

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

THE RETIRED PUBLIC EMPLOYEES)
OF ALASKA, INC.,)
)
Plaintiff,)
)
vs.)
)
SHELDON FISHER, et al.,)
)
Defendants.) No. 3AN-16-04537 CI
_____)

TRANSCRIPT OF STATUS HEARING

BEFORE THE HONORABLE ERIC A. AARSETH
Superior Court Judge

Anchorage, Alaska
August 8, 2019
3:28 o'clock p.m.

APPEARANCES:

FOR THE PLAINTIFF: REEVES AMODIO, LLC
BY: SUSAN C. ORLANSKY, ESQ.
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Anchorage, Alaska 99501

FOR THE DEFENDANTS: OFFICE OF THE ATTORNEY GENERAL
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Page 2

1 PROCEEDINGS
2 Courtroom 604
3 3:28:04 PM
4 **THE COURT:** Thank you. Please be seated. We're on
5 record. This is a status hearing in the case RPEA versus the --
6 it's titled Sheldon Fisher, but it's the State of Alaska.
7 The -- 3AN-16-4537 Civil. We have -- we're checking in with the
8 parties because I issued a decision in favor of the plaintiffs
9 in this case, which requires, I think it's fair to say, a lot of
10 heavy lifting on the part of the State of Alaska in terms of
11 making some changes here. And so we've got a few procedural
12 motions that are in place that I think we need to talk about
13 today and figure out, you know, what -- where this case is going
14 to go next.
15 I guess before I go off what I had prepared in my mind to
16 discuss, are -- the parties have any more discussions? Do you
17 folks have anything that you've come up with, a plan, between
18 now and whenever this -- where this is going next?
19 **MS. ORLANSKY:** No, Your Honor.
20 **THE COURT:** No.
21 **MS. ORLANSKY:** My --
22 **THE COURT:** Okay. All right. So there is -- the first
23 thing is this motion for an entry of final judgment, and the
24 final judgment is key in terms of, you know, triggering that
25 time frame in terms of is there going to be an appeal filed or

Page 3

1 not. The State would like me to issue that final judgment. I
2 think there was an opposition by the plaintiffs. I was I guess
3 a little surprised by the opposition because I kind of assumed
4 that you would, you know, agree, let's get a final judgment out
5 here, we won. I -- is there a concern that somehow I would not
6 have retained the jurisdiction to enforce my order because I
7 issued that?
8 (Telephone noise)
9 **MS. ORLANSKY:** Your Honor, I suspect that's my client
10 representatives who --
11 **THE COURT:** Okay.
12 **MS. ORLANSKY:** -- had called in. Maybe we should make
13 sure they know they're on speaker.
14 **THE COURT:** Hi. This is Judge Aarseth. Who do I have on
15 the phone?
16 **MR. OWENS:** Judge, this is Brad Owens calling in, and
17 Sharon Hoffbeck is in the process of calling in, so it should
18 take about another 30 seconds. I apologize if I'm late.
19 **THE COURT:** No, that's all right. I just need you to put
20 your phone on mute.
21 **MR. OWENS:** I'll do that right away.
22 **THE COURT:** Thank you. Okay, and is -- do I have Sharon
23 the phone?
24 **MS. HOFFBECK:** Yes, you do.
25 **THE COURT:** Okay. And if you could please put your phone

Page 4

1 on mute, please.
2 **MS. HOFFBECK:** All right.
3 **THE COURT:** Do I have anybody else on the phone, because
4 I'm still hearing background noise. There we go.
5 Okay, so back to my question.
6 **MS. ORLANSKY:** No, Your Honor, I don't have any concern
7 that you would be divested of jurisdiction to monitor the
8 implementation of your order. Our only concern was the
9 practical one. Every time I've had a case up on appeal, but
10 still trying to deal with Superior Court motions, even if
11 they're sort of clearly legitimately Superior Court motions,
12 there always seems to be an extra layer of work involved.
13 Sometimes there's not an agreement over whether the Superior
14 Court has jurisdiction and I find myself needing to move for a
15 remand or a partial stay in the Supreme Court. So I was just
16 hoping to avoid that kind of additional uncertainty and work.
17 That's the entire basis for our --
18 **THE COURT:** Okay.
19 **MS. ORLANSKY:** -- opposition to entry of a final judgment
20 before this Court is really done with the case.
21 **THE COURT:** So my thought would be entering the final
22 judgment and maybe adding some language to it, which would say
23 the Superior Court is retaining jurisdiction to the extent
24 necessary to be able to enforce its order to ensure that the
25 State is actually implementing, you know, this change as

Page 5

1 required, and then, you know, ultimately that -- that's a signal
2 to the Supreme Court, that's my intention, and then you guys can
3 duke it out with the Supreme Court if you want to say, hey,
4 tell the Superior Court to knock it off; they don't get to do
5 that anymore. What do you think about that, Ms. Alloway?
6 **MS. ALLOWAY:** Your Honor, I think that's fine, without
7 conceding the fact that we might have a disagreement whether the
8 Court can retain jurisdiction to supervise --
9 **THE COURT:** Okay.
10 **MS. ALLOWAY:** -- the implementation, and we do intend,
11 like we have a pending motion with the Court to stay pending the
12 appeal. The State does intend to appeal, so as soon as the
13 entry of final judgment is made final we will file our notice of
14 appeal, and should the Court deny the stay pending appeal, we
15 will ask the Supreme Court for a stay.
16 **THE COURT:** Right. Okay. All right. So is there
17 anything else, Ms. Orlandsky, that you want to be heard on
18 regarding the entry of the final judgment?
19 **MS. ORLANSKY:** No, that's fine, Your Honor.
20 **THE COURT:** Okay. So I'm going to enter a final judgment
21 in the case indicating that the plaintiffs are the prevailing
22 party and adopting the order -- the findings that I made. Part
23 of that, at least I'll state orally, is that I -- it is my o-
24 pinion that the Court has the ability to -- has the inherent
25 discretion to have continuing jurisdiction to enforce its

Page 6

1 orders.
2 I think you can see that there are many cases that -- in
3 many different types, both criminal and, frankly, civil, that
4 you will see where a court will have the inherent -- even though
5 the underlying decision may be appealed, there's always this
6 ongoing downstream effect because of the implementation of that
7 order, and the court has the ability to enforce the purpose of
8 the order. And the purpose of the decision was to say that the
9 rights that were -- I don't know if it's rights -- the
10 contracted rights that were in place for the employees with the
11 2013 plan were not properly replaced with the 2014 plan, and
12 that the State has to go back to the drawing board to either
13 reinstate what the plan was in the 2013 plan or to come up with
14 another plan that, in fact, is a suitable replacement for it.
15 That's the purpose of the order that I'm entering, and so
16 it to me, barring the Supreme Court saying, no, we think it's
17 better just to put everything on a standstill, you know, the
18 Superior Court has the ability to continue to monitor and
19 enforce that. And so that is going to be this Court's decision
20 to enter that final judgment and, frankly, to get that -- if
21 there's going to be an appeal, which I certainly anticipated
22 that there would be. It's a very important topic and will be
23 good to hear from the Supreme Court. I got reversed twice last
24 week, so maybe I'll do better. You -- I think you had one of
25 them, so --

