EXHIBIT 5

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT-CHANCERY DIVISION

CITY OF CHICAGO, a municipal corporation,
Plaintiff,

- vs -

MARSHALL KORSHAK, et al,
Defendants.

No. 87-CH-10134

REPORT OF PROCEEDINGS at the hearing of the above-entitled cause before the Honorable ALBERT GREEN, Judge of said Court, on the 16th day of May, A. D. 1988, at the hour of 2:00 o'clock P. M.

P R E S E N T:

THE HON. JUDSON H. MINER
Corporation Counsel, City of Chicago
BY MS. AMY LOUISE BECKETT
Assistant Corporation Counsel
appeared on behalf of the plaintiff, City of Chicago;

JACOBS, BURNS, SUGARMAN & ORLOVE
BY MR. MARTIN J. BURNS
appeared on behalf of the Firemen's Annuity Fund;

LAW OFFICES OF KEVIN M. FORDE, LTD.
BY MR. KEVIN M. FORDE
appeared on behalf of the Policemen's Annuity Fund;

MAROVITZ, EDELSTEIN & MAROVITZ
BY MR. WILLIAM A. MAROVITZ
and
BOYLE & HEISS, LTD.
BY MR. FREDERICK P. HEISS
appeared on behalf of the Laborers and Municipal Employees Annuity Funds;

SACHNOFF, WEAVER & RUBENSTEIN, LTD.
BY MR. CLINTON A. KRISLOV
appeared on behalf of the intervenors, Ryan, et al.

THE COURT: Good afternoon, ladies and gentlemen. In the matter of City vs. Korshak, 87-CH-10134, cross-motions to strike and dismiss, would the attorneys please identify themselves for the record?

MR. BECKETT: Good afternoon, Your Honor. Amy Beckett for the City of Chicago, plaintiff and counterdefendant.

MR. FORDE: Kevin Forde, F-O-R-D-E, on behalf of the Policemen's Annuity Benefit Fund.

MR. KRISLOV: Clinton Krislov on behalf of the intervenors.

MR. MAROVITZ: William Marovitz on behalf of the Laborers and Municipal Fund.

MR. HEISS: Fred Heiss, Laborers and Municipal.

MR. BURNS: Martin Burns, B-U-R-N-S, on behalf of the Firemen's Annuity Fund.

THE COURT: All right. I have these cross-motions. Let the record reflect that on the first motion to strike and dismiss, it's a motion filed by the various pension

funds to strike the complaint for mandamus, restitution, and other relief filed by the City of Chicago.

The court has reviewed the original complaint for mandamus, restitution, and other relief, has reviewed the motion to dismiss the City of Chicago's complaint filed by the Policemen's Fund, Kevin Forde and Katrina Veerhusen, and the defendants' memorandum in support of that particular motion to dismiss.

I've reviewed the motion to strike and dismiss filed by Michael A. Cohen, et al, for and on behalf of the Firemen's Annuity and Benefit Fund.

I have reviewed the Laborers Board memorandum in support of the motion to dismiss and the reply to the city's memorandum, the motion to strike and dismiss the complaint for mandamus filed by the Municipal Employees Annuity and Benefit Fund, and the Municipal Employees memorandum in support of the motion to dismiss and reply to the city's memorandum.

I've reviewed the City of

Chicago's memorandum in opposition to the defendants' motion to strike and dismiss the city's complaint, the defendants' memorandum in reply to the City of Chicago's memorandum in opposition to the defendants' motion to strike and dismiss the complaint, and lastly in this particular series, the memorandum and reply to the City of Chicago's memorandum in opposition to the defendants' motion to strike and dismiss the complaint.

Have I got all of the pleadings pertinent to the first motion to strike and dismiss?

MR. BURNS: I'm not certain that you mentioned having read the firemen's memorandum.

THE COURT: You better believe I did. It's in there.

MR. BURNS: Okay. Sorry, judge.

THE COURT: Now, as to the other motion; that is,the cross-motions of the various pension funds to strike the city's motion to strike the various pension funds' counterclaims, I have reviewed the original

complaint for mandamus and restitution, the verified counterclaim for injunction and other relief filed by the Policemen's Annuity and Benefit Fund, the verified countercomplaint for injunction and other relief filed by the Firemen's Annuity Fund, the verified counter-complaint, counterclaim for injunction and other relief filed by the Laborers and Retirement Employees Benefit Fund, the verified counterclaim for injunction filed by the Municipal Employees Annuity and Benefit Fund, the City of Chicago's motion to dismiss the verified counterclaim for injunction and other relief of Board members of the Police Annuity and Benefit Fund, the City of Chicago's memorandum in support of the motions to dismiss the verified counterclaims, the response to the City of Chicago's memorandum in support of the motions to dismiss the verified counterclaims, the response of the Firemen's Annuity and Benefit Fund Trustees to the City of Chicago's memorandum in support of motions to dismiss verified counterclaims, the response

to the City of Chicago's memorandum in support of motions to dismiss verified counterclaims filed by the Laborers and Retirement Board, and the response to the City of Chicago's memorandum in support of motions to dismiss verified counterclaims filed by the Municipal Employees.

I believe I have covered them all, and I went through every one of them very carefully, and I numbered them chronologically, so that I know I have them in the right sequence.

Let's address the first set of motions, wherein the pension funds seek to strike and dismiss the counter -- the original complaint for mandamus and restitution filed by the City of Chicago.

I take it that since the Policemen's Fund filed the first motion, that they will be addressing it first.

I take it that the Firemen's Fund will want to speak to it, and you'll get equal time, Miss Beckett.

I take it that the Laborers and the Municipal Employees Funds want to speak to the issue.

And I want to caution everyone, please try not to cover what other counsel for the other funds have already covered, because I notice in many respects some of the funds adopt the arguments of the others.

Mr. Forde, you're the movant.

MR. KRISLOV: If I might reserve, we did not file a separate addition to the stack of pleadings.

THE COURT: On behalf of the intervenors.

MR. KRISLOV: If I might reserve a minute or two, if appropriate, to comment on behalf of the intervenors separately, I would like to.

THE COURT: Let's cross that bridge when we get there.

