

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

The Retired Public Employees
of Alaska, Inc.,

Plaintiff,

vs.

Leslie Ridle, Commissioner
of the Alaska Department of
Administration,

Defendants.

3AN-16-4537 CI

ORDER

Adopting RPEA's Proposed Findings of Facts and Conclusions of Law

The court adopts the findings and conclusions proposed by RPEA and incorporates the same by reference as a part of this order. The court makes the following additional findings:

1. The defendant, Department of Administration, was the only party with complete access and control to relevant records necessary for the comparison of the 2013 and 2014 dental plans.
2. The defendant owed a duty to all public employees, both active and retired, to maintain complete records of the dental plans offered and the manner in which they managed.

3. The defendant was in the best position to provide a complete and thorough evaluation of the 2013 and 2014 dental plans, but did not conduct that evaluation except to prepare for litigation.

4. The analysis/comparison by the defendant was biased with a view to protect the decision to change the third-party administrator, MODA, rather than to provide an objective and neutral comparison of the two plans.

5. The defendant's focus was solely on the premium paid rather than the impact on the benefits offered.

6. The plaintiffs, having the burden of proof, had to resort to using less than optimal evidence to prove the scope and extent of the benefits offered in the 2013 dental plan. The defendants were unable to rebut that evidence. The defendant, if it had properly maintained the records of the 2013 dental plan, should have been able to present the best evidence regarding scope and extent of the benefits as well as the management of the plan.

7. The defendants challenge plaintiffs' evidence and argument such as Exhibit 1001, Exhibit1007 and Table 1 as unreliable, but defendant was unable to present better evidence. If those plaintiffs' exhibits were inaccurate, despite being based on information received from the defendant, then defendant should have been able to produce better evidence to rebut the plaintiffs' argument.

8. The court rejects the defendant's argument that there is no evidence that the defendant approved of HealthSmart's practices of administrating the 2013 plan. The only evidence that could have existed would have been in the defendant's complete control. In this instance, the absence of evidence is held against the defendant, not the plaintiff.¹ Retirees are at the mercy of the defendant when it comes to recordkeeping and as such, the defendant effectively has a fiduciary duty to maintain complete and accurate records.

Conclusion

The court finds in favor of the plaintiffs. The effective date of this order is 1 May 2019. Motions for additional/alternate remedies are due no later than 17 May 2019. Motion for fees and cost bill is due no later than 1 May 2019.


IT IS SO ORDERED.

Dated at Anchorage, Alaska this 17th day of April 2019.



Eric A. Aarseth
Superior Court Judge

I certify that on 4/17/19 a copy
of the following was mailed/faxed/hand delivered
to each of the following at their addresses of record.

 Ms. Orlansky/Allaway/Paton-Walsh
Administrative Assistant

¹ See CPJI 2.23 – Failure to Present Evidence

IN THE SUPERIOR COURT OF THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

THE RETIRED PUBLIC EMPLOYEES)
OF ALASKA, INC.,)

Plaintiff,)

v.)

LESLIE RIDLE, COMMISSIONER)
OF THE ALASKA DEPARTMENT OF)
ADMINISTRATION,)

Defendant.)

Case No. 3AN-16-04537 CI

**[RPEA'S Proposed]
FINDINGS AND CONCLUSIONS**

Background Facts

1. The Retired Public Employees of Alaska, Inc. ("RPEA") is a non-profit corporation whose primary purpose is to educate retired public employees about their retirement benefits and to assist them in obtaining the benefits to which they are legally entitled.

2. Leslie Ridle is the Commissioner of the Alaska Department of Administration. She is sued in her official capacity. In accordance with the parties' conventions, the defendant in this case is generally referred to as "the State."

3. Since 1979, the State has provided retired public employees the opportunity to purchase dental insurance as one of their retirement benefits.

4. The State provides retiree dental insurance as part of a combined plan that

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also includes visual and audio insurance. The combination is often referred to as “DVA insurance.” Retirees may not select just dental insurance.

5. Retirees who desire dental insurance must select DVA coverage at the time they retire.

6. Retirees who select DVA insurance must pay a monthly premium to the State for this insurance.

7. The premium is determined by the State, based on the costs incurred by the covered insurance plans, the cost of administering the plans, and the need to keep a reserve. The premium is adjusted regularly, and historically it has increased, due principally to the rising cost of health care. The DVA plan is designed to be self-sustaining.

