the retiree's right became vested at the time of retirement. In most of

the subject contracts, the use of terms like "at date of retirement" correlates with references to specific insurance plans (i.e. fee-for-service, Plan 2, etc.) The contract language states that "such coverage," referencing the specified health insurance, will be provided for the "life of the retiree". Since the benefit vested on the retirement date, the term "such coverage" must refer back to the preceding contract language defining the specific health plan the employee received on retirement. Throughout the disputed contracts, the language preceding "such coverage" is an identification of the specific health plans available to the retiring employee.. Thus in the 1983 Confidential Employees Contract, "such coverage" is referring to the fee-for-service plan specified as available to qualified retiring employees and their qualified dependents. App. 227. In the 1991-1993 Supervisory Contract, "such coverage" refers to fee-for-service coverage and fee-for-service coverage shall be subject to an annual deductible amount of $650 for claimed dependents. App. p. 476. In the 2004-2006 Basic Unit Contract, "such coverage" refers to the fee-for-service coverage or plan 2 coverage, or, after ratification of the contract, (Plan 1), H.M.P. (Plan 2), Comprehensive Plan (Plan 3) or Plan 4 coverage provided to active employees. App. pp. 331-334. To grant the Defendant's contention that "such coverage" means nothing would strip the retired employees Hospital and Medical Insurance articles and subsections of the various contracts of meaning and purpose in the contract by one interpretation of only two (2) isolated words "active employees". That would deprive the class members of the right to continue coverage under the policy provisions that vested at the time of retirement.

To accept the Defendant's contention that "such coverage" and the other subsections of the retired employees Hospital and Medical Insurance articles and subsections used in the contracts are transitory would give the Defendant the right, in the future, to eliminate all retiree health coverage by simply eliminating health coverage for current employees. This was not the intent of the contract language from 1983 through 2006. All terms of the contract must be given

reasonable meaning and weight whenever possible. Thus "such coverage" must refer to that health coverage in place for the respective retiree, as defined by the contract under which the employee retired, on the retirement date. The holdings in *Norman* and *Adams* agree. Whatever contract rights existed for the employee at the time of retirement, continue to exist as a personal obligation between the Defendant and the individual retiree regardless of changes to subsequent contracts to which the retired employee is not a party. *Adams* at p. 7.

If the term "such coverage" in the various retiree benefits provision did not refer to and lock the retiree into the health coverage in place on the date of retirement, but allows the Defendant to vary the retirees health coverage in accordance with future employee benefits, the Defendant must be obligated to change the Plaintiff retirees health benefits to conform with benefits available to current employees and not merely the right to reduce the benefits granted to retirees. Accordingly, if the term "active employees" were deemed transitory, the City would be obligated to pay the class member the same $75 per month, 1% and lump sums being paid to current "active employees" under the 2007-2008-2009 AGREEMENT BETWEEN THE CITY OF DULUTH AND LOCAL 66 A.F.S.C.M.E., COUNCIL 5 FOR BASIC UNIT EMPLOYEES. it employees, then or now. The Defendant has refused to interpret these provisions, such as the $75 per month payment, to apply to retired employees. App. 388-390. However if the term "active employees" in past contracts is transitory so as to change the health benefits of past employees to conform to that for current "active employees", it would stand to reason that the retirees should also receive the additional health coverage benefit enjoyed by current "active employees" such as receiving the $75 per month cash payment enjoyed by other "active employees". App. 388-390. The only way the Defendant can justify denying the class members the benefits of current "active employees" is if the term "active employees' in past contracts meant the employees active at the time of the individuals retirement; thereby, vesting the retirees

benefits at the level in place on their respective retirement dates.

Extended to its logical conclusion, the Defendant's claim of a unilateral right to change retiree health benefits in accordance with health benefits under current and future contracts would permit the City to unilaterally eliminate current employee health insurance and thereby extinguish any health insurance obligation to class members. This is exactly what the employer attempted in *Norman.* In *Norman* and *Adams*, the Court emphatically said that the employer cannot unilaterally change or eliminate a vested right. *Adams* at p. 7. The class members are only requesting the same recognition of their vested rights as previously acknowledge in *Norman* and *Adams.*

In *Housing and Redevelopment Authority of Chisholm v. Norman*, 696 N.W.2d 329 (Minn. 2005) and *Adams, et al. v. ISD No. 316*, 2008 WL 2573660 (Minn. App.2008), the Minnesota Supreme Court affirmed that the Employer's contractual agreement to provide retiree health care benefits did not expire at the end of a CBA. As in the present case, the Employer had unilaterally eliminated Plaintiff Carolee Norman's contractually guaranteed health insurance benefits without the agreement of Ms. Norman. Carolee Norman brought suit against the Chisholm Housing and Redevelopment Authority ("CHRA") based upon the provisions of the CBA in effect when she retired to enforce her contractually provided post-retirement health and medical benefits. The CBA in effect when Norman retired provided that all employees with at least ten years of service,

> "shall continue to be covered under * * * the existing hospital medical, surgical, drug and dental programs covering employees of the CHRA * * * ." The CBA further provided that the CHRA "shall pay all insurance premiums in full, to include single coverage and disability retirement."