Page 7

1 Okay. Now, in terms of the stay, so, Ms. Alloway, my
2 thought on the request for the stay is the stay sort of says
3 that the State's not going to do anything at all until the
4 Supreme Court gets through making a decision your appeal, which
5 means that -- and this is not a derisive statement for the
6 appellate process, but it may be years before we actually get a
7 decision, and in the meantime we have people living with a plan
8 that from this Court's perspective is not an adequate
9 replacement for what was in the 2013 plan.
10 I mean -- and there's nothing wrong with the State asking
11 for that, but why instead can't we simply handle this in terms
12 of the State, and I sort of suggested that in my order in terms
13 of what the State can do, is why can't we simply process this in
14 terms of the State is going to make a showing to say this is the
15 efforts that we're making, this is the time that we needed.
16 That was sort of the gist of the affidavit by a gentleman -- I
17 don't recall his name, but a gentleman that works with the DRB
18 to say, look, Judge, 13 days is kind of ridiculous. We can't do
19 that. We need more time to be able to figure out how we're
20 going to make these changes. And this Court providing
21 extensions at that request and saying, look, show me good cause,
22 show me that you're making good faith efforts, that we're -- you
23 know, we're actually going to reach a result where they're going
24 to make that change.
25 Why can't we simply do it that way instead of just staying

Page 8

1 this whole thing and nothing happens?
2 **MS. ALLOWAY:** Well, Your Honor, I mean, I can make that
3 showing. The State has been making efforts to enforce the order
4 should that -- should we not get a stay pending appeal. What
5 I'm telling the Court is that it's impossible due to -- prior to
6 January 1, 2020. I can tell you why, but I think the State is
7 entitled to a stay pending appeal because just the practicality
8 of implementing a new dental plan is something that is a huge
9 undertaking for the department, and it faces a lot of legal
10 questions.
11 **THE COURT:** Can I --
12 **MS. ALLOWAY:** Yeah.
13 **THE COURT:** -- you used an acronym to create a new
14 something plan. What did you say?
15 **MS. ALLOWAY:** Oh, I just said dental plan.
16 **THE COURT:** Oh, dental plan.
17 **MS. ALLOWAY:** Yeah, dental plan.
18 **THE COURT:** I thought you used some sort of acronym --
19 **MS. ALLOWAY:** No, no.
20 **THE COURT:** -- and I -- sorry.
21 **MS. ALLOWAY:** I mean, so here's some of the -- just the
22 legal concerns that the State has with implementing an order
23 before getting a decision from the Supreme Court. One of the
24 options that the Court provided us was to go back to the 2013
25 plan. The State believes that the 2014 plan is actually a

Page 9

1 higher value plan than the 2013 plan. RPEA doesn't represent
2 all of the retirees. If we get rid of the 2014 plan, the State
3 is now subject to litigation because that loss of the 2014 plan
4 could be considered by some of the retirees to be a
5 diminishment, and now they're paying for a more expensive plan
6 that doesn't offer everything that the 2014 plan does.
7 **THE COURT:** Uh-huh.
8 **MS. ALLOWAY:** So that's the legal concern that the State
9 has with just getting rid of the 2014 plan completely and
10 returning to what we call the legacy plan, which is the 2013
11 plan.
12 The same sort of legal concerns arise if we go with the
13 dual option, which is the Court allowing the State to offer both
14 the 2013 plan and a 2014 plan. Assuming the State does that, is
15 there a subset of retirees for which we've created an accrued
16 benefit where they will forever have to have the option of
17 buying into two plans. We don't know the answer to that. And
18 if we offer a 2013 plan and a 2014 plan, are they both subject
19 to diminishment to the extent that if the State ever wants to
20 change the 2014 plan do we also have to go through a
21 diminishment clause analysis before we can do that. These are
22 all concerns that the State has, and in doing that we could
23 potentially be creating accrued benefits which will be -- which
24 could irreparably harm the State and that we could never get rid
25 of this benefits, even if the Supreme Court rules in our favor.

<p style="text-align: right;">Page 10</p> <p>1 Beyond that, just the undertaking that the department has 2 to go through in order to return to the plan. I can represent 3 to the Court that the administrator or the commissioner has made 4 a decision that if the Court orders us to implement the plan, we 5 will offer two plans. We will offer a 2013 plan and we will 6 offer the 2014 plan.</p> <p>7 But to give the Court just an idea of the things that the 8 State has been wrestling with since the April decision came out, 9 first, we had -- we have to go through a procurement process. I 10 know the Court's well aware of the procurement the State has to 11 go through. We had an outstanding request for proposal for 12 third-party administrators. We first had to analyze whether 13 offering two dual plans was within the scope of that RFP or 14 whether it was a material change to the extent that we would 15 have to go through another RFP process. We are continuing to 16 negotiate with third-party administrators as far as that's 17 concerned.</p> <p>18 Circling back, there -- just some of the practicalities of 19 actually implementing the plan, first, the State has an 20 eligibility system. Basically, we have a way of notifying Delta 21 Dental that these retirees are eligible for this plan package. 22 It's a system that's out of date. We've been trying to 23 negotiate with contractors to update that system, and it's 24 automated, because we're talking about 55,000 enrollees in this 25 plan and it's not something the department can do by hand. And</p>	<p style="text-align: right;">Page 12</p> <p>1 MS. ALLOWAY: No, I'm -- 2 THE COURT: So -- 3 MS. ALLOWAY: -- talking about returning to the old plan. 4 THE COURT: Okay. 5 MS. ALLOWAY: So -- 6 THE COURT: All right. 7 MS. ALLOWAY: -- basically, we're in a world of the 2014 8 plan, but to -- 9 THE COURT: Right. 10 MS. ALLOWAY: -- do what the department -- to implement 11 the Court's order we need until at least January 1. 12 THE COURT: One -- and, Ms. Orlansky, I'll certainly, you 13 know, hear from you. One -- my first concern -- I don't know if 14 it should be the most important, is from my -- just my first 15 concern in this was at a minimum -- okay. Just assuming for a 16 second that I was right and that there was a diminishment and 17 that there had to be -- the 2013 plan that was there were the 18 benefits that had to be provided under the plan, that -- is 19 capturing the numbers of denied services that the retired folks 20 requested, so they asked for a service, they were denied, and 21 one is recording that, capturing that, so there's no question 22 about, okay, from 2014 until present and ongoing we know -- 23 we've identified all the people whose claims were denied so that 24 we could retroactively reimburse them or whatever needs to 25 happen to them, okay?</p>
<p style="text-align: right;">Page 11</p> <p>1 so the department has been working with the contractor. 2 My understanding is that it's one person that can really 3 do the IT that is necessary to update a system that's probably 4 dated in like the 1970s or the 1980s. We are trying to update 5 that system going forward, and the department is trying to do 6 that through some other procurement processes, but to do this by 7 January 1st we have to use this one individual that's capable of 8 doing that. That takes between 90 days -- at least 90 days to 9 do that.</p> <p>10 All of the claims are processed by an automated system, so 11 Delta Dental needs to update their coding. They're need -- they 12 need to make sure that their coding is available for both the 13 2013 plan and the 2014 plan. That takes at least 90 days to do 14 that. We've instructed Delta Dental to start doing that, but in 15 order to roll this out by January 1st, or to do it properly, I 16 should say, we need to audit that system, so the department will 17 make sure that the adjudication process is working.</p> <p>18 The pre-implementation audit system, our program takes 19 about 30 days, and then we need another 30 days to fix any 20 problems that should arise. That process is also ongoing, and 21 it's something that the department is working on as we speak, 22 but it's also the reason why we cannot implement a new dental 23 program for the retirees before at least January 1st.</p> <p>24 THE COURT: And we're talking -- and when you say new, 25 you're talking about a new third plan?</p>	<p style="text-align: right;">Page 13</p> <p>1 And then the second part is just who the burden is on. 2 That -- is that going to be -- is the expectation that the 3 burden is going to be on the person going to the dentist, that 4 they somehow -- to dig through their records and, you know, turn 5 everything in and prove that they were actually denied this 6 claim, or is this something that the State can capture? I mean, 7 I think that was my first concern, because, you know, you see a 8 lot of cases where the -- you know, there was a motion for stay, 9 they're like, okay, is there going to be irreparable harm, we'll 10 never be able to recapture this, put a number on it to repay 11 somebody? And so that -- that's just my first concern. Has 12 that been a discussion with DRB? I mean, are they looking at 13 that in terms of how they're going to go back and figure this 14 out and -- the services that were denied? Or at least even 15 ongoing from the moment I put the order in until moving forward. 16 That type of -- 17 MS. ALLOWAY: That has not been a discussion with DRB. 18 The department has not considered any payment of retroactive 19 claims, if you will, because RPEA didn't ask for damages in 20 their complaint. They were talking about prospective relief. 21 THE COURT: Okay. So let's put it in that framework, 22 then, this in terms of prospective. So I entered my order. The 23 State's on notice going forward from there. Then, at least from 24 there, there would be relief that they could get, correct? 25 MS. ALLOWAY: The difficulty that -- with that, Your</p>