8. The State does not itself administer the retiree dental plan – or any of the benefit plans it offers to employees and retirees. The State contracts with a private company to administer the benefit plans. This company is called the Third Party Administrator or TPA.

9. From July 1, 2009, through December 31, 2013, Wells Fargo and then HealthSmart served as the TPA for the retiree dental plan. (HealthSmart acquired Wells Fargo early in that period.)

10. Effective January 1, 2014, Moda became the TPA for the retiree dental plan.

11. Although the TPA is assigned principal responsibility for the day-to-day claim-handling process, the State is ultimately responsible for ensuring that the TPA administers the plan in accordance with its terms.

12. To discharge this responsibility, representatives of the State meet extensively with representatives of an incoming TPA to be sure the TPA understands the plan it will administer. Historically, the State also wanted to ensure continuity in claim-handling, although that was not desired when Moda took over as the TPA.

13. Once the TPA begins handling claims, representatives of the State meet regularly with representatives of the TPA, including formal weekly and quarterly meetings and frequent informal communications that address particular claims and how they should be handled. The State also receives information on claim-handling practices by reviewing appeals from members and by responding to complaints from members. The State has the authority to make the final decision on how any claim is handled.

14. The State has the authority to audit the claim-handling by a TPA. The State exercised this authority at least once by conducting an audit while Wells Fargo or HealthSmart was the TPA of the retiree dental plan.

15. If the State determines that the TPA wrongly paid a claim that should not have been paid, the State may require the TPA to repay the plan.

16. The retiree dental plan offered by the State has changed a number of times over the years.

17. The retiree dental plan in effect in 2013 was largely unchanged since 2003. In accordance with the parties' conventions, this is referred to as the "2013 plan."

18. Effective January 1, 2014, the State adopted and implemented a revised retiree dental insurance plan. This is referred to as the "2014 plan."

19. RPEA contends that the changes in the retiree dental plan that took effect in 2014 diminish or impair the benefits available to retirees as compared to the benefits available under the 2013 plan. The State disputes this.

20. The court previously ruled, as a matter of law, that the retiree dental plan is covered by the guarantee against diminishment of benefits in Alaska Constitution Article XII, Section 7.

21. A six-day trial was held in April and July 2018 for the purpose of presenting evidence so that the court could determine whether or not the 2014 plan diminishes retirees' benefits as compared to the 2013 plan.

Changes in the Plan

22. The coverages provided to retirees under the 2013 plan are largely set forth in the Retiree Insurance Information Booklet (May 2003). [Exhibit 1000] This document is referred to as the 2013 plan booklet.

23. The 2013 plan booklet is not the exclusive document that describes coverage under the 2013 plan. The court accepts as credible the testimony by Katherine (“Kelly”) Farmer that Exhibit 1001 also describes coverage provided by the 2013 plan. Ms. Farmer was certain that Exhibit 1001 would not have been available to her on her work computer, which it was, if it had not been approved by the State as a summary of how claims should be handled.

24. The court also accepts as credible the testimony of Ms. Farmer that the 2013 plan covered services not listed in either Exhibit 1000 or 1001 – in particular brush

biopsies, full-mouth debridement, and tissue conditioning. The non-exclusive language in the 2013 plan is consistent with the testimony that the 2013 plan document should not be interpreted as excluding coverage of all services not explicitly listed.

25. The court also accepts the testimony and exhibit prepared by Richard Ward that reflect his review of HealthSmart's claim-handling data and determined that root canal therapy (retreatment) and denture adjustments were services regularly treated as covered under the 2013 plan.

26. The coverages provided to retirees under the 2014 plan are largely set forth in the 2014 amendment to the AlaskaCare Retiree Health Plan. [Exhibit 1003] This document is referred to as the 2014 plan booklet.

27. Coverages under the 2014 plan are also set forth in a series of benefit clarifications, as stated in Exhibits 1004, 1005, and 1006.

28. Based on the express language in the 2014 plan booklet that states that the listed services are covered, indicating that non-listed services are not covered, the court finds that, for the 2014 plan, any service not specifically listed in the booklet or in a formal benefit clarification is not covered.