Norman, 696 N.W. 2d at 330. About seven months after Norman's retirement, the union was decertified, and the CBA expired.

The CHRA continued to pay Norman's health insurance premiums under health and dental plans covering CHRA employees for more than seven years after her retirement. The CHRA then notified Norman that it would no longer pay her premiums due to the continuing rise of health insurance costs and budget constraints. Norman sued, and, eventually, CHRA and Norman brought cross motions for summary judgment. The CHRA argued that it:

> "Has no obligation to pay Normans's health insurance premiums upon her retirement , that it had 'gratuitously' paid the premiums for 7-1/2 years, and that her reliance on CHRA's promise to continue payment was not reasonable in view of Minn. Stat. Sec. 179A.20,subd. 2a, which said that a CBA may not obligate a public employer 'to fund' health care benefits beyond the duration of the CBA."

Norman, 696 N.W.2d at 332. Both the District Court and the Court of Appeals ruled in Norman's favor based upon the doctrine of promissory estoppel and in doing so, relied on the Supreme Court's decision in *Christiansen v. Minneapolis Municipal Employees Retirement Board*, 331 N.W.2d 740 (Minn. 1983). The Supreme Court also ruled in favor of Norman, but based its ruling on conventional contract principles.

The Supreme Court of the State of Minnesota:

> ". . . granted review of the issue whether a promise contained in a CBA may bind a public employer to pay retiree health insurance premiums beyond the term of the CBA."

Norman 696 N.W.2d at 332; see also *Law Enforcement Labor Services, Inc., et al. v. County of Mower*, 483 N.W.2d 696, 701(Minn. 1992). The Supreme Court held that the CBA did bind the public employer to continue to pay health insurance premiums beyond the expiration of the CBA for individuals who had retired during the existence of the CBA. The issue decided in *Norman* is the precise issue facing Plaintiff Class Members.

For about twenty-five (25) years, the Defendant in this case provided retired employees, their spouses and eligible dependents with health and medical insurance to the Class Members at

the same cost and on the same terms as were in effect under the CBAs in effect on the Class Members' respective governing retirement dates. App. pp. 467, 470, 475-476, and 479-480. For most all of those years it was the stated position of the Defendant that the cost of health and medical benefits to Class Members could not be changed because of the existing state of Minnesota law governing the vested rights of retirees under the terms of the CBAs. Minn. Stat. sec. 471.61, subd. 2b (1992); *Norman*, 696 N.W.2d at 333-335. App. pp. 474.

The Supreme Court of the State of Minnesota in *Norman* noted, that Minn. Stat. sec. 471.61, subd. 2b (1992) obligates a government entity to continue to allow retired employees, the employees' spouse and dependents to continue to participate indefinitely in the employer-sponsored hospital, medical and dental insurance group that the employee participated in immediately before retirement provided:

> " c) The former employee must pay the entire premium for continuation coverage, <u>except as otherwise provided in a collective bargaining agreement</u> or personnel policy."[2]

Minn. Stat. Sec. 471.61, Subd. 2b(e). (Emphasis added.)

Here the District Court ruled in the Order For Summary Judgment that the promises set forth in the CBAs, in effect when the respective Class Members retired, only obligated the Defendant to fulfill the promises to continue health and medical insurance at the same level of coverage in effect for now current employees pursuant to the terms of the currently effective CBAs. App. pp. 509. The Defendant claimed, and the District Court accepted, that the term "active employees" as used in the relevant CBAs from January 1, 1983 through December 31, 2006 referred to employees currently working for the City of Duluth prospectively and that the

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[2] Minn. Stat. sec. 471.61, subd. 2b (k) specifically allows continuation of medical and health coverage for retired employees, their spouses and eligible dependents in a CBA notwithstanding section 179A.20, subd. 2a.

Class Members' insurance coverage could be changed whenever unit CBAs were changed. The Defendant's reinterpretation of "active employees" was a complete reversal of the Defendant's historical interpretation and application of the term "active employees" over the prior twenty-five (25) years.

