



November 26, 2019

## RESPONSE TO COMMISSIONER TSHIBAKA'S NOVEMBER 22 TOWNHALL STATEMENT

On November 22, at the beginning of the DRB Townhall meeting, Commissioner Tshibaka made an unscheduled statement to the participants. Her announcement involved an incomplete and misleading description of a recent order issued by the Superior Court in a lawsuit involving the Retired Public Employees of Alaska (RPEA) and the State Division of Retirement & Benefits (DRB). Most importantly, it failed to provide the context in which the order was issued.

After many years of unsuccessful discussions with the DRB about the changes it imposed on retirees in 2014 when it unilaterally changed the coverage and benefits under the 2013 retiree Dental plan, the RPEA filed a lawsuit in Superior Court in 2016 challenging the constitutionality of those changes. The DRB claimed the dental benefits were not constitutionally protected retiree benefits and that the Moda standard plan it imposed on retirees in 2014 was lawful and proper.

**In December 2016, the Superior Court ruled that the 2013 retiree dental benefits are constitutionally protected.**

After a six-day trial, the Court entered judgment in favor of the RPEA in April 2019, ruling that the DRB had diminished and impaired the coverage and benefits under the 2013 dental plan when it imposed the Moda standard dental plan in 2014.

**The Superior Court specifically ruled that the 2014 Moda standard plan--the plan currently offered by the DRB to retirees--was unconstitutional.** For some reason, but not for

transparency, Commissioner Tshibaka failed to mention that fact during her statement.

The April ruling by the Superior Court did provide the DRB the option of allowing retirees to return to the 2013 dental plan or continuing with the 2014 Moda standard plan. **However, that option did not alter the ruling that the 2014 Moda standard plan was an unconstitutional plan.** In August, four months after the ruling by the Court, the DRB advised the RPEA and the Court that it had elected to pursue the two-plan option.

Commissioner Tshibaka claimed that the primary motivation of the DRB since the April decision by the Court has been to provide choice to retirees and protect against much higher premiums that many retirees cannot afford. But the choice the DRB was offering, before the recent Court order, was to stay in the unconstitutional dental plan--as the default--unless each retiree acted to opt-out of that unconstitutional plan. That isn't much of a choice, nor is it consistent with constitutional legal principles. Commissioner Tshibaka is trained as a lawyer and should understand this.

In addition, her claim of "much" higher premiums under the 2013 plan are exaggerated: the premium increase is only approximately \$7.00 per person per month. While that is not insignificant, that premium increase was determined **solely** by the DRB without any transparency in how it was calculated.

In addition, the DRB recently disclosed that it had accumulated, over the last six years, reserves of approximately \$20.6 million in the DVA trust, and that **reserves needed were only approximately \$7.6 million.** The DVA plan is retaining approximately \$13 million more than it needs which means that premiums have been higher than needed for the past 6 years. The DVA trust is funded 100% by plan participant premiums, and the \$20.6 million represents premiums collected by those who purchase the DVA plan. The State does not contribute to the DVA trust. Rather than transparency, the DRB would not have disclosed the data to justify these hugely excessive reserves, except for the recent order of the Court.

In response to the request of the Court, during the August status hearing, the State attorney and Emily Ricci acknowledged that the DRB could, and would, ask Moda to review and report all denied

dental claims since 2014. There was no statement or limitation that this review would be limited only to claims denied in 2019 or that the review would not begin until 2020.

At a recent Court status hearing, the State disclosed that they were not going to begin that review until 2020 because those who chose the Standard plan for 2020 would not be included or entitled to reimbursement for claims denied inappropriately prior to 1/1/20. This action would be violating these retirees' constitutional rights prior to 1/1/20 and was rejected by the Court, ordering the DRB to immediately begin the review of the claims between 1/1/14 and now. Perhaps Commissioner Tshibaka was unaware that the DRB had made this commitment during the hearing in August that she now claims is too imposing on the DRB.

Perhaps most significantly, Commissioner Tshibaka claims that the order to disclose claims data will violate federally protected privacy of personally identifiable information of dental plan participants. She says that the DRB doesn't know who at RPEA will have access to this data, how RPEA will store it, how it will be protected, or what it will be used for.

This statement demonstrates either lack of information provided by the State attorney or ignorance by the Commissioner: during the early part of the lawsuit, by agreement between the State and the RPEA, the parties entered into a confidentiality agreement that was approved by the Court. This agreement allowed the DRB and Moda to disclose to RPEA personally identifiable dental claims data. The agreement limited the persons at RPEA who could view this data, how it would be maintained and protected, and what could be done with it.

Lastly, Commissioner Tshibaka scolds the Court for issuing this order changing the default plan from the unconstitutional Standard plan to the **constitutional Legacy plan** so close to the end of the open enrollment period because it may result in uncertainty, confusion and frustration.

As with much of this case, the DRB has only itself to blame for any such problems. The DRB has solely and exclusively drafted and implemented this two-plan option, the initial default scheme and the timing of the open enrollment. Neither the RPEA nor any other retiree group has been invited by the DRB to participate in, or to review the

development and imposition of this scheme. Much like the previous imposition of the Moda dental plan in 2014, the DRB has only itself to blame for any problems the RPEA and the Court have had to address in the rush by the State to put this new plan into operation.

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