<p style="text-align: right;">Page 14</p> <p>1 Honor, is we go back to the thing that we've always been talking 2 about throughout this case, is that the retirees pay the cost of 3 their premiums. And so one of the options that the department 4 considered was let's just pay all of the premiums through the 5 remainder -- or all of the claims through the remainder of the 6 year until we can roll out the dual program in January, on 7 January 1st.</p> <p>8 The problem with that option is that that would nearly 9 deplete all of the reserves that the financial -- the trust 10 account has for this plan, which would result in a dramatic 11 increase for the retirees on January 1 in order to replenish 12 those reserves. So I don't know how to do that without -- the 13 basic problem is the retirees pay for this, so ultimately 14 they're paying the -- all of the retirees, they need to pay for 15 the increase in costs that it would go to pay back all of that. 16 So there has to be an adjustment in the premiums at some point.</p> <p>17 THE COURT: Okay. All right. Without getting into the 18 actual -- the repayment of the money, though, that the -- like I 19 said, the capture of -- that there were denials and that a 20 person can go back, we can -- what -- I don't know what the 21 remedy's going to be, but we -- at least we know who was denied 22 the claims, you know, that they should have gotten. So Delta 23 Dental is enforcing the plan or serving the plan, whatever word 24 you want to use, you know, according to the 2014 benefits. 25 We're going to have people that are not getting services</p>	<p style="text-align: right;">Page 16</p> <p>1 at a minimum you would know had we been under the 2013 plan we 2 would have approved those services, but we're under the 2014 3 plan and we denied them. At least we've captured that.</p> <p>4 MS. RICCI: Yeah.</p> <p>5 THE COURT: And that would be -- and that way we can 6 figure out whatever the remedy is at the end of it. We can 7 easily go back to that and figure that out. So that -- I think 8 that would be a good thing to do. Thank you, Ms. -- is it 9 Reeses (ph), soft S, Cs or -- Ricci?</p> <p>10 MS. RICCI: Ricci.</p> <p>11 THE COURT: What?</p> <p>12 MS. RICCI: Ricci.</p> <p>13 THE COURT: Ricci, hard -- okay.</p> <p>14 MS. RICCI: Yeah.</p> <p>15 THE COURT: You can go ahead and be seated. Thank you. 16 Ms. Orlansky.</p> <p>17 MS. ORLANSKY: Yeah. I mean, Your Honor, my clients are 18 really troubled by having one case and sort of seeing no 19 results. They've been operating under an unconstitutional plan 20 since the beginning of 2014 according to Your Honor. It's 5-1/2 21 years from now and we're sort of hearing we're not going to do 22 anything about it for two or three years until the Supreme Court 23 decides this case, and that's pretty hard to take.</p> <p>24 Your Honor put your finger on one of the things that I was 25 thinking about, is that Ms. Alloway's right, we never asked for</p>
<p style="text-align: right;">Page 15</p> <p>1 that they used to get under the 2013 plan. Those are the 2 denials that I'm talking about. Is the State doing something to 3 capture that so we have an easy database or whatever it might 4 look like in terms of, okay, these are the folks and these are 5 the services they were denied? We don't know what the 6 reimbursement is going to look like or if there's a 7 reimbursement or, you know, what the case is, but at least we 8 know who they are and what the services were. Is that being 9 happened -- is that happening?</p> <p>10 MS. ALLOWAY: If you don't mind, if Ms. Ricci knows the 11 answer -- Ms. Ricci is the chief health administrator for the 12 Department of Administration. She's here to help me with some 13 of these factual questions --</p> <p>14 THE COURT: Okay.</p> <p>15 MS. ALLOWAY: -- that I might not know the answers to. 16 Okay.</p> <p>17 MS. RICCI: Your Honor, Emily Ricci.</p> <p>18 THE COURT: Yeah.</p> <p>19 MS. RICCI: And --</p> <p>20 THE COURT: You testified.</p> <p>21 MS. RICCI: So that is not happening currently, but we 22 could absolutely do a retrospective claims review and make sure 23 that we are capturing any sort of denied claims and who those 24 individuals were.</p> <p>25 THE COURT: Yeah, I think just at a start that would be --</p>	<p style="text-align: right;">Page 17</p> <p>1 reimbursement of past unconstitutional denials of claim. It 2 seemed to me that that was probably going to be an 3 administrative nightmare to do it retrospectively, but I don't 4 think there's any excuse for not doing it going forward.</p> <p>5 And we thought of that at a minimum, and that doesn't help 6 the retirees who've learned to play the game, who've already 7 changed their provider to a network dentist, even if they used 8 to love their old non-network dentist, and who've known that 9 they won't get fluoride treatments and they're not even asking 10 for fluoride treatment. So it doesn't help people who have just 11 sort of resigned themselves to playing by the rules of the 2014 12 plan, but it would help at least the retirees who have tried to 13 get coverage for an out-of-network dentist or tried to get 14 coverage for fluoride. So I think that's the bare minimum the 15 State ought to be required to do going forward.</p> <p>16 Other than that, I mean, I think Your Honor picked up from 17 trial, the State's credibility with my clients is pretty low. 18 So when Ms. Alloway comes in and says, well, we need four months 19 to do this or three months to do that, it's a little hard to 20 understand how come it takes all that or why they won't put a 21 little more resources into it. I mean, the affidavit they came 22 in with before said it's going to take us four months to 23 understand the 2013 plan, and that seemed ludicrous to me. Your 24 Honor's decision told them what was in the 2013 plan, and there 25 were experts out there like Kelly Farmer (ph) who knew what was</p>