29. The court finds that both Exhibit 1007 (as discussed at trial) and Table 1 (submitted by RPEA post-trial to summarize the trial evidence) are largely accurate statements of the coverages provided under the 2013 and 2014 plans and of the nature of the changes that took effect in 2014.

30. Both plans organize the covered services into classes. The rate of reimbursement varies by class. Services in class I are covered at 100% of the recognized charge, and no deductible must be satisfied. For services in class II and class III, a \$50 deductible applies. After the deductible is satisfied, services in class II are covered at 80% of the recognized charge, and services in class III are covered at 50% of the recognized charge.

31. The 2014 amendments did not change the overall organization of the plan into three classes or the reimbursement rate for each class. A few services were moved to a different class.

32. Based on the trial evidence, the court finds the following as to the respective coverages and changes:

Service	2013 Plan	2014 Plan	Change
Oral exam	Covered – no express limitations	Covered once in 6 months	Imposes a frequency limitation
X-rays for diagnosis	Covered – no express limitations	States both that it covers “only” intra-oral x-rays, and that it covers only panoramic, periapical, occlusal, and bite-wing x-rays	Imposes limitations on types of x-rays covered
Routine full-mouth x-rays	Covered once per year	Covered once in 5 years	Imposes a frequency limitation
Routine bite-wing x-rays	Covered – no express limitations	Covered once/year	Imposes a frequency limitation
Diagnostic casts and study models	Covered	Not covered	Deletes coverage

Topical fluoride	Covered – no express limitations	Covered once in 6 months for persons 18 and under; if 19 or older, covers once in 6 months if there is a recent history of periodontal surgery, or high risk of decay due to disease, chemotherapy, or similar treatment	Imposes a frequency limitation for all ages; deletes coverage for adults except for specified dental conditions
Prophylaxis	Covered – no express limitations	Covered once in 6 months; also covers up to 3/year for person in third trimester of pregnancy and up to 4/year for person with diabetes, periodontal disease, or when determined dentally necessary by Moda	Imposes a frequency limitation; allows specified exceptions based on dental condition or if Moda determines it is dentally necessary
Sealants	Covered through age 18	Covered once in 5 years, with no age limitation, but limited to the unrestored occlusal surface of a permanent molar	Deletes age limitation; imposes a frequency limitation and a tooth limitation
Periodontal maintenance	Covered – no express limitations	Covers prophylaxis or periodontal maintenance once in 6 months; allows up to 2 periodontal maintenance treatments per year in addition to two prophylactic treatments if person is pregnant or has diabetes or periodontal disease	Changes from Class II to Class I; imposes frequency limitations, with higher limits for certain specified conditions

Space maintainers	Covered – no express limitations	Covered only if under age 14 and only once per tooth space, with no coverage for primary anterior teeth or missing permanent teeth	Changes from Class II to Class I; imposes age limitation, tooth limitation, and frequency limitation
Fillings	Covered	Covered	No change
Bridges and dentures – repair and relining	Covered – no express limitations	No coverage within 6 months of initial placement; subsequent relining is limited to one/year	Changes from Class II to Class III; imposes time and frequency limitations
Palliative emergency care	Covered – no express limitations	No coverage	Deletes coverage
Extractions and other oral surgery	Covered – no express limitations	Covered; precludes separate charge for alveoplasty	Deletes coverage for alveoplasty as a separate charge
Brush biopsy	Covered	Covers 2/year (but not the lab services)	No change
Root canal and retreatment	Covered – no express limitations	Covered, but no coverage for retreatment by the same dentist within 24 months	Imposes frequency limitation
Pulp capping	Covered – no express limitations	Covers direct but not indirect pulp capping	Deletes coverage for indirect pulp capping
Apicoectomy	Covered – no express limitations	Not mentioned	Deletes coverage
Periodontal scaling and root planing	Covered – no express limitations	Covered once per quadrant in 24 months	Imposes frequency limitation
Periodontal splinting	Covered if approved by ADE	Not covered	Deletes coverage
Gold foil restoration	Covered – no express limitations	Not covered	Deletes coverage