MR. KRISLOV: Fine, Your Honor.

THE COURT: Mr. Forde.

MR. FORDE: Yes, Your Honor. I am

aware that you have read all that we have written.

THE COURT: And more.

MR. FORDE: I will be very brief. I'd just like to point out and emphasize that we are here, the four of us who are supporting the motion to dismiss, representing pension and annuity funds.

We do not represent health and welfare funds. The monies that are within the responsibilities of these trustees were collected for a very specific purpose, to provide pension benefits, and the only way these monies can be spent is for those pension benefits.

Now, the only reference anywhere in any statutes governing the expenditure of funds by these trustees for health and welfare benefits is the statute that we quote in our brief that provides that there shall be a levy for health and welfare -- for health benefits that provides a specific amount, $55 and $21.

THE COURT: You covered that in your

brief, Mr. Forde.

MR. FORDE: And it provides for an additional premium to be deducted from the annuitants' checks, and that's the sole function, to deduct from the annuitants' checks any additional premium that should be charged.

Nowhere in that complaint is there any allegation that the trustees of the Policemen's Fund or any of the other funds, for that matter, ever failed to deduct from a check an amount that was billed to them, a premium billed to them by the city.

Everything the city has billed has been paid. And the other point I'd like to emphasize here is that the city has decided to go into the insurance business in providing the insurance for these annuitants and its own employees.

This is purely a proprietary function. They have elected to make this coverage available.

It is no different, Your Honor -- I tried to think of a hypothetical, and it's

no different than if we had a situation where an insurance company entered into an agreement with a Bar Association under the terms of -- and under the terms of this agreement the Bar Association would collect health benefits from its employees as billed by the insurance company, and then ten years later the insurance company comes to the present Board of Governors of the Bar Association and says, "We didn't bill you enough over those years. You now have to pay it back."

Well, as a matter of fact, that's exactly what the city is talking about here.

They are suing these trustees and they are alleging that these trustees should take from their funds, the funds that are presently there for all sorts of purposes -- all sorts of persons, for a specific purpose, the pension and annuity benefits, and they are saying, "We want you to take from those pension funds that were collected for the entire universe of your annuitants, and we want you

to take that money and spend it for a completely different purpose, and that purpose is health benefits that we provided to some of that group," because not all members participate.

That's part of the inequity of the concept they're dealing with, but the principal thrust is the trustees of the pension fund have no obligation to deduct anything but what the city billed them for, and there is no allegation that they were ever billed for any services other than what was specifically provided by statute.

THE COURT: Address Count 2, the claim for restitution.

MR. FORDE: Pardon?

THE COURT: Address Count 2, the claim for restitution.

MR. FORDE: With respect to the -- with respect to the restitution -- and we've discussed this at length in our brief, but to have the trustees repay all of these funds from prior years for benefits that went -- the trustees didn't receive these benefits.

If anybody -- if the city had a claim against anybody, it would be the annuitants who didn't -- who they claim didn't pay a sufficient premium.

They have completely sued the wrong person. I don't think they have a claim against anybody parenthetically, but insofar as dealing with the complaint that is presently before Your Honor, if there were a proper party, it would be the annuitant who should have received the bill and whose benefits would have been reduced to pay the city its premium, but here -- that's what I was getting to with my Bar Association analogy.

Members of the association who may long have been deceased are the ones who received this benefit that they want -- that they make the claim of restitution against, and it would be improper to sue the Board of Trustees of the Bar Association for claimed benefits that were received by some of its former members or current members, and that's the situation we're in here.

If they had a claim against anybody, it would be the annuitants who received these benefits.

THE COURT: I will give you an opportunity also to answer the charge that whatever they have done was illegal, there was no appropriation, they contend, and I know about the alleged appropriation of 1985.

Would you address that issue?

MR. FORDE: I think that goes more to the -- if you look at that claim for restitution, I don't think that comes into play.

It does insofar as their motion to -- that's the defense to our case and, first of all, we disagree with it.

Second, it's their burden to plead and prove it. We have alleged the elements of contract in our complaint, and their defenses --

THE COURT: I'll give you an opportunity on the next motion. Do you have anything to add for the firemen?

MR. FORDE: Your Honor, one final

point I was going to make --

THE COURT: Sorry. I didn't mean to cut you off, Mr. Forde. Go ahead.

MR. FORDE: The one or two final points I was going to make on a couple of aspects of the complaint, which we treat in our brief, one year -- everything after nineteen or before 1982 is obviously barred by the Statute of Limitations, anyway, and the claim for prejudgment interest is obviously barred, but those have been treated in the briefs.

THE COURT: They have been reviewed by the court. Mr. Burns, anything to add on behalf of the firemen?

MR. BURNS: Yes. I have been trying to determine whether I could add anything, judge.

I think I would only say this. With respect to Count 2 and seeking restitution, it's helpful to keep in mind that the fund's function, as Mr. Forde has indicated, is to act as kind of a liaison between the

city and the beneficiaries; that is, the retired annuitants and their families.

The city sets the rates to be paid by those annuitants. The funds do not. The city in its brief acknowledges that fact.

That's not at issue here. And in connection therewith, let's assume that something was done improperly.

The beneficiary of that impropriety was not the fund but the individuals who incurred health care costs that were paid by the city to the hospital or to the doctor that provided the care.

Now, some of those beneficiaries of that city action are deceased today, I mean, I would assume, or at least the facts, I think, would establish that, so it seems to me that the city cannot look to the funds if the city made a mistake.

With respect to Count 1 in mandamus, I would only point out to the court that the situation -- the facts would show what the situation was, and it's really not

in dispute before the statute in 1983 and post-statute.

Nothing changed. And we submit that in 1983, at that time the city, in fact, had a contract with insurance carriers, specifically with Blue Cross and Blue Shield and with Bankers, and we were, in a sense, and our annuitants particularly were the third-party beneficiaries of those contracts, but that the funds were in compliance with the statute.

THE COURT: Mr. Heiss, Mr. Marovitz, anything to add for and on behalf of the Laborers and Municipal Employees?

MR. HEISS: Yes. And I am aware that I'm not to be duplicitous, but in a couple instances I may have to be, only because we're looking at the Municipal and Laborers, and they're identical at this point in their statutory obligation of the trustees.