<p style="text-align: right;">Page 18</p> <p>1 in the 2013 plan. So those didn't feel like very believable and 2 credible excuses. It just felt like a reason to do nothing. 3 I still hear a lot of resistance to trying to do anything 4 meaningful. I haven't heard anything -- I mean, Your Honor gave 5 them the option of coming up with a whole new constitutional 6 plan, and that's -- I don't think Your Honor or we can force the 7 State to do that, but that seemed to me in my mind to be the 8 obvious solution. 9 The -- what we call the 2013 plan has been in effect 10 the -- was in effect from about 2003, I think the evidence 11 shows, and I know and the State knows that there have been 12 changes in dental technology since then. It was never RPEA's 13 intent to sort of freeze a plan at its 2003 level. All we 14 wanted to do -- the State seems to think plans should change to 15 account for new dental technology. We agree. All we wanted was 16 a meaningful Duncan (ph) complaint actuarial analysis that says, 17 hey, here are the new benefits and they do, in fact, outweigh 18 the new detriments, but I haven't heard anything that says just 19 that the State is looking at that alternative. And that's 20 unfortunate, but that would have been a nice way for the State 21 to go forward in good faith and accomplish many of the laudable 22 goals it had in implementing a new plan while still protecting 23 the class of retirees. 24 So I guess I'm not really sure where we are except we are 25 frustrated to be hearing so little, and the State -- to the</p>	<p style="text-align: right;">Page 20</p> <p>1 to do nothing, then the retirees who've lived with an 2 unconstitutional plan for more than five years will be left 3 living with an unconstitutional plan for two or three more years 4 while the appeal goes forward. So the extent that Your Honor is 5 trying to figure out a way to protect retirees, I don't think a 6 stay pending appeal is the right answer. I think where the 7 State is headed, at least as of 2020, I'm not happy that it's 8 not happening in 2019, and I don't the State has shown why none 9 of it should be happening in 2019, but at least as of 2020, 10 rather than a stay pending appeal, the State should be required 11 to implement -- if they want to do it dual, that's at least one 12 package that probably meets the constitution and the spirit of 13 this Court's order. 14 THE COURT: Okay, thank you. So the dual plan is one -- 15 I'm anticipating that -- 16 MS. ORLANSKY: Yeah. 17 THE COURT: -- your -- you can continue with the 2014 plan 18 and pay the premiums that are already designated there or you 19 can go to the 2013 plan and then there's a change of premium? 20 MS. ALLOWAY: Yes. 21 THE COURT: And do we know what that is? 22 MS. ALLOWAY: The estimate is for the dual plan right now, 23 the 2014 plan is \$66. There would be an increase of 25 to 30 24 percent for the 2013 plan. So -- let me just check my notes, 25 Your Honor. 2013 plan expected to have a 25 to 30 percent</p>
<p style="text-align: right;">Page 19</p> <p>1 extent that the State is implicitly asking for more of a stay 2 pending appeal, obviously, we oppose it. I don't think the 3 State meets the legal standards for a stay pending appeal. They 4 haven't shown that they're -- I mean, it's a two-pronged test. 5 Clear showing of probable success on the merit -- well, 6 first prong is that the appeal raises substantial issues. I 7 won't dispute that. We think Your Honor is right, but the 8 Supreme Court will tell us ultimately whether the DBA plan is 9 protected by the anti-diminishment clause. So it's not a 10 frivolous appeal. I'm not suggesting that. 11 But then the State needs to show either a clear showing of 12 probable success on the merits or that the balance of hardship 13 favors the State, and I don't think the State has shown either 14 one. The possibility of winning the appeal is not the same 15 thing as a clear showing of probable success. We don't think 16 that the State has made a clear showing that Your Honor is 17 wrong. We obviously feel that Your Honor's right. 18 And the State hasn't shown that the balance of hardship 19 favors the State. There isn't any harm to the State in 20 developing and implementing a fully constitutional plan as soon 21 as it possibly can, and the -- particularly, since, as 22 Ms. Alloway keeps reminding us, it's the retirees who bear the 23 administrative costs and any costs for added coverage. So those 24 are not harms to the Stater. 25 On the other side of the balance, if the State continues</p>	<p style="text-align: right;">Page 21</p> <p>1 increase, which would make it between 82 and \$85. Currently the 2 2014 plan premium for just the retiree only is \$66. 3 THE COURT: And you're saying that because there's 4 55,000 -- so that's a difference -- if we say it's \$85, that's 5 the -- basically, a bump of about \$19, that bump. So are you 6 saying, then, that the -- you're saying the reserves would be 7 depleted if going forward the State were to cover the difference 8 between the two for the 55,000 -- 9 MS. ALLOWAY: What I'm saying -- 10 THE COURT: -- retirees? 11 MS. ALLOWAY: Right now it's not possible for the State to 12 process the claims using the 2013 plan. The -- 13 THE COURT: Right, that's -- 14 MS. ALLOWAY: -- reason for that -- 15 THE COURT: -- because the coding is not done -- 16 MS. ALLOWAY: Right, the coding. 17 THE COURT: -- with Delta Dental and that whole process. 18 MS. ALLOWAY: Right. And so what -- 19 THE COURT: Right. 20 MS. ALLOWAY: -- the State had contemplated is that we 21 just pay all of the dental claims through the rest of the year, 22 and that would deplete the reserves, which -- 23 THE COURT: Would -- 24 MS. ALLOWAY: -- would result in an additional increase. 25 THE COURT: Just pay all the claims without -- I --</p>

<p style="text-align: right;">Page 22</p> <p>1 MS. ALLOWAY: Without -- just -- 2 THE COURT: Huh? 3 MS. ALLOWAY: -- you submit a claim, we don't even look at 4 the plan, we just pay for it, up until your 2,000-dollar 5 maximum, because we can't -- I know Ms. Orlansky and RPEA 6 doesn't want to believe me, but I can tell you that the 7 Department of Administration is not just doing. They have been 8 working extremely hard since the Court's decision came out in 9 April in order to make sure that it is possible to even offer 10 the 2013 plan by January 1. It is impossible to do it before 11 that. 12 We have a lot of different procurement requirements. We 13 have to set up an open enrollment system that the -- currently 14 does not exist for retirees. We don't even have the time to do 15 a competitive bid for that before the November deadline -- or 16 for the November time period for the open enrollment. So the 17 department is handling a different things in order to make this 18 happen. 19 THE COURT: Because that's -- the active employee open 20 enrollment coming up is going to be in November. 21 MS. ALLOWAY: The -- 22 THE COURT: Is that -- that's -- 23 MS. ALLOWAY: -- open enrollment period for the retiree 24 me -- retirees and their dental plan will coincide with the 25 active employees' retirement --</p>	<p style="text-align: right;">Page 24</p> <p>1 THE COURT: -- 2013 plan. There's a smaller number subset 2 that's only entitled to that 2013 plan, right? 3 MS. ALLOWAY: No, I don't think so. 4 THE COURT: Well, that's what I'm asking. I don't 5 remember the numbers myself. 6 MS. ALLOWAY: I think all of the retirees, and, Emily, you 7 can correct me if I'm wrong, all of the retirees will have the 8 option to decide between the 2013 and the 2014 plan. If the 9 2013 plan is the standard, then that was the plan that was 10 accepted by all of the retirees during their active employment 11 with the State, and that's the standard to which the Court will 12 hold us to in its diminishment clause analysis. 13 But we did -- to the extent someone after 2014 was making 14 a decision as to whether they were going to participate in the 15 dental plan or not participate in the dental plan and declined 16 the dental option, the State was intending to allow them to have 17 the opportunity to consider that decision and choose between the 18 2013 plan and the 2014 plan. So we were going to open up the 19 enrollment to some people that had declined the dental plan 20 since 2014. 21 THE COURT: How much of this that you've been discussing, 22 how much of this has -- have the plaintiffs been included on in 23 terms of hearing about what you're planning on rolling out, 24 said -- and I'm envisioning sort of an analogy in terms of a 25 class action suit where you have -- you will have the parties</p>
<p style="text-align: right;">Page 23</p> <p>1 THE COURT: Right, that being -- 2 MS. ALLOWAY: -- or enrollment, yes. 3 THE COURT: -- November. 4 MS. ALLOWAY: The problem is, is that the retirees 5 currently don't have an open enrollment period. So the 6 department has to create one full cloth. Right now they process 7 enrollment into the retirees' health plans by hands, but if you 8 give the retirees two options, we need to, one, coordinate and 9 educate the retirees as to what their options are, but then we 10 need to have a portal for the retirees to go in and 11 electronically select which dental plan that they're going to 12 participate in. That does not exist, so we are creating one. 13 THE COURT: You gave me a number I thought was like 55,000 14 retirees? 15 MS. ALLOWAY: I think there's 55 -- 50,000 -- 16 MS. RICCI: Members. 17 MS. ALLOWAY: -- members in -- enrolled in the dental 18 plan, so that would include the retirees and their dependents. 19 THE COURT: 50,000. Okay. And so -- and that 50,000 are 20 all -- were all enrolled in 2013 prior to the change? 21 MS. ALLOWAY: No, I think the numbers have increased 22 since. 23 THE COURT: So -- but the people that have increased, 24 they -- they're not entitled to that -- 25 MS. ALLOWAY: Right.</p>	<p style="text-align: right;">Page 25</p> <p>1 that will work on and they'll litigate it if they have to, but 2 they'll work on how the notice is going to go out to different, 3 you know, claimants and that sort of thing. How much of that 4 has the plaintiffs been included on? 5 MS. ALLOWAY: I have not been communicating directly with 6 RPEA on this matter. The Department of Administration reports 7 to the retiree health -- 8 MS. RICCI: Commissioner. 9 MS. ALLOWAY: -- commissioner. You report to a plan -- 10 the board, right, or not? 11 MS. RICCI: They're advisory. 12 MS. ALLOWAY: The advisory board, to some extent, about 13 the progress in this, but I have not been communicating with 14 RPEA explicitly about all the steps that have been taken. 15 MS. ORLANSKY: Your Honor, my clients' position, we 16 haven't heard any of this. This is all news. And, I mean, my 17 clients are down in Juneau today. They went to a health plan 18 advisory board meeting. That's why they're on the phone. But 19 we haven't heard any of this. And, I mean, the State's briefing 20 is full of we're asking them to negotiate with us, and that's 21 not really true. We're prevailing party in a litigation that 22 has tried to be reasonable, you know, and not push for instant, 23 complete compliance. But without some communication I can't say 24 this is substantial compliance, we won't go fussing to the 25 Court. We could live with that.</p>