Full-mouth debridement	Covered – no express limitations	Covered once in 3 years but only if there was no prophylaxis within 2 years	Imposes frequency limitation
Local and general anesthesia	General anesthesia covered as necessary for dental procedures	General anesthesia covered only for surgical procedures or if needed due to a medical condition	Imposes restrictions on use of general anesthesia
Nitrous oxide	Covered	Covered	No change
Crowns and onlays	Covered with no time limitations; extra cost for porcelain not covered for 2d or 3d molar	Covered once per 7 years; extra cost for porcelain not covered for upper 2d or 3d molar and lower 1st to 3d molar	Imposes frequency limitation and a material limitation for first lower molar
Inlays	Covered with no time limits; extra cost for porcelain not covered for certain teeth	Not covered	Deletes coverage
Bridges	Covered – no express limitation; temporary bridges also covered	Covered once in 7 years, and only if there was no crown; temporary bridges not covered	Imposes frequency limitation; deletes coverage for temporary bridge
Dentures (full)	Covered – no express limitation; temporary full denture also covered	Covered once in 7 years and only if there was no crown; temporary complete denture is not covered	Imposes frequency limitation; deletes coverage for temporary complete denture
Dentures (partial)	Covered – no express limitation; temporary partial denture also covered	Covered; temporary partial denture covered only if placed within 2 months of tooth extraction	Imposes a time limitation for temporary partial denture

Denture adjustment, repair, and relining	Covered – no express limitation	Covered, but no coverage within 6 months of initial placement; subsequent adjustments covered at 2 per denture in 12 months; relining covered once per 12 months	Changes from class II to class III; imposes time and frequency limitations
Denture replacement	Covered after 5 years, if denture cannot be repaired	Covered after 7 years, if denture cannot be repaired	Increases the frequency limitation
Tissue conditioning	Covered – no express limitation	Covered 2 times per denture within 36 months	Imposes a frequency limitation
Implants	Covered for the making of the artificial tooth, when medical plan covered the surgery when implant is needed due to accident or disease	Covered once per tooth for the making of the artificial tooth, when the medical plan covers the surgery when implant is needed due to accident or disease; covers implants not covered by the medical plan	May expand coverage, but the record does not establish when implants would be needed and are not covered by the medical plan
Athletic mouthguard	Not covered	Covered once in 12 months if patient is 15 or younger; covers once in 24 months if patient is 16 or older	Adds a new coverage

33. The changes, individually and collectively, affect thousands of people. The clearest evidence concerned fluoride treatment for adults. The number of approved claims for fluoride treatment for adults dropped from over 7000 in 2013 to under 1250 (and most likely to no more than about 750) in 2014.

34. In addition to changing coverage for particular services as described above, the 2014 plan introduced a network with steerage, which was not a part of the 2013 plan.

35. Under the 2014 plan, in Alaska, a patient who sees a non-network provider is reimbursed at only 75% of the otherwise-allowed reimbursement.

36. Members of the retiree dental plan who reside outside Alaska are also financially penalized if they see a non-network provider, but Moda has not disclosed the nature or amount of the penalty. It varies state-by-state.

37. The financial penalty for seeing a non-network provider applies even if the member resides in a community that has no network provider. This includes members who live in communities where they have access to a non-network provider but no in-network provider. This description applies to a number of communities in rural Alaska, and likely applies to some members in rural communities outside Alaska.

38. Only 53% of dentists in Alaska were members of the Moda network as of 2017.

39. The percentage of claims submitted in Alaska for seeing a non-network provider was 34% in 2014; 28% in 2015; and 25% in 2016. Outside Alaska, the percentage of claims submitted for seeing a non-network provider is lower (between 12% and 17% in each year between 2014 and 2016). It is impossible to determine how many of these claims come from members without easy access to a network provider, as compared to members who had access to a network provider but who chose to see a non-network dentist.

40. Members of insurance plans – particularly older members – value having a fully restricted choice to choose their dental provider without incurring a financial penalty. This freedom has been curtailed.