As has been indicated, the rates have been in place and the benefits have been in place since the rates have been

in place, since 1982.

In 1985 the Illinois General Assembly amended the pension code for one purpose and one purpose only, and that was to grant to any annuitant age 65 years with 15 years of service a supplement to his annuity in the form of making a payment toward his premium rate.

That 65/15 is very important, because there are many people who are in the health care plan who are paying premiums who retire at 55 years of age, and that's a big difference to consider, that the city is indicating that these trustees in the complaint for mandamus must go out and purchase insurance for people that are never even referred to in the statute, and it's very plain in the statute.

It's not a matter of construction. It's very plain in the statute. At 65/15 you simply get a $25 supplement.

All those other annuitants -- those other annuitants are still part of the

plan by virtue of the city, and what's important -- what's important about that is intertwined through all of these arguments that the city has made, they try to lump all these things together, to push it together, and you can't.

You can see what the Legislature -- the General Assembly intended when you just look at that paragraph, and that's why I think that when the court enters an order, the order ought to be dismissing that count with prejudice, because I don't think it could ever be amended to say, okay, we'll include -- we'll permit them to include 65 and 15, those people, because the intent was a supplement, not to get insurance for those people.

I have nothing -- those same arguments apply along with the arguments of Mr. Burns and Mr. Forde.

Their claim for restitution against the funds, the funds only have an obligation to permit that supplement for those individuals who are 65 and 15 years of service, and that's a portion of the retirees, and the

funds have done that, so there is no way that they could recover, and even an amendment as to that count would be contrary to the legislative intent, which is very obvious from a reading of the statute, because it's an attempt to take -- it's an attempt to take active contributions that are used and projected for future benefits to make health care benefits out of the funds that were indicated -- I mean, as Mr. Forde indicated, there was no basis for, and that would apply, of course, equally to Laborers and Municipal, because they both have the 65.

Thank you.

THE COURT: Miss Beckett, they have consumed 17 minutes, and I will give you equal time on the first set of motions.

You may respond.

MS. BECKETT: As Your Honor is fully aware, this first motion is one pursuant to the Illinois Code of Civil Procedure, Chapter 110, Section 2-615.

The only question before Your

Honor is whether the city's complaint states a cause of action.

All I've heard today have been a lot of arguments that go to the merits of this case.

The defendants will all have plenty of opportunity to argue the merits, be it by way of answer or affirmative defense, after such time as this motion has been decided.

All that the city need plead in order to state a good cause of action for mandamus is a clear legal right and a clear legal duty.

I've cited you the cases to that effect. There's no question that the city's a proper plaintiff to assert this right.

There's no question that these are proper defendants from whom to have this duty performed.

I have to respond regarding the mandamus count to a couple of statements made by Mr. Forde.

First of all, he alleged that

the city is going into the business of providing health care in a purely proprietary capacity.

No. 1, I have to note that that's a defense, that that does not go to the question of whether the city has asserted a good cause of action.

No. 2, at any rate, it's noteworthy that he can't cite a single case for that proposition.

He argues an analogy today that we didn't see in the briefs, but he certainly can't cite you any authority for the proposition that what the city's doing is in a proprietary and not a governmental capacity.

At any rate, the city between the years of 1980 and 1987 never passed a prior appropriation, with the possible exception of 1985, to support what they term a business undertaking.

I'd like to respond to the arguments of Mr. Heiss briefly. He expounded on the question of a statutory interpretation by discussing legislative history.

Again, this is not an evidentiary hearing. There has been no evidence tendered regarding the legislature's intent.

That's not before this court. What's before this court is whether the city has stated a cause of action for a mandamus in Count 1.

In Count 2 the question is whether we have stated a cause of action for mandamus.

Quite simply, what we've pleaded is that there was an expenditure that would not have been made but for the dereliction of the funds' duties.

Therefore, we seek from the funds restitution of these monies.

THE COURT: Anything else?

MS. BECKETT: No. I'd be happy to entertain any questions, however.

THE COURT: I'm aware of your argument. You covered it in your brief. You attack all of their pleadings, saying that they mix 2-615s with 2-619s, and I know of

the prohibitions against same, but I want to admonish both sides, you both did it.

You both mixed 2-615s and 2-619s, and I used 2-615s in the pure sense and only checked to see if there was a cause of action set forth.

The others, if I have to, I'll address 2-619s. Now, there's still one big motion pending before us.

That is the city's motion to strike and dismiss all four counterclaims. And I've read all of the briefs, and it's your turn first, Miss Beckett, because I will address the entire thing at one time.

MS. BECKETT: Again, Your Honor, as I argued in responding to the motion to dismiss, I will argue in further our motion to dismiss.

The question is whether under Rule 2-615 a cause of action for injunctive relief has been stated.

We have argued extensively in our brief that the four elements of a cause

of action for injunctive relief are not met, that there's no clearly ascertainable right, that they failed to allege any facts to the effect that there would be irrepairable injury, or that there's no adequate remedy at law.

All that we see are conclusions and that there is no likelihood of success. First, there is no ascertainable right for the relief they seek overall, because there is no prior appropriation, and that's a theory that the city has argued extensively and supported with reference to the Illinois Municipal Code, with reference most particularly to the Diversified Computer case, also the Illinois Patrolmen's Association -- excuse me, the Chicago Patrolmen's Association case, and most recently the decision handed down by the Illinois Appellate Court, the Kinzer case, all of which stand for the proposition that any contract made in the absence of a prior appropriation is ultra vires, without proper authority of law and, therefore, not a good contract.

This resonates throughout the complaints for several reasons. Let's look at Count 1.

They allege that there's been -- Count 1 fails to state a claim for breach of a term and condition of employment, first of all, because of the failure of the city to have a prior appropriation; but secondly, because the parties don't allege the elements of term and condition of employment.

Instead, they allege what they call common knowledge on the part of certain city employees.

This is conclusory. This is vague. This is not factual, and this doesn't amount to a term or condition of employment.

Again, referring back to the failure of the city to have a prior appropriation, there's an element of reliance that the parties allege here.