Page 26

1 **MS. ALLOWAY:** Your Honor, I'd like to add to the fact that
2 part of the problem, like I said, is that the department has
3 been in an ongoing RFP process with third-party administrator.
4 It's just issued its notice of intent to award the contract to
5 Delta Dental yesterday. So this has been a lot of the hangup,
6 is we've been trying to negotiate. We didn't even know who our
7 third-party administrator was going to be.
8 **THE COURT:** RFP is --
9 **MS. ALLOWAY:** A request for proposal.
10 **THE COURT:** All right, I got it right. Okay.
11 **MS. ALLOWAY:** Sorry about that.
12 **THE COURT:** No, that --
13 **MS. ALLOWAY:** I'm not as the procurement as -- actually,
14 at all, really. We've exhausted my knowledge.
15 **THE COURT:** I'm just trying to keep track, but -- so,
16 Ms. Alloway go ahead and be seated. Thank you --
17 **MS. ALLOWAY:** Okay, thanks.
18 **THE COURT:** -- very much. The -- so I want a little bit
19 of time to think about this. The first part, Ms. Ricky (ph) --
20 **MS. RICCI:** Ricci.
21 **THE COURT:** Ricci.
22 **MS. RICCI:** Yeah.
23 **THE COURT:** Okay, Ms. Ricci -- you know, said that they
24 could do, which was capturing the difference between what would
25 have been approved on the 2013, but was denied under 2014, and

Page 27

1 we can capture -- we can get -- we can capture those people and
2 those claims from the date of my decision going forward. So
3 that to me seems like an important piece that can happen in the
4 meantime, okay?
5 The concern I have is the level of detail with a number of
6 these services and the cost that is going to be associated with
7 it is -- I do -- I mean, it would be easier if the parties could
8 talk about this instead of the Court saying this is what you're
9 going to do. If the parties could talk about this and say,
10 look, this is our proposal, we'll offer these -- I mean, there
11 may be some collateral -- my concern is there's some
12 unanticipated collateral effect in terms of doing this.
13 So for one, you're saying if you offer the 2013 and then
14 2014 and you don't simply require everybody to go under the 2013
15 plan, are you losing, then -- are you failing to dilute the
16 expense of the additional premium over everybody? And so you
17 said it's going to be -- I mean, I don't know how you figured
18 that out, that if you do 2013 you're going to pay \$85 a month
19 and if you do the 2014 you're going to pay \$66 a month. Are we
20 losing -- are we failing to capture, you know, some benefit
21 there in terms of, well, what if we just told everybody, look,
22 it's going to be the 2013 plan going forward and, you know,
23 that -- I mean, does that end up being -- reducing that amount
24 to something -- level in between the 66 and the 85? I mean, I
25 don't know, but that's what I'm asking.

Page 28

1 **MS. ALLOWAY:** So if you -- if we just went with the 2013
2 plan, their estimate in increase in the premiums would be 14 to
3 16 percent. So \$66 now --
4 **THE COURT:** And it's 666, right? 666.
5 **MS. ALLOWAY:** 66.
6 **THE COURT:** Okay.
7 **MS. ALLOWAY:** Projected for 2013 -- if we just return to
8 the 2013 plan, the premiums would increase to 74 to \$75, to 74
9 or -- for just the retirees.
10 **THE COURT:** Okay.
11 **MS. ALLOWAY:** But this is part of the concern that the
12 department has, Your Honor, is just that level of increase might
13 be too expensive for some retirees.
14 **THE COURT:** Right, because the testimony that I heard is
15 that there gets to be this economic effect where that 10-dollar
16 difference -- I guess it's a 9-dollar difference, is -- you're
17 suggesting that maybe that will drop more people out and so,
18 therefore, you don't have enough sustainability with the members
19 that are involved in it.
20 **MS. ALLOWAY:** Right. And --
21 **THE COURT:** Okay.
22 **MS. ALLOWAY:** -- so, you know, the department did the
23 analysis and believed that the retirees would like to have the
24 choice. They could choose between the 2013 plan and the 2014
25 plan and look at the premiums and what is being offered and make

Page 29

1 that choice, but the 2013 plan would be funded by only the
2 retirees that choose that plan, and the 2014 plan would be
3 funded by only the retirees that choose that plan. And so the
4 premiums are calculated by the State's actuary to account for
5 selection, utilization, and the costs of the various benefits,
6 and that's how that's -- those are calculated.
7 **THE COURT:** But if -- and so then this is the part of the
8 remedy -- part which I don't know we need to figure out today,
9 but part of the remedy is that if the State would have done this
10 on the front end and done the Duncan analysis on the front end
11 of this before they went through and made these changes, we
12 would have everybody in the same group and we wouldn't be losing
13 out -- I'm using the royal we -- we wouldn't be losing out on
14 everybody being in the same group. And so it wouldn't be a 66
15 and an 85, it would be one rate, the same rate for everybody,
16 and so we wouldn't have the people in the 2013 plan paying \$9
17 more than everybody else -- or \$19 more.
18 I'm just not sure that that really -- I understand it, I
19 mean, it's a solution. There's something about it that strikes
20 me that what you're doing is you're saying, okay, folks, if you
21 wanted the 2013 plan, here you go; you're shouldering all the
22 costs. And you're going to lose --
23 **MS. ALLOWAY:** But that's what the plan --
24 **THE COURT:** -- and I -- no, no, but you're shouldering all
25 the costs and you're going to -- we're going to take away the