Findings About Diminishment

41. Based on all of the testimony and exhibits, the court finds that coverage for the following services has been diminished by the adoption of the 2014 plan:

- Oral examinations
- Diagnostic x-rays
- Routine full-mouth x-rays
- Routine bite-wing x-rays
- Diagnostic casts and study models
- Topical fluoride
- Prophylaxis
- Space maintainers
- Bridge and denture repair and relining
- Palliative emergency care
- Extractions and oral surgery
- Pulp capping
- Periodontal scaling and root planing
- Periodontal splinting
- Gold foil restoration
- Full-mouth debridement
- General anesthesia
- Crowns and onlays
- Inlays
- Bridges
- Dentures
- Partial dentures
- Denture replacement
- Tissue conditioning

42. Based on all of the testimony and exhibits, the court finds that coverage for the following services has been enhanced by the adoption of the 2014 plan:

- Sealants
- Periodontal maintenance
- Athletic mouthguards

43. The court has not placed implants on either the diminishment list or the enhancements list, because, while it is clear that coverage has not been diminished, the

preponderance of the evidence does not demonstrate that coverage for implants has been enhanced.

44. The court finds that overall the enhancements are not equivalent to the diminishments. The court would make the same finding even if it concluded that coverage for implants has been enhanced.

45. The court has not simply counted the number of entries on each list. Rather, the court has considered the magnitude of each change, the number of members affected by the changes, the fact that two of the enhancements are in themselves a mix of an enhancement (improvement of the class of coverage) and a diminishment (frequency limitations were imposed), and the fact that the only unequivocal enhancement (coverage for athletic mouthguards) is of limited utility to a largely retired population.

46. The court's own analysis is supported by the expert testimony of Todd Allen. Mr. Allen was accepted as an expert in benefit plan evaluation, based on his training and work experience. The court found his testimony helpful and accepts as credible his evaluation that overall the enhancements in the 2014 plan are not equivalent to the diminishments.

47. The court also finds impairment of benefits based on the loss of the freedom to choose one's dental provider without financial penalty. Evidence established that members value freedom of choice; burdening this choice with a financial penalty impairs the benefits previously granted.

48. The court finds that it is not true as a matter of fact that the changes that impose frequency limitations and other such limitations do no more than eliminate payments for services that should not have been treated as covered under the 2013 plan, even assuming that the 2013 plan only covered dentally necessary services. The court accepts in full the testimony of the dentists who testified as experts that many of the 2014 changes deny coverage for dentally necessary care, where such coverage was available under the 2013 plan.

49. The court does not find that the retiree dental plan was or is intended to be administered in such a way as to eliminate coverage for all treatments that are not dentally necessary, regardless of the language in the plan booklets. The court accepts the testimony of the State's witnesses that efficient and responsible administration of a plan does not require the TPA to scrutinize every claim for dental necessity, particularly if the claim is within a recognized reasonable frequency limit. Thus, the court finds it is not true that coverage under the 2013 plan was limited to dentally necessary treatment.

50. The State presented testimony by Richard Ward, who calculated what he defined as the "actuarial value" of the 2013 plan as compared to the "actuarial value" of the 2014 plan as it was administered in each year between 2014 and 2017. The court does not find that Mr. Ward's testimony (summarized in his Exhibit 2046) supports a conclusion that the enhancements in the 2014 plan are equivalent to the diminishments.

51. The court finds that RPEA articulated a number of sound reasons for not accepting Mr. Ward's testimony and Exhibit 2046, and the court adopts RPEA's reasoning on this point.

51. In rejecting Mr. Ward's testimony and Exhibit 2046, the court relies particularly on the following findings:

a. Mr. Ward did not compare the value of the 2013 plan to the value of the 2014 plan, nor did he assess the comparative value of the benefits available to an average member during his or her lifetime under the two plans. At most, Mr. Ward compared certain aspects of the claim-handling experience in each of a number of discrete years. He did not show that any one year was representative of how a typical employee (or the full membership) would benefit under any plan over a lifetime.

b. Mr. Ward excluded all non-network claims from his analysis of the value of the 2014 plan in each year the plan was in effect. This is an incomplete analysis, and its effect is to overstate the value of the plan, using Mr. Ward's definition of actuarial value, because, on average, the plan pays for a greater percentage of the allowed charge in network claims as compared to non-network claims. The Moda data highlighted in Exhibit 1030 (showing per member per month allowed costs and per member per month costs paid by the plan) corroborate this commonsense conclusion about the effect of eliminating non-network claims from the comparison.