The City of Duluth, the respective collective bargaining units and the active and retired employees, had interpreted and applied the term "active employees" to mean that the retired employee, spouse and eligible dependents continued to pay only such amounts or items that were required in the specific retiree insurance contract provision in effect on the employee's retirement date for premiums, co-pays and deductibles following retirement as the employee, spouse and eligible dependents were paying prior to the employee's retirement date. App. pp. 456, 466, 470, 475, and 478; Affidavit of Patrick Alexander, pp. 1, 4, 7, 10, 12, 13. Thus, the Class Members were excluded from the annual open insurance enrollment options for working employees. App. pp. 451, 470, 476, and 477-478, The Class Members had to stay with the selected insurance plan in effect at the time of the respective Class Member's retirement. *Id.* At the time of retirement, when a contract provided alternate plans for unit employees an employee had to select the plan he/she would be covered under following retirement. *Id*; App. p. 482. They could not transfer to new coverage plans provided in contracts for current unit employees but not in the retiree health contract Article. The specific date of retirement determined what health plans were available to a retiring employee, and also determined the scheduling of the commencement of benefits. *Id*, App. p. 489.

Once a selection was made upon retirement it was irreversible for that retiree for life. The Supreme Court in *Norman* held that what matters is the language in the CBA in effect at the time of retirement. In this case, The Class Members' claims are supported by the decision of the Minnesota Court of Appeals in *Adams. et at v. ISD No. 316*, 2008 WL 2573660 (Minn.

App.2008). In *Adams*, 67 teachers retired between 1988 and 2005 from their employment with ISD No. 316 (Greenway). The *Adams* retirees claimed vested rights and specific retirement health care benefits provided in the CBAs that were in effect at the time of their respective retirements. The retirees alleged that for those who retired between the years 1987 to 2003, the CBAs in effect provided that ISD No. 316 must pay the full single subscriber rate and 50% of the dependency costs for coverage for retired teachers. The 2003 to 2005 CBA changed the terms of coverage to provide that ISD No. 316 would pay only 80% of the single subscriber rate instead of the full premium. ISD No. 316 further breached the contract by not paying for the supplemental policy. The retired teachers who were eligible for Federal Medicare and retired prior to 2005 also claimed that ISD No. 316 breached its promise that if the retiree was eligible for Federal Medicare he/she would be covered by the existing supplemental medical plans. The *Adams* Medicare eligible retirees claimed that ISD No. 316 breached this promise when it unilaterally changed the terms of the retirees health benefits to those contained in the 2005-2007 CBA. The 2005 - 2007 CBA no longer provided benefits to retired teachers under an existing supplemental medical plan but instead provided that, at age 65, if the retiree was eligible for Federal Medicare, he/she would be provided supplemental coverage under the Arrowhead Pro Care Senior Gold policy. A change to Arrowhead Pro Care Senior Gold would result in a decrease in benefits, and an increase in costs, for the retirees. *Adams* at p.3. In upholding the rights of the retirees, the *Adams* Court reaffirmed the holding in *Norman* that

> ". . . the CBA in effect at the time of the public employees retirement created vested contractual rights to retirement health care benefits which survived the expiration of the CBA."

Adams at p. 7. In the current action, under the CBAs in effect between January 1, 1983 through December 31, 2006, the Defendant promised that when the Class Members retired, the Defendant would continue to provide the Class Members medical and health insurance during

their lifetime at the cost and benefit level in effect at the time of their applicable retirement dates. In this case approximately 1400 City employees, their spouses and dependents are covered under the CBAs in effect between January 1, 1983 and December 31, 2006. App. pp. 181-134, and 337-375. Under *Norman* and *Adams*, the Defendant is obligated to provide health and medical benefits to the Class Members, at the same level and terms as existed at the time of their respective retirement dates. The present Union bargaining committees have no legal right to bargain away the rights, entitlements or obligations of retired employees. Likewise, retired employees have no right to insert themselves into the ongoing negotiations of the bargaining units and the Defendant. Both the Class Members and the Defendant are bound by those contract provisions in effect on the date of the respective retirement dates. If either a Class Member or the Defendant violates the relevant provision, the matter would sound in contract law and/or promissory estoppel and not under the grievance procedures of any of the CBAs. *Adams* at p. 8-9. Therefore, the Summary Judgment in favor of the Defendant is erroneous and must be reversed.

II. THE DISTRICT COURT ERRED IN DENYING SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFF WHERE THE AFFIDAVITS, DOCUMENTS AND SUBMISSIONS BEFORE THE DISTRICT COURT SHOW THAT THE PLAINTIFF'S HEALTH INSURANCE BENEFITS VESTED AT THE TIME OF THE PLAINTIFF'S RETIREMENT.