Page 30

1 benefit you would have had with sharing this with the rest of
2 the retiree population, which is what -- if the Duncan analysis
3 would have been done the way it was supposed to have been done
4 on the front end, and the State didn't do it because you didn't
5 think you had to do it, but if you had done it on the front end,
6 you know, there would have been all this analysis and there
7 would have been all this data that we would have had at trial,
8 which you didn't have at trial.
9 And there would have been -- you know, there would have
10 been the benefit that the retirees now, they either would
11 have -- you know, there would have been -- maybe there would
12 have the evidence to support the 2014 plan or something similar
13 to that. There would have been a discussion with the retirees
14 to say, hey, your premium is going to this number. I mean, that
15 whole analysis would have happened back then instead of now, and
16 the folks that -- the plaintiffs right now, you know, like I
17 said, wouldn't be in the position of where they're -- in a way
18 they're getting penalized because they're losing out on
19 spreading out this additional cost over everybody, as opposed to
20 just their small group.
21 **MS. ALLOWAY:** But that -- I mean, we can -- we obviously
22 disagree, Your Honor. I do think that the evidence was there to
23 support the 2014 plan.
24 **THE COURT:** And I --
25 **MS. ALLOWAY:** But that's part of the --

Page 31

1 **THE COURT:** -- don't think in these conversations -- just
2 so we're clear, I don't think in these conversations if you talk
3 in terms of my terminology that I'm using, that you're conceding
4 everything. I think you've made a very clear record of what
5 your position is. Now I just want to talk about -- again, just
6 for argument's sake, my decision was correct. My analysis was
7 correct. This is the new reality. What are we going to do
8 about it, okay? That's the position I really need to spend time
9 talking about. What -- this is the new reality. What are we
10 going to do about it?
11 **MS. ALLOWAY:** Right. But I think if you look at it from
12 the flip side, not all of the retirees are going to want to pay
13 for the 2013 plan or subsidize those people that want to
14 participate in that plan. So by requiring them all to fund the
15 2013 plan, those people who would prefer some lower premiums are
16 also being penalized.
17 **THE COURT:** Right, but the people ultimately responsible
18 for doing that weren't any of the retirees. They never got a
19 vote. They never got a choice. They never got any input. They
20 just got told what it was going to be. And so who ought to bear
21 that cost is my question. Your plan is suggesting that the 2013
22 people are going to pay for all of this when they're not the
23 ones that really created the extra cost right now.
24 **MS. ALLOWAY:** But the extra cost is a result of
25 increased -- the just health care increases.

Page 32

1 **THE COURT:** Well --
2 **MS. ALLOWAY:** That's just a natural function, that if you
3 want unlimited cleanings, the cost of unlimited --
4 **THE COURT:** Right.
5 **MS. ALLOWAY:** -- cleanings is going to go up --
6 **THE COURT:** But --
7 **MS. ALLOWAY:** -- as health cares rise.
8 **THE COURT:** But what you told me, Ms. Alloway, is because
9 you're not spreading out the cost of the premiums over
10 everybody, which if you did it over everybody it would be 74 to
11 \$75, okay? Which would be a 9-dollar increase, 8 to 9-dollar
12 increase over where it is right now. As opposed to by isolating
13 the -- just those that want to select the 2013 plan, they're
14 going to have a 19-dollar increase in terms of what they're
15 doing. So there's a difference there of -- assuming I just
16 accept that it's -- that the 8 to 9-dollar increase between the
17 2014 -- the \$66 up to the 74, 75 is correct, okay? Just
18 assuming that that is correct with no question about it, I'm
19 just not sure why the 20 -- the folks that want to up for the
20 2013 services have to pay that extra \$10. That's the part that
21 I'm really questioning.
22 **MS. ALLOWAY:** Because that's the cost of participating in
23 the plan.
24 **THE COURT:** Only if you package it in the way you're
25 proposing, as opposed to packaging it where it's spread all the

Page 33

1 way across.
2 **MS. ALLOWAY:** But then you're asking the people that want
3 to participate in the 2014 plan for a reduced cost to subsidize
4 the 2013 plan.
5 **THE COURT:** But they wouldn't have had that choice to
6 start with. They would have been -- they would have had the
7 2013 plan or whatever the new plan was, that you would have gone
8 through the analysis, they would have -- this -- all this would
9 have been on the front end instead of capturing on the back end.
10 That's the part where we're -- you're -- the discussion
11 we're having is I keep pushing back the burden on the people
12 that are in control, which is the State. You are solely in
13 control of this. Nobody else has the power to do anything about
14 it, okay? So my question is, then, if you made a mistake in
15 terms of the analysis, which is what I said, who needs to pay
16 for that mistake? Is it the retirees that should pay for your
17 mistake or should the State pay for the mistake? That's --
18 that -- that's where we're getting to, okay? And so --
19 **MS. ALLOWAY:** So are you suggesting that the State would
20 have to cover the costs of the people that want to participate
21 in the 2013 plan?
22 **THE COURT:** I think that is a reasonable possibility in
23 terms of the remedies here, to make them whole in terms of where
24 they're at and have the services available.
25 **MS. ALLOWAY:** For how long? Forever, ongoing, the

Page 34

1 State --
2 **THE COURT:** No, I --
3 **MS. ALLOWAY:** -- would have to subsidize the difference
4 between the 2013 --
5 **THE COURT:** I think --
6 **MS. ALLOWAY:** -- and 2014 plan?
7 **THE COURT:** -- until there's a Duncan-compliant plan
8 comparing the 2013 in terms of whatever the new plan is. So
9 that is going to take as long as it takes for the State to come
10 up with that plan, which helps you because that means there's an
11 emphasis to get it done soon and you get it done quickly and
12 efficiently and the -- doesn't leave the folks that are -- that
13 had the 2013 plan, doesn't leave them basically just sitting
14 there waiting, you know, with their cups out saying please help
15 me.
16 **MS. ALLOWAY:** But you -- the State is offering a Duncan-
17 compliant plan per the court order by offering the 2013 plan.
18 **THE COURT:** But you're making --
19 **MS. ALLOWAY:** That is being offered.
20 **THE COURT:** But you're doing it in a way potentially --
21 you haven't done it yet -- you're doing it in a way that's going
22 to cost them more than if you did it in a different way.
23 **MS. ALLOWAY:** I feel -- honestly, I feel like this is a
24 little bit of a blind-side because this is what -- this is the
25 options that RPEA asked for in its findings of facts and

Page 35

1 conclusions of law, was return to the 2013 plan, offer two
2 plans, the 2013 plan or the 2014 plan, or negotiate with RPEA
3 over the third plan. We can't do the third option because RPEA
4 doesn't represent all of the retirees, so we picked one of
5 RPEA's options and now we're being told that that is not okay.
6 **THE COURT:** I'm not making a ruling. I'm having a
7 discussion with you, and this is the part I'm -- the part of me
8 having this conversation with you right now is to -- you haven't
9 had it coming into it. The parties haven't had this discussion
10 coming into the courtroom, so I'm trying to generate that
11 discussion because I think the people that are in the best
12 position to have that discussion are -- isn't the person here
13 behind the -- on the bench. It's the people that are out there
14 by the bar and are going to -- you could be discussing in terms
15 of some possibilities here.
16 So, Ms. Orlansky.
17 **MS. ORLANSKY:** Yeah. Your Honor, by -- I mean, listening
18 to the conversation I find myself really profoundly troubled by
19 a proposal that essentially says if you want a constitutional
20 dental plan, you have to pay more for it. So, you know --
21 **THE COURT:** I think there's part of that, though, I mean,
22 I think realistically the evidence suggested that if the 2013
23 plan was going to continue and not make changes, it was going to
24 cost more.
25 **MS. ORLANSKY:** Yeah.