Any reliance on -- that amounts to common knowledge doesn't satisfy the standard of pleading for this Count 1, but

furthermore, the reliance was misplaced in that there was no legal prior appropriation.

Finally, with respect to Count 1, no labor agreements are alleged by any of the parties with the exception of the firemen, and that labor agreement is not universal in its application.

Count 2 fails to state a claim for breach of an implied contract. Now, the court must know that there are two types of implied contract, one implied in fact and one implied in law.

This distinction was not made in the pleadings. It was made, however, in our briefs and addressed in the responsive briefs.

Very briefly, a contract implied in fact must meet the same elements of an express contract.

You have to plead offer, acceptance, and consideration. These complaints were rife with conclusions.

They failed to state facts.

They were vague. They did not meet the standard. Furthermore, you cannot imply a contract if it would be illegal if expressed.

We have already dealt with that. A contract implied in law, the second kind of implied contract, seeks an equitable remedy.

I would submit that is duplicate relief, duplicative of Count 4, which seeks equitable estoppel.

In the end, the same relief is sought. The parties seek to estop the city to continue or to prevent it from stopping continuing a practice that there was no justifiable reliance in believing it would continue.

Count 3 fails to state a claim for breach of express contract. Now, although not clearly pleaded as such, apparently Count 3, at least with respect to the Policemen's, Laborers, and Municipal Funds, is an alternative claim for relief.

What they seek there is merely additional time to go out and find private sources of insurance.

They say that, although there is a document they call a contract, the term that they claim was breached is not expressed in that contract.

First of all, we have two responses. First of all, as with any other claim propounded by the parties here, if there's no appropriation, you can't base a contract on it.

Secondly, the relief they seek in Count 3 is moot. The funds have had more than seven months in which they can go out and seek private insurance, if that's what they want.

Now, they made some highly inappropriate references to settlement discussions in their briefs.

Even assuming that it were permissible to do so, the fact remains there's no guarantee that a case will settle.

There's no guarantee of how it will come out in court. It seems to me that the only reasonable approach to this question on the part of the funds was to go

out and continue their program of contacting private insurance companies and making use of the seven and a half months in which they've had to do so, rather than coming in and seeking an injunction for additional time, relief that they have already obtained.

Finally, with respect to whether they've even stated a cause of action for breach of contract, when you look at the annuitant medical benefits plan that was attached and analyze it under the tests set forth in the Duldeleo case, we'll see that the Duldeleo case is an opposite.

It relates to employee handbooks, not handbooks handed out to retirees. Even if the case did apply, the situations are sufficiently different that this particular handbook did not meet the elements of Duldeleo which we set forth at Page 11 of our brief.

Finally, a wrapup on Count 4. The funds failed to state a claim for estoppel against the city.

First of all, estoppel is not

available against a municipality, except in very limited circumstances, which don't apply here.

The theory is that a government or a municipality guards the city treasury and that you can't use estoppel or laches or any of those equitable defenses against the city.

The funds come back and attempt to claim that the city's acting in a proprietary and not a governmental capacity.

I addressed that earlier in the argument regarding our mandamus claim. The funds attempt to plead that because the city repeatedly violated its own rules that, therefore, it waived any attempt to enforce them.

I submit that repetition does not rehabilitate, that the fact that the city may have repeatedly processed insurance claims doesn't mean that it was any the more legal a situation.

Without an appropriation, you can't have estoppel. There was no justified

reliance.

Section 817 of the Illinois Municipal Code is clear on this, as are the cases that I cited earlier.

For all these reasons, we ask that the court dismiss all four counterclaims for failure to state a cause of action for injunctive relief.

THE COURT: All right, Mr. Forde. Miss Beckett only used about 13 minutes in her argument on this, and I'm going to divide that time between all of you.

Mr. Forde, it's your turn to respond.

MR. FORDE: I'll be very brief, Your Honor, and in fact, I'll use most of it to get back to a point on the motion to dismiss their case.

Your Honor emphasized and Miss Beckett emphasized that we're here on the motion to dismiss for failure to state a cause of action, the 615 motion, and if you look at the complaint -- I'll use that as an

example -- the complaint in Count 2 for restitution, all that is alleged by the city there is that there was an improper expenditure of city funds and that the city wants or has a right to get the funds back.

It never says from whom. And you have to state a cause of action against these defendants, and whether they can state a cause of action against some other defendants is not for the court to decide today, but certainly they haven't even attempted to allege a cause of action against these defendants.

With respect to the response to the city's motion to dismiss our counterclaim, Miss Beckett's argument is essentially -- on all aspects of it is essentially that there was an illegal appropriation.

For reasons we discuss in our brief, we disagree. We believe these expenditures were ratified, and for other reasons that argument isn't available, but that would be an argument that would come to them as an affirmative defense in their answer at some

later time.

Insofar as the injunction is concerned, I can't conceive of a case that is more ripe for injunctive relief, when you have the threatened irrepairable harm that we present the court with here, the dire circumstances that would occur if the city withdrew these benefits without adequate time to resolve or provide for -- make other provision for these benefits if it is determined that the city is not obligated to provide them, and we believe the city is obligated to provide them, and that's the essence of the complaint.

A policeman goes to work every day with the understanding in his mind that one of the benefits, one of the few benefits of the job, is that once he retires, he knows that his health benefits for himself and his family will be covered for the rest of his life, and that's a very significant aspect of his employment contract with the city, and we will prove that at the time, and we will meet the illegal appropriation argument

if and when it's made as an affirmative defense by the city.

THE COURT: The Firemen's Fund, do you have anything to add?

MR. BURNS: Well, two brief points, judge.

THE COURT: In your pleadings you adopted most of his arguments. Go ahead.

MR. BURNS: Yes, we attempted to reduce the paper that was submitted, although one would probably dispute that, one like yourself, who had to read it all.

THE COURT: When you try to reduce the paper, you also reduce the words and arguments.

Go ahead.

MR. BURNS: I just would make two points, Your Honor. One, Miss Beckett refers to inappropriate or improper references to settlement discussions.

I submit nothing improper has been done by counsel for the various funds. This court's been aware of settlement

discussions.