c. Mr. Ward calculated an "actuarial value" of the 2013 plan in two ways. The court finds neither offers a reliable value.

d. Mr. Ward calculated a value for 2013 using HealthSmart data, but he first described the data as incomplete and untrustworthy. The court cannot accept as valid and reliable a valuation based on the data set he described.

e. Mr. Ward also calculated a value for 2013 by projecting backward from the 2014 data and making adjustments based on changes in the plan. For his calculation to have any meaning, it was essential for him to have an accurate understanding of the changes – and Mr. Ward’s understanding was not accurate. He found no changes as to particular services when there were in fact diminishments; he found enhancements in coverage of particular services when there were in fact no changes. The errors are largely due to his reliance on only the 2013 plan booklet to describe coverage under the 2013 plan; the court by contrast has found that Exhibit 1001 and the testimony of Ms. Farmer also must be accepted in determining coverage of services under the 2013 plan.

53. Mr. Ward’s errors in listing the actual diminishments and enhancements also make unreliable the analysis he provided in Exhibit 2050. The court does not find this document helpful in determining whether new enhancements are equivalent to new diminishments.

54. The largest enhancement that Mr. Ward identified in Exhibit 2050 is in the coverage for implants. As discussed earlier, the court is not persuaded that coverage in fact has changed. Even if it has, the court cannot accept that an enhancement in coverage for implants is sufficient to offset all the remaining diminishments. *Duncan* requires that, to be an offsetting advantage, an improvement must relate to the diminishment it

supposedly offsets. Enhancing coverage for implants while diminishing coverage for preventative and restorative treatments does not satisfy this test.

55. Besides the substantive problems with Mr. Ward's analyses, his demeanor on the stand made him incredible. He plainly did not testify as a disinterested expert.

56. In sum, the court accepts RPEA's evidence that shows diminishment in coverage, and the qualitative analysis that RPEA offered that shows the diminishment in coverage are not offset by new enhancements in coverage. The court rejects the testimony the State offered through Mr. Ward as a way to show quantitatively that the enhancements are equivalent to the diminishment.

57. The court therefore finds, by a preponderance of the evidence, that the 2014 plan diminishes and impairs the benefits available to retirees under the 2014 plan.

Conclusions of Law

58. The court held in its pretrial order granting partial summary judgment to RPEA that the guarantee of the Alaska Constitution Article XII, Section 7 applies to the retiree dental plan. The court adheres to that conclusion and incorporates its reasoning into these findings and conclusions.

59. The State has reiterated arguments that the constitutional guarantee does not apply because retirees pay a premium for their participation in the DVA plan, whereas the State pays the premiums (for most retirees) for the retiree medical insurance that was at issue in *Retired Public Employees of Alaska, Inc. v. Duncan*, 71 P.3d 882 (Alaska 2003). In *Duncan*, the Supreme Court held that the Alaska Constitution protects retirees' benefits,

not the premium paid for the benefits, and this court believes that holding applies regardless of who pays the premium.

60. The State has argued that a quantitative analysis is required under *Duncan* to prove that new diminishments are not offset by new enhancements. This court does not read *Duncan* that way. *Duncan* stated that reliable quantitative analysis, based on actual experience and reliable actuarial sources, could be used to prove equivalency, but *Duncan* did not state this is the only approved method of showing equivalency or the lack of equivalency.

61. Quantitative analysis might be a necessary part of the analysis when the changes in the plan affect coverage in many ways that only can be measured monetarily – for example, changing reimbursement rates per class, changing the deductible, and changing the annual or lifetime maximum. There were few such changes in the amendments to the retiree dental plan at issue in this case: the coverage class for three services was changed (two moved from 80% coverage to 100%, and one moved from 80% coverage to 50%). All other changes deleted – or in a few instances – added coverage for a service or imposed frequency limitations or other limitations; these are easily assessed as diminishments or enhancements without the need for quantitative analysis.

62. If a quantitative analysis were used to compare two plans, the court believes that, under *Duncan*, a valid comparison would have to consider the effect on the entire group of members over the members' lifetimes. It is not meaningful to compare the value

of claims covered in two isolated years, without a showing that those years are representative.