Page 36

1 **THE COURT:** It just was a question of how much more --
2 **MS. ORLANSKY:** Right.
3 **THE COURT:** -- it was going to cost, but the concern I
4 have, Ms. Alloway, is that it was going to cost more for
5 everybody.
6 **MS. ORLANSKY:** Right, and what we're saying right now is
7 if you're willing to live with an unconstitutional package, you
8 can have the unconstitutional package for less money.
9 **THE COURT:** Right.
10 **MS. ORLANSKY:** If you really want your constitutional
11 rights, you have to pay for that. And that is not generally
12 something that the State is allowed to do. The State is not
13 normally allowed to burden the exercise of constitutional
14 rights. You know, if the whole -- RPEA has accepted all along
15 that the focus is supposed to be on coverage and not on
16 premiums. If everyone's premiums goes up, that's something
17 we've accepted.
18 I would also say that we've never asked for them to
19 negotiate with us. We have suggested that there ought to be a
20 compliant plan, there -- you know, a Duncan-compliant plan could
21 require, you know, bring -- could include bringing in a brand
22 new consultant who puts down this is the best new plan using all
23 the modern technology and we save costs here and we save costs
24 there, and we increase benefits, and, look, we do a real
25 actuarial analysis and it's compliant. It doesn't look like

Page 37

1 either the 2013 plan or the 2014 plan. It's not an
2 impossibility for the State to do. It's something they did at
3 the beginning of 2014, but they skipped an important step. They
4 could do it now.
5 **THE COURT:** Ms. Orlansky, what if -- what about the
6 possibility of the plan as proposed by -- I don't know if that's
7 really a proposal. It's a discussion that's ongoing right now,
8 so I don't know if it's the exact proposal from the State. But
9 where the retirees, you know, would make these choices one way
10 or the other, but there would be -- and I'm just suggesting this
11 for the parties to talk about -- that if in the end RPA -- RP --
12 the plaintiffs prevail, that they're going to get reimbursed
13 those monies, whatever the additional amount they paid above for
14 premiums, of what eventually will be the premium plan for
15 everybody across the board, that they would get reimbursed, they
16 would recapture what those are.
17 So they could preserve their -- what they want in the 2013
18 plan. They're going to pay up front money -- more at the --
19 right now, so it complies with the statutory plan, which is that
20 they're playing the premiums for it, playing for the -- paying
21 for the plan. But, Ms. Alloway, the State would then cover
22 them. If in the end in the appeal they prevail and you have to
23 go back for it, the State's going to have to reimburse those
24 premiums, those additional premiums that they had to pay above
25 whatever the final constitutional plan is that's going to apply

<p style="text-align: right;">Page 38</p> <p>1 to everybody. Do you follow what I'm saying? 2 MS. ALLOWAY: I don't. I'm sorry. 3 MS. ORLANSKY: I think -- 4 THE COURT: I thought I said it so brilliantly, too. 5 MS. ORLANSKY: I think I get it, and my answer is I don't 6 love it, but it's better than nothing. 7 THE COURT: I mean, basically, what I'm saying, 8 Ms. Alloway, is that let -- let's say that the 2013-2014 plan as 9 you've outlined, which is the -- if you opt for the 2013 plan 10 you're going to pay, let's say, 85 bucks a month. And opt for 11 the 2014 plan you're going to pay 66 bucks a month, okay? And 12 so we go forward with that plan, and that's -- that way the 13 plaintiffs have the benefits that they want to have and they're 14 paying the additional amount like you're talking about in terms 15 of -- because retirees are supposed to be paying premiums to 16 actually cover the cost of the plan. Follow me thus far? 17 MS. ALLOWAY: Uh-huh. 18 THE COURT: Yes? 19 MS. ALLOWAY: Yes. Sorry. I'm -- this is my 20 concentration face. 21 THE COURT: I know. And so -- and the State files the 22 appeal. I get affirmed, okay? The Supreme Court says, yep, 23 that was an unconstitutional, you know, diminishment of 24 benefits, and either somewhere in the meantime or after the 25 appeal a process is finished, and the State goes back to it and</p>	<p style="text-align: right;">Page 40</p> <p>1 Ricci. So one of the ways that we set premiums in the employee 2 plan, we offer three different plans in the employee plan: 3 consumer-directed health plan, the economy plan, and the 4 standard plan. And we spread the costs across -- the risk and 5 the cost of the plan across that full bucket of lines in the 6 employee plan, but the premiums for the consumer-directed plan, 7 the economy plan and the standard plan are differentiated by the 8 value of that plan, the actuarial value of that plan, because 9 the standard plan has greater benefit and a higher actuarial 10 value than the economy plan, and the economy plan in turn, then 11 the consumer-directed plan. 12 And so that's the method that we've identified that's 13 actuarially sound and lets us spread the risk across the three 14 plans, but still differentiate the premiums based on the 15 actuarial value of those plans. So that way the people that are 16 in the more valuable plan are paying more in their premiums, but 17 they're also benefitting from having those costs spread across - 18 - having their risks pooled and the administrative costs pooled. 19 And -- 20 THE COURT: Okay. 21 MS. RICCI: -- so I offer that up as maybe a -- an 22 alternative approach to consider. 23 THE COURT: And so you're comparing sort of the 2013 as 24 being that premium plan, the 2014 plan being more the economy 25 plan. Okay. But do we still end up with the same numbers,</p>
<p style="text-align: right;">Page 39</p> <p>1 says, okay, we're not working with the 2013 or 2014 plan, and we 2 now have a 2022 plan, okay, and this -- these are what the new 3 premiums are, and if there's a difference between what the RPEA 4 folks have been paying, been paying too much because it didn't 5 apply -- didn't get applied like peanut butter over everybody, 6 then that difference is -- let's say the new plan is 75 bucks. 7 They get a 10-dollar -- they get 10 -- they get reimbursed that 8 \$10 for every month that they had to pay that extra. Now do you 9 follow what I'm saying? 10 MS. ALLOWAY: I think so, but, I mean -- 11 THE COURT: I'm not -- 12 MS. ALLOWAY: -- I guess -- 13 THE COURT: -- asking you to agree to it right now. 14 MS. ALLOWAY: Right. 15 THE COURT: I'm just throw -- I'm trying -- I'm putting on 16 my mediator hat trying to through some ideas out here for people 17 to try to come to an agreement, because I am concerned with the 18 plaintiffs waiting. And I -- your client wants to say 19 something? 20 MS. ALLOWAY: She wants to. I'm not sure -- 21 MS. RICCI: Right. 22 MS. ALLOWAY: -- it's a good idea, but I -- 23 MS. RICCI: No, no. 24 MS. ALLOWAY: -- trust her. No, go ahead. 25 MS. RICCI: Okay, Your Honor -- oh, I should stand. Emily</p>	<p style="text-align: right;">Page 41</p> <p>1 though? 2 MS. RICCI: I -- I'm not an actuary, but I would assume 3 that those numbers would change a little bit. I think you'd 4 probably find something in the middle for both. 5 THE COURT: Okay. 6 MS. RICCI: I mean, I -- the people in the richer plan, 7 which would -- while the people in the richer plan would have a 8 higher premium based on that actuarial value and the people in 9 the lower-valued plan would have a lower premium, I think what 10 complicates this is -- just thinking about the actuarial values 11 and how the premiums would be set with a pool, but without 12 committing to anything that I shouldn't be committing to because 13 I don't have the numbers and I'm not an actuary -- 14 THE COURT: Right. 15 MS. RICCI: -- an approach like that might kind of thread 16 the needle as -- 17 THE COURT: Okay. 18 MS. RICCI: -- far as retaining that risk. 19 THE COURT: All right. Thank you. All right. So this is 20 my sense -- we're getting to the end of our time here. This is 21 my sense. First of all, I asked the State to come to this 22 hearing with information about what they can do for the 23 retirees, okay? And I used language and I wasn't trying to be 24 derisive about it, but I was a little frustrated with what I 25 read, which sounded a lot more like this is all the things we</p>