The references in the briefs go to action by the City Council, which is independent of any settlement of a court case.

The other point I would make is the reference to the labor agreement, which I think is clear from the pleadings involves only the firefighters, that specifically covers firefighters to age 65.

The rates set forth in that labor agreement, which incidentally has now been renewed and is awaiting ratification, those rates are set by the city.

And it shows, I think, the existence of the plan for the annuitants, and I think that our allegations establish beyond any doubt that if we can prove the facts as alleged, that we will show that there is a contractual right as a post-employment benefit and that -- well, that the court should issue relief, injunctive relief, because of the immediate need that will exist as of the end of May, unless the City Council acts

independently.

THE COURT: Anything on behalf of the Laborers and Municipal Employees?

MR. HEISS: One small point that I think is a major point. Counsel is referring to the handbook.

You've got Daldeleo, if I pronounced it right.

THE COURT: The St. Mary of Nazareth case. Go ahead.

MR. HEISS: Yes, that's what I would refer to it, St. Mary's. In that case they alluded to the fact it has to be an employee handbook.

It's an employee handbook or policy statement, and all the exhibits are attached to the petition, and that would surely indicate the policy statement that existed for many years.

MR. MAROVITZ: I would add, Your Honor, just in commenting on Miss Beckett's defense to our motion to dismiss, she states that all she has to show -- all the city has

to show is that there's a clear legal right and a clear legal duty.

It seems to me that nowhere at all has she established that there was any breach of any clear legal duty by any of the fiduciaries, the trustees of any of the pension funds.

THE COURT: Miss Beckett, I take it -- you're not in the case. Miss Beckett, I'm going to give you an opportunity to reply to these responses, because I noted you were making notes.

Go ahead.

MS. BECKETT: Yes. First of all, let me reiterate that while the funds plead in a conclusory fashion that there's a threat of irrepairable injury, they don't plead any facts to support that.

They don't show that there are no alternative sources of insurance, nor do they show what dire circumstances their annuitants would be left in were the city to succeed in its plan of action.

Furthermore, they have had more than seven and a half months to rectify that situation.

Mr. Forde talked about the average cop on his beat and that one of the few benefits of his job is the apparent promise of future health care.

At least he said there's an understanding in his mind. First of all, I might point out that, as Mr. Forde says, it's only in the policeman's mind.

It's certainly not in the 50 page document that we know as in some years the blue book and in some years the green book.

Secondly, I would argue that there are more than just a few benefits to the job.

There are an awful lot of chapters to that labor agreement laying forth an awful lot of benefits for the policemen that they -- that their Fraternal Order of Police bargained long and hard for and the city bargained long and hard for.

The labor agreement attached to the firemen's countercomplaint for injunctive relief makes some mention of annuitant health care, but it ends at age 65, and so if there's any contractual protection, it's only for a three year window between the ages of 63 and 65.

That doesn't establish a life-long contract.

MR. BURNS: Excuse me. That's not a true statement of fact.

THE COURT: I've reviewed the statutes. Go ahead. Anything else?

MS. BECKETT: Yes. I maintain that it is inappropriate to refer in briefs that are arguing whether a cause of action has been stated to refer to the contents of settlement discussions, not the fact of settlement discussions, which, of course, we have informed this court of in open court.

And secondly, the actions of the City Council were taken with full reservation of rights by the city and the defendants with

respect to their various claims.

That's an erroneous argument on the part of Mr. Burns. We have nothing further.

THE COURT: I would like to state this for the record. This court does not live in a vacuum, and I've been privy and conversant with a lot that's been going on in this particular case.

I have set these two sets of motions specifically for today. I have reviewed all of the pertinent pleadings, and you've all agreed that I've reviewed them, and I have listened to your arguments, and I full well know the time constraints that we are confronted with, that May 31st being a deadline date, so to speak.

As to these motions, this matter comes before this court on the defendants' four separate motions to dismiss the City of Chicago's complaint for mandamus, restitution, and other relief.

The city concurrently brings its motion to dismiss the four separate

counterclaims filed by the defendants.

The defendants to this action are the Board members of the four separate annuity and benefit funds for policemen, firemen, municipal employees, and the laborers, and Retirement Board employees.

Plaintiff brought this action seeking a writ of mandamus to compel the funds' Boards to enter into contracts for group health care for their funds' annuitants pursuant to their statutory obligations.

The authority creating these fund Boards is found in Articles 5, 6, 8, and 10 of the Illinois Pension Code, the Illinois Revised Statutes, Chapter 108 1/2.

Relevant sections of this chapter set forth the obligations of the Boards governing these funds.

The Policemen's Annuity Fund Act, Illinois Revised Statute, Chapter 108 1/2, Section 5-167,and the Firemen's Annuity Fund Act, Chapter 108 1/2, Section 6-164.2, since January 12, 1983 have provided in relevant

part for the funds to enter into a contract with an insurance carrier to provide group health insurance for all annuitants.

It states, quote, "The Board shall pay the premiums for such health insurance for each annuitant with funds provided as follows. The basic monthly premium for each annuitant shall be contributed by the city from the tax levy prescribed in Section 5-168 up to a maximum of $55 per month if the annuitant is not qualified to receive Medicare benefits or up to a maximum of $21 per month if the annuitant is qualified to receive Medicare benefits."

It goes on, "If the basic monthly premium exceeds the maximum amount to be contributed by the city on his behalf, such excess shall be deducted by the Board from the annuitant's monthly annuity, unless the annuitant elects to terminate his coverage under this section, which he may do at any time."

The statutory provisions establishing the Boards for the Municipal Employees

and the Laborers and Retirement Employees have been in effect since 1985, Illinois Revised Statutes, Chapter 108 1/2, Section 8-192 and Section 11-181.

These two funds draw their authority from Section 8-164.1 and Section 11-160.1, which are identical and provide that; one, each annuitant who is over 65 years of age and had at least 15 years of municipal employment may participate in a group hospital care plan and a group medical and surgical plan, a plan approved by the -- in a plan approved by the Board; two, the Board is authorized to make health insurance payments from the city's tax levy up to $25 per month per annuitant; and three, if the monthly premium exceeds the $25 statutory authorization; one, the excess may be deducted from the annuitant's annuity at his election, or else; B, the coverage shall terminate.