63. For purposes of a qualitative analysis, the changes at issue in this case can be understood by a layperson, and the court concludes that *Duncan* authorizes the court to analyze the overall effect of the changes qualitatively. If the balance were close, the court would want to defer to an expert – but the comparison here is not close.

64. When considering the effects of the changes to the retiree dental plan, the court, as explained earlier, relied on the testimony that establishes the coverage that actually was provided to members under the 2013 plan (as listed in Exhibit 1001 and as described by Ms. Farmer and as established by Mr. Wards’s data). Based on the testimony, the court did not find that the benefits under the 2013 plan were limited to the coverage explicitly listed in the 2013 plan booklet.

65. In accepting this broader view of coverage under the 2013 plan, the court is persuaded by the fact that the State selects the TPA, supervises the TPA, requires regular reports from the TPA, has the right to audit the TPA, and has the right to require the TPA to repay the plan if the State determines that the TPA improperly paid a claim that was not covered. When a practice of covering certain claims was established while Wells Fargo and HealthSmart served as the TPA, the court finds that the State must have known or at least should have known about the practice. Therefore, the State is responsible for allowing all coverage that was routinely allowed. That makes these services “covered” by the 2013 plan, even if the service was not listed in the 2013 plan booklet.

66. This is especially true based on the language of the 2013 plan, which was inclusive and not exclusive. The plan booklet states that services covered within each class “include[e]” the listed services, not that coverage is limited to the listed services.

67. Thus, the court rejects the State’s argument that the court must compare the services listed as covered in the 2013 booklet with the services listed as covered in the 2014 plan booklet and base its decision on whether the enhancements are equivalent to the diminishment solely on that comparison.

68. In considering whether a particular treatment was covered under the 2013 plan or is covered under the 2014 plan, the court resolves any ambiguities in favor of RPEA. The State writes the plan booklets and has the responsibility to be clear.

69. The State has suggested that *Duncan* does not require the court to compare the 2014 plan to the 2013 plan to evaluate whether benefits were diminished. Instead, the State suggests that *Duncan* requires only that the new plan be a reasonable plan in the mainstream of retiree dental plans offered to public employees around the country. The court disagrees. The Alaska Constitution protects retirees against diminishment of the benefits they had. Alaska retirees are not necessarily protected against diminishment of their benefits even if the new Alaska plan is in the mainstream of plans offered in places outside Alaska. The court therefore finds that Cathye Smithwick’s testimony and conclusions are largely irrelevant to the issue before this court.

70. The State also has suggested that the guarantee against diminishment is satisfied so long as the current retiree dental plan is like the dental plan the State offers to

current active employees. The court disagrees. The Alaska Constitution protects retirees against diminishment of the benefits they had. Retirees are not necessarily protected against diminishment of benefits if the new retiree plan is comparable to the benefits offered to current employees. The Constitution does not forbid diminishing the benefits offered to active employees. The court therefore finds that testimony and conclusions about the dental plans available to current employees are irrelevant to the issue before this court.

71. Based on all of the above, this court concludes that, because the 2014 retiree dental plan diminishes the benefits that were available to retirees under the 2013 retiree dental plan, the State violated the Alaska Constitution in implementing the 2014 changes to the plan.

Order

Based upon the above findings and conclusions, it is ordered as follows:

- A. The court declares that the 2014 changes to the retiree dental plan are unconstitutional.
- B. The court enjoins the State from continuing to offer the 2014 retiree dental plan as the only dental plan available to retirees.
- C. The State may (1) return to the 2013 retiree dental plan; (2) provide individual retirees the option of returning to the 2013 plan or continuing with the 2014 plan; or (3) negotiate a new alternative plan that RPEA accepts as comparable and not diminishing retirees' benefits.

- D. On motion of either party, the court will set a schedule for additional briefing on remedy.
- E. RPEA is the prevailing party, and, as a constitutional litigant, RPEA is awarded its full reasonable costs and attorney fees in accordance with AS 09.60.010(c).

Dated at Anchorage, Alaska, this 16th day of April 2018.



Eric A. Aarseth
Judge of the Superior Court

I certify that on 4/17/19 a copy of the following was mailed/faxed/hand delivered to each of the following at their addresses of record.

Ms. Orlandy/Allaway/Paton-Walsh
Administrative Assistant