The term "active employees" in the language of the relevant contracts does not alter the City's obligation to continue to provide the Class Members health and medical benefits at the same level with the same cost, or no cost, to the Class Members as was in effect for them as "active employees" at the time of the relevant retirement dates. In *Adams*, Court of Appeals for the State of Minnesota recognized that the retirees were no longer a party to negotiation of CBAs after retirement and relied on previous decisions by the Minnesota Supreme Court that "[i]n

interpreting provisions of the PELRA, it is often instructive to refer to decisions interpreting the National Labor Relations Act, 29 U.S.C.A. §§ 151 to 168. *Adams* at p. 8, *Int'l Union of Operating Eng'rs, Local No. 49 v. City of Minneapolis,* 305 Minn. 364, 368, 233 N.W.2d 748, 752 (Minn.1975). Specifically, because retirees were not employees and members of a bargaining unit within the meaning of the National Labor Relations Act, 29 U.S.C.A. §§ 151-168, the union was not under a statutory duty to represent them during negotiations, and bargaining for their benefits was a permissive subject. *Allied Chem. & Alkali Workers Local No. 1 v. Pittsburgh Plate Glass Co.*, 404 U .S. 157, 181 n. 20, 92 S.Ct. 383, 398 n. 20 (1971) "[A]bsent a clear and unmistakable inclusion of retirees under the grievance procedure [in a CBA], they are not covered by the grievance procedure and their benefits, as retirees, are not subject to arbitration. "Frank Elkouri & Edna Elkouri, *How Arbitration Works,* ch. 5.4.A, at 208 (Alan Miles Ruben ed., 6th ed.2003).) Therefore, ISD No. 316 could not rely on language in subsequent CBAs to change the terms and conditions of the retirees health insurance benefits. *Adams* at pp. 6-7.

Under the 1991-92-93 AGREEMENT Between the CITY OF DULUTH and CITY OF DULUTH SUPERVISORY ASSOCIATION (hereinafter ' 1991-93 Supervisory Agreement'), paragraph 14(c) the City contracted to provide that any individual who retired under the 1991-93 Supervisory Agreement would not be required to pay any premium for the fee-for-service plan subject to a $650 annual deductible for dependent/spouses.[3] App. p. 476. The language of 1991-93 Supervisory Agreement is unambiguous as to the cost to the retirees and their spouse and eligible dependants. The language regarding "active employees" does not reduce or alter the financial cost of future benefits to the retirees, spouse and dependents. Rather, the language regarding "active employees" identifies the plan under which the retirees, dependent and spouses

[3] See also Exhibits A - D at Appendix pages 181-134, and 337-375.

will be covered in the future at **no additional cost to the retirees, spouses and dependents.** The City Agreed with this interpretation throughout the period from January 1, 1983 through December 31, 2006. The Defendant continued to provide health and medical benefits to the retirees, their spouses and dependents throughout this period at no additional cost to the relevant individuals even though insurance costs to the Defendant were continually increasing.

The Defendant also continued its policy of free coverage to the retired employee, subject to the $650.00 deductible for dependents and spouses in the 2004 - 2005 - 2006 AGREEMENT BETWEEN THE CITY OF DULUTH AND LOCAL 66 OF A.F.S.C.M.E. FOR BASIC UNIT EMPLOYEES (hereinafter, "2004-06 Basic Agreement"). The 2004-06 Basic Agreement, paragraph 23.1 states in relevant part:

> " **(b) Effective December 31, 1987, for any such eligible retired employee with or without claimed dependents, the City will provide, without cost to the retiree, the approved fee-for service coverage or plan 2 coverage, whichever is designated by the employee at the time of retirement, provided active employees.** Effective with the approval of this contract by the City Council, for any such eligible retired employee with or without claimed dependents, the **City will provide without cost to the retiree, the approved fee-for-service, (Plan 1), H.M.P. (Plan 2), Comprehensive Plan (Plan 3) or Plan 4 coverage provided to active employees. However, the approved fee-for-service coverage shall be subject to an annual deductible amount of $650.** "

All of the CBAs in effect at the times guaranteed that the Defendant would continue to provide the Class Members health and medical benefits until their deaths. See SJ Exhibit A - D. Repeatedly, the Defendant negotiated and ratified contract language which specified that the retirees, dependents and spouses would continue to be enrolled in health plans available to active employees at the time of the respective retirement dates. The 2004-06 Basic Agreement CBA language guaranteed that this benefit would continue to be at no cost to the retiree and subject to a $650 deductible per annum for the spouse/dependents regardless of changes in future CBAs. Under *Norman* and *Adams*, the Defendant cannot change the terms of the agreement after the Class Members respective applicable retirement dates. The Summary Judgment in favor of the

Defendant must be reversed.

CONCLUSION

For the foregoing reasons, the Summary Judgment must be reversed and summary judgment in favor of the Class Members be granted, or, in the alternative, the matter remanded for trial.

Date: 1-18-11

Shelly M. Marquardt AIN 21193X
Attorney for Plaintiff
314 West Superior Street
Suite 1000
Duluth, Minnesota 55802
(218) 726-0707

Date: 1-18-11

Don L. Bye AIN 13924
Attorney for Plaintiff
1000 Torrey Building
314 West Superior Street
Duluth, Minnesota 55802
(218) 733-0745