Count 2 of the plaintiff's complaint seeks to recover funds which the city alleges it wrongfully expended without

a statutorily required appropriation on behalf of annuitants of the four funds from 1980 to the present.

The annuitants of all four funds have been receiving health insurance through the city, which is a self-insurer.

The funds allege that approximately 26,000 persons, including annuitants, their surviving spouses, and dependents, participate in the program.

The city alleges that its excess costs for health insurance on behalf of these annuitants for the period 1980 through June 1987 total approximately 58.8 million dollars over and above the premiums paid by the funds for the annuitants' health insurance costs.

The Policemen's Fund in its memo in support of its motion to dismiss alleges the following; that since 1964 many of its fund annuitants have participated in a group medical benefits program sponsored by the city, that the program has been administered

on a self-funded, quote, "claims made," close quote--and I emphasize claims made -- basis since the mid-1970s, that there is no insurance policy issued by an insurance company to cover claims made by the annuitants, that, rather, when a covered claim is submitted by a covered individual, whether an active employee or a covered annuitant, the city simply reimburses the private carriers which, as the city's agents, administer the program and pay the claims made by the covered individuals.

The memo further alleges that the monthly rates charged by the annuitants were periodically increased between the mid-1960s and April of 1982.

Since the program became self-funded, the city has been paying a portion of the costs of the annuitants' medical benefits, and the fund has deducted the premium specified by the city.

The Policemen's Fund alleges that the city established monthly premiums for the annuitants which have remained unchanged

from their effective date of April 1, 1982 until the present date, notwithstanding the fact that the actual cost of the annuitants' coverage increased dramatically during that period.

Since 1982 the city has paid the cost of the fund's annuitants' medical benefits to the extent it exceeds the established premiums.

The Policemen's Fund memo further alleges that the fund was never directed by the city to make deductions for retired employees nor to increase the amounts being deducted from the annuitants' monthly checks for the cost of their dependents' health benefits.

In mid-October of 1987 the fund's executive director received a letter from the city corporation counsel advising the fund that from 1980 to the present the city paid health care costs for the annuitants of the four pension funds in excess of the contributions made by the funds for the costs.

The letter stated that the city viewed the quote, "payments," close quote, as illegally made and had, therefore, filed suit seeking to recover the monies plus interest.

Finally, the letter advised the funds that the city would cease making health care payments to pension fund annuitants as of January 1, 1988.

The motions to dismiss filed by the other three funds allege virtually the same facts.

As to Count 1, the funds allege that the city has failed to state a cause of action for its writ of mandamus.

First, they argue the city is not the proper party to seek a writ of mandamus, because the city has no legal right to compel the funds' performance of their statutory duties.

Defendants urge that the statute addresses group health insurance for the funds' annuitants and directs the Board to take certain actions with respect to that

coverage.

They argue that the city itself is given no rights, duties, or responsibilities with respect to the annuitants' health insurance coverage.

Defendants allege that thus the city has no right to seek a writ of mandamus to compel the Board to act under the statute.

Secondly, the defendants urge that even assuming the city has standing, a writ of mandamus is not available to compel the discretionary acts described in the statute.

The statute requires the funds to select a carrier to provide health insurance to the annuitants and to enter into a contract for such coverage.

The statute specified many criteria to be considered in selecting a carrier.

Defendants urge that the discretion required of them to do so is not proper subject matter for a writ of mandamus.

Third, the defendants urge that

the plaintiff's Count 1 is further deficient in that it fails to allege facts demonstrating defendants have breached their duty to enter into a contract.

Defendants argue that facts alleged by plaintiff actually demonstrate that the funds have fulfilled their duty to contract for insurance, as their annuitants have been receiving health insurance through the city's self-insurance program.

Defendants argue that the city is the carrier for their annuitants' insurance.

This court agrees that the city's Count 1 fails to state a cause of action for a writ of mandamus to issue.

Its conclusion that the defendants have not performed their statutory duty to contract with an insurance carrier is contradicted by its own factual allegations that the annuitants have, at all relevant times, been covered by the city's own plan.

Clearly, the city has acted

as a carrier to the annuitants. In addition to being factually deficient, this count is defective in that plaintiff has no standing to compel the funds to perform under the statute.

The city's argument that it is a proper plaintiff because it is asserting a, quote, "public right," must fail for two reasons.

First, the city as an entity is not a member of the public and, therefore, does not have an interest in this matter sufficient to afford it standing; and secondly, the right it attempts to assert does not, in fact, belong to the public but to the annuitants of the four funds.

Mandamus is a summary writ issued from a court of competent jurisdiction. It commands the officer to whom it is addressed to perform some specific duty which the petitioner is entitled by right to have performed and which the party owing the duty failed or refused to perform, and I cite People, ex. rel. Williams vs. Daley, 14 Il. Ap. 3d 627.

However, mandamus will not lie to

compel that same officer to undo an act he has already performed and perform it in another manner, and I cite Hiawatha Community School District vs. Skinner, 32 Il. Ap. 2d 187.

This is precisely what plaintiff seeks to do here, and it is not appropriate. Further, the petition must show the petitioner's interest in the action.

If the object of the petition is the enforcement of a public right, the petitioner need only show that he is a member of the public and that the public is entitled to the enforcement of that right, citing Retail Liquor Dealers Protective Association of Illinois vs. Schreiber, 328 Il. 454.

The city claims fails both these tests. It is essential that a petition for mandamus show a demand for performance of the act and a refusal of the demand or that the demand is unavailing.

If this element is not included, and no valid excuse exists, it may be fatal to the petition, and I cite Pople, ex. rel. Endicott

vs. Huddleston, 34 Il. Ap. 3d 799.

For all these reasons, this court finds it must dismiss plaintiff's Count 1. Thus, the court does not find it necessary to consider defendants' arguments as to laches, the Statute of Limitations, or estoppel as to this count.

Count 2 of the city's complaint purports to state a claim for restitution. Defendants in their motions to dismiss Count 2 attack it as being both deficient and defective for several reasons.

First, they claim the city has failed to allege sufficient facts to state a cause of action against the defendant.

First, it is important to note that the equitable remedy of restitution has its basis a theory of contract -- it has as its basis a theory of contract.

Although plaintiff never pleads any facts alleging that a contractual relationship existed between the city and defendants, it comes now seeking a remedy grounded in contract

law.

Instead, the city merely alleges that it has spent money for the funds and for the benefit of these annuitants and dependents from 1980 through June of 1987 without an appropriation by the corporate authority, as required by statute.

The city claims it has spent approximately 58.8 million dollars on behalf of the pension funds for their annuitants over and above the premiums paid by the funds.

Considering a Section 2-615 motion to dismiss, a court must accept as true all facts well pleaded as well as reasonable inferences which can be drawn from these facts, and I cite Sharp vs. Stein, 90 Il. Ap. 3d 435.

Having done so, this court must agree with the defendants that the city simply has not pleaded its facts sufficient to state a claim for restitution.

Central to such a claim is an allegation of unjust enrichment. Even this basic element has not been pled.

Having found the city's Count 2 deficient, this court will, nonetheless, also consider its defects alleged by the defendants.

The funds argue that they are not proper defendants here because legally the funds have no right or authority to use the assets -- and I emphasize the assets -- of the funds to pay for health care benefits.

They urge that the statute only requires the funds to make certain defined payments for premiums, certain deductions from individual annuitants.

Further, the funds assert that it would be inequitable to pay the damages alleged by the city from the funds' assets, because many of the annuitants do not participate in the city's health benefit program.

This court finds that the defendants are not the proper parties for the plaintiff to seek restitution from.

The city urges that defendants' affirmative defenses of laches, the Statute of Limitations, and estoppel cannot lie against

it as a public body.

However, the law provides exceptions to this general rule when a public body acts in a proprietary, as distinguished from its governmental, capacity, citing Hickey vs. Illinois Central Railroad, 35 Il. 2d 427.

This court has determined that the operation of a self-insurance program more properly fits in the mold of a proprietary act.

Further, the city's argument that the illegality of the ultra vires nature acts makes it immune to the equitable defenses raised by the defendants is not persuasive.

Accordingly, this court finds that the defendants have properly raised these equitable defenses and that they effectively bar and defeat the claim based on the city's Count 2, and for those reasons this court shall also dismiss Count 2 of the city's complaint.

Now, I will address the city's motion to dismiss the four separate counterclaims.

The defendant funds each brought

a counterclaim seeking to enjoin the city from terminating the annuitants' medical coverage and to stop paying most of the cost of that coverage.

The counterclaims allege in separate counts that; first, the city has breached a term and condition of employment; second, the city's intent to terminate coverage is a breach of an implied agreement; third, breach of contract based on the city's annuitant medical benefits plan; and fourth, equitable estoppel.

Alternatively, the complaints seek to enjoin the city from terminating coverage until the funds are able to contract for a similar medical benefits coverage with a private insurance carrier.

The city brings its motion to dismiss the four counterclaims for failing to state a cause of action on which injunctive relief may properly be granted.

Particularly, the city alleges that the claims do not plead sufficiently that irrepairable harm will result from a failure to

grant injunctive relief or that no adequate remedy exists at law.

As to each count, the city alleges defendants have failed to plead the elements of either an implied contract or an express contract existing between the parties.

The city further argues that even if such elements were sufficiently pled, no cause of action can lie because such contracts, if any, were not lawfully made by the city.

The city urges that its expenditure of the monies, absent required statutory prior appropriations, renders any contract, implied or otherwise, null and void.

The city further argues that the Boards have no standing on behalf of annuitants to assert these claims.

The city attacks the counterclaims' counts which seek equitable estoppel, urging that there could have been no justified reliance on expenditures made without prior appropriation.

Finally, the city argues that

the ultra vires nature of its acts preclude the applicability of equitable estoppel.

The court will address first the issue of standing. The city urges that the claims, if any, belong to the annuitants and not the Board.

Defendants argue that both the Boards of the funds and their annuitants have an interest here.

They argue that because the statutes grant them authority to enter into contracts with one or more carriers to provide health care insurance to the annuitants, and it is their opinion that they have done so with the city as a carrier, thus the Boards are the real parties in interest here as to any issue regarding whether the city is obligated to continue to provide that insurance.

This court finds the defendants have standing to bring these claims against the city.

The Illinois Revised Statutes, Chapter 17, Paragraph 16.65, gives trustees a

specific statutory power to sue in a representative capacity on behalf of a trust.

Defendants here have by statute been placed in a trustee relationship to their respective annuitants.

Secondly, the city urges that the defendants have not sufficiently pled a cause of action for injunctive relief.

This court must disagree. Defendants have pled facts on four separate theories which, if proved, would establish that a protectable right or interest exists.

Additionally, facts set forth establish that irrepairable harm would result if the city is allowed to terminate coverage.

The annuitants would be at risk for any health care costs which might occur while they are uninsured.

Further, the task of obtaining new coverage, especially for these retirement age annuitants, would be made even more difficult if the city were simply allowed to drop them.

Accordingly, the impending threat that the city will terminate coverage renders any remedy at law inadequate here.

The standards for preliminary injunction are set forth in Eleven Homes, Inc. vs. Old Farm Homes Associates, 111 Il. Ap. 3d 30.

They are; one, that he possess a clearly ascertained right which needs protection; two, that he will suffer irrepairable harm without the injunction; and three, that there is no adequate remedy at law for his inquiry -- injury, and that; fourth, that he is likely to succeed on the merits.

Defendants have satisfied these requirements. The city next attacks Counts 1, 2, and 3 of each countercomplaint, claiming they fail to state a cause of action against the city.

When considering a Section 2-615 motion to dismiss, the trial court must accept as true all facts well pleaded as well as reasonable inferences which can be drawn from those facts, and once again I cite Sharp vs.

Stein, 90. Il. Ap. 3d 435.

Having done so, this court finds that the counterclaims have sufficiently pled causes of action sounding in breach of a term and condition of employment, breach of an implied contract, and breach of contract.

The city argues that even if this court finds that defendants have stated a claim for breach of a contractual relationship, it must then find that contract void for illegality or unenforceable because it was an ultra vires act by the city.

As to the alleged ultra vires nature of the city's action, this court disagrees.

The state statute specifically allows municipalities to provide various types of group insurance for their employees, and I cite Illinois Revised Statutes, Chapter 24, Section 10-4-2 of the Illinois Municipal Code.

Additionally, as a home rule unit, the city is entitled to, quote, "exercise any power and perform any function pertaining

to its government and affairs," close quote.

That's the Illinois Constitution, Article 7, Section 6-A. Therefore, it is well within the ambit of the city's authority to provide health care benefits to retired employees.

The city has not adequately demonstrated to this court that illegality should defeat defendants' claims for injunctive relief.

It is merely stated in a conclusory manner that the city's provision of health care benefits to the funds' annuitants was illegal because the monies were spent without a prior appropriation.

Even this is not clear where defendants have alleged that funds were specifically appropriated for the annuitants' benefits in at least one year and generally in the others.

It is illogical to believe that the claims paid on behalf of approximately 26,000 persons to the tune of an alleged 58.8 million dollars could be expended over a period of seven years but for the appropriation of the

funds in some fashion.

The sums involved are far too substantial to have slipped through the cracks. This court has not been advised by the city of the manner in which these monies could have been spent absent an appropriation.

That the city chose to designate from year to year in the line item appropriation from which the funds were paid is not important.

What is relevant is that over this period of years the city must have repeatedly contemplated and made provisions for the availability of these monies with which it paid the annuitants' claims and provided insurance to them.

Finally, this court finds that the defendants have adequately stated a claim for equitable estoppel and that the city's argument that claims of estoppel cannot lie against it as a governmental entity will not defeat defendants' claims.

Generally, the doctrine of equitable estoppel refers to reliance by one

party on the words or conduct of another, resulting in the relying party's change of position and subsequent harm therefrom, and I cite Gary Wheaton Bank vs. Meyer, 130 Il. Ap. 3d 87.

Equitable estoppel arises when one by his conduct intentionally or through culpable negligence induces another to believe and have confidence in certain material facts.

The other party, having the right to do so, then relies on the acts and is misled, citing the Gary Wheaton case at Page 96.

Although the intent to mislead is not required, the reliance must be reasonable. That's still at Page 96.

Although governmental bodies enjoy a qualified immunity, some situations may arise which justify invoking the doctrine of estoppel, even against the state acting in its governmental capacity, and I cite Hickey vs. Illinois Central Railroad, 35 Il. 2nd 927.

The party asserting estoppel

has the burden of proving it by clear, precise, and unequivocal evidence, and I cite Carey vs. The City of Chicago, 134 Il. Ap. 3d 217.

At this juncture the court does not need to find that the defendants have made their case, merely that they have sufficiently stated a cause of action.

It is this court's opinion that the defendants have adequately stated a claim for equitable estoppel.

Accordingly, this court will deny the city's motion to dismiss the four separate counterclaims brought by the defendants.

And now I ask the $64 question. With the time parameters that we are confronted with, how much time does the city desire to answer?

Because we have until May 31st.

MS. BECKETT: I'd like seven days to answer. We'd also like leave to amend our complaint for mandamus and restitution, if the court believes that's possible.

THE COURT: Facts are facts, Miss

Beckett, I must respectfully assert, and I don't think there's any possibility of your changing the facts.

I'm going to deny the filing of an amended complaint by the city at this juncture.

You've got seven days to answer. And having stricken Counts 1 and 2 of the city's complaint, there is no need to set any hearing on the motion for summary judgment.

Now, with seven days within which to answer, that gives me 'til the 23rd. I believe a request was made by you, Miss Beckett, in the event that this case should come down the way the court has set, that a pretrial should be held, am I correct?

MS. BECKETT: That was my request. I wish to renew that request at this time. I think this is a case particularly appropriate for a pretrial in chambers.

THE COURT: I most certainly will afford you that opportunity, knowing the gravity of the situation.

Your answers are due by the 23rd.

I will pre-empt --

MR. MAROVITZ: Could we respectfully do it on a Monday or Friday, if that's possible, Your Honor?

THE COURT: That only leaves her until the 25th.

MR. HEISS: The pretrial doesn't matter. She can answer and pretry at the same time.

MR. MAROVITZ: The afternoon of the 26th I will fly in.

THE COURT: That's too close to the 31st.

MR. FORDE: I would say the 23rd.

THE COURT: Could you file your answer in the morning? And I will pre-empt the Prestige trial and give you the afternoon, because I figure this is going to be a long, long pretrial.

MR. MAROVITZ: On the 23rd, Your Honor?

THE COURT: Yes, I'll set you for 2:30.

MR. HEISS: Okay. Thank you, Your Honor.

THE COURT: Prepare the appropriate order about the cross-motions being denied pursuant to the reasons set forth in the opinion and in the transcript of record.

MR. FORDE: Should we have the executive directors of the funds available that day?

THE COURT: If we are sincerely going to have a pretrial --

MR. FORDE: We will have them available.

THE COURT: -- we should have some people in authority that can speak. And keep in mind that Miss Beckett still has to go back to a legislative body.

MR. FORDE: I understand.

MR. MAROVITZ: Your Honor, would the morning of the 25th be better for Your Honor?

THE COURT: Counsel, my mornings are set with contested motions that have been set. What time does the last plane leave, 6:00 o'clock?

MR. MAROVITZ: It doesn't matter.

THE COURT: Mr. Forde, will you and Miss Beckett get together and draw the order?

MR. FORDE: Thank you.

(Whereupon the further hearing of said cause was adjourned to May 23, 1988, at the hour of 2:30 o'clock P. M.)

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

Judy Landauer, CSR, being first duly sworn, on oath says that she is a court reporter doing business in the City of Chicago; and she reported in shorthand the proceedings at the hearing in said cause, and that the foregoing is a true and correct transcript of her shorthand notes so taken as aforesaid, and contains all the proceedings at said hearing.

Judy Landauer CSR

SUBSCRIBED AND SWORN TO
before me this 17th day
of May, A. D. 1988.

Susan Sanders
Notary Public.