Page 42

1 can't do, okay? Which that may be true, I'm not questioning
2 that, but I didn't really hear we're going to get to a solution.
3 I am now hearing a solution.
4 I mean, Ms. Orlansky can argue this if she would like to
5 make a record of it, but I hear the State making a definite good
6 faith effort in terms of trying to improve and come up with some
7 kind of solution. Okay?
8 I really do think that -- I don't think I'm prepared to be
9 able to say, well, this is what you have to do to enforce my
10 order from now until then, because I don't think the State's
11 really ready to present that. And I'd like -- and I don't think
12 it's really fair thus far on the plaintiffs in terms of
13 saying -- taking a position on whether we agree with it or
14 disagree with it or whatever the case may be, okay?
15 And procedurally I don't think we're really in that
16 posture today, anyway, because there's still those motions that
17 are pending in terms of entering the final judgment and making a
18 decision on the stay, which, frankly, I'm not going to grant. I
19 don't think that there's any way to weigh the hardships against
20 the retirees versus the State, and I think it was -- it would be
21 easier to simply give extensions as I was talking about in terms
22 of how this implementation is going to go.
23 So -- but what I would like to do is -- from here is set a
24 time frame, because -- and I didn't ask this question yet, but
25 I'm assuming that the State is willing to sit down and talk to

Page 43

1 plaintiff representatives to at least inform them in terms of
2 what you're contemplating. I understand you're telling me that,
3 well, they don't represent all the retirees. I got that, okay?
4 But they do resent -- they resent -- they do represent the
5 people in this case that you have to answer to the Court for,
6 and I would like them to get the information because it seems to
7 me that we're putting some objective parameters on what's going
8 to happen between now and whenever the final decision is in this
9 case, so that there can be some measurement at the end of it in
10 terms of what remedies are needed, if any. Am I making any
11 sense?
12 **MS. ALLOWAY:** Sure. I mean, yes, the State can inform
13 RPEA of what it's doing. I do have a question, I guess, in the
14 sense that if the Court is unhappy with the dual plan that the
15 State is preparing to offer as of January 1, we need to know
16 that, because the department is actively -- basically, we have a
17 set -- you know, we have -- this must be done by August 15th.
18 This must --
19 **THE COURT:** Okay.
20 **MS. ALLOWAY:** -- be done by September 15th. We have a
21 draft letter that's ready to go out to 55,000 retirees tomorrow
22 to let them know that they have the option of going into two
23 different plans, and we held off on that for this status
24 conference, but --
25 **THE COURT:** Okay.

Page 44

1 **MS. ALLOWAY:** -- that needs to happen, and if we're going
2 to all of a sudden force the department to change course and do
3 something different, then that's going to kick us beyond even
4 January 1st.
5 **THE COURT:** I will say this, Ms. Alloway, that I think
6 that it would have been prudent for the State to have -- and if
7 you wanted to keep it confidential, would be to have filed
8 something with the Court, serve the plaintiffs, and say, head's
9 up, this is what we're going to have ready to talk about,
10 because I'm hearing this all for the first time. And this is a
11 pretty big -- I mean, it's taken how long for DRB to put this
12 together, and I don't know how long it took you to get your mind
13 around it, but I'm just getting this for the first time.
14 And so when you posed the question, well, we need to know
15 from the Court, I know you want to know from the Court whether I
16 approve of this or not. I don't really think it's fair -- it
17 doesn't have to be fair to me. I don't think it's really fair
18 to the plaintiffs to say, hey, this is what our proposal is and
19 they have no chance whatsoever to respond to this in a
20 meaningful fashion in terms of that is just a bogus type of, you
21 know, remedy, or interim remedy.
22 **MS. ALLOWAY:** I want to push back a little bit, because my
23 interpretation is we're doing exactly what one of the options
24 the Court ordered was. Like this is where the department is
25 going to have a little bit of a misunderstanding because the

Page 45

1 Court said you have these three options, and the department
2 chose option two. And so we didn't think there was going to be
3 a problem. We thought you would be happy. We've chosen an
4 option that was made as of January 1st, and we can get this --
5 we -- the -- July 1st I believe is when the commissioner made
6 the decision, and we can do this as of January 1st. I
7 don't -- that's where I don't understand, necessarily, why
8 there's a problem, because this is what RPEA asked for --
9 **THE COURT:** Okay, one, I didn't --
10 **MS. ALLOWAY:** -- and we're doing it.
11 **THE COURT:** One, I didn't say there's a problem. Okay,
12 two, it's not -- I mean, just -- so we're just not too flippant
13 with our words, not happy or unhappy with anything, okay? I
14 am -- I made findings already that I think the State has been
15 acting in good faith in terms of what you've been presenting.
16 All right.
17 The part I'm reacting to right now is when you said, hey,
18 but we need to know right now whether there's a problem with
19 this or not. That's the part that -- and I'm just telling you,
20 I -- how am I supposed to say, well, I -- I mean, I don't
21 know -- it's not really in front of me. There's nothing been
22 filed with me to say you're seeking my approval or not.
23 I mean, you're making your decision to do what you're
24 going to do, apparently, and that's kind of the way it's
25 postured, that RPEA can file something that they don't like it,

Page 46

1 and I can step in if it's appropriate. I don't think that helps
2 anybody, and so I simply was saying I think it would have been
3 more prudent to get some head's up about exactly how you're
4 going to implement this, and maybe do a little bit of, you know,
5 deconflict a little bit if there were any kind of concerns,
6 fine-tune this process or plan a little bit if that's possible
7 or desirable by anybody, to avoid some collapse 60 -- you know,
8 60 days from now because I say no way. That's not -- that
9 doesn't do it at all.

10 **MS. ALLOWAY:** Well, I mean, I guess in the sense that I
11 misspoke when I said that we were asking for your approval, we
12 thought we were -- we still think that we are implementing your
13 order as of your -- as of the date of your order, which was
14 offer 2013, offer both, or negotiate a new plan. And so all
15 along the department said what's -- what do we think is the best
16 interest of the State and the retirees. We chose option two,
17 and so all along my pleadings have been we can get this done by
18 January 1st and no earlier.

19 **THE COURT:** Okay. But --

20 **MS. ALLOWAY:** If --

21 **THE COURT:** -- I don't recall -- and maybe I'm mistaken --
22 but was there anything in your pleadings saying that this was
23 our plan? We've chosen option two and this is what we're --

24 **MS. ALLOWAY:** No, because we hadn't chosen option two
25 until July 1st.

Page 47

1 **THE COURT:** Right, which is when -- so this was the --
2 remember, my order was what can you do. So this is -- you would
3 agree that today is the first day that I or the plaintiffs are
4 hearing about what the State can do in terms of enforcing the
5 order, correct? And all I had in front of me today walking in
6 was a motion to stay of we just stay it, don't -- we can't do
7 anything until January 1 and we don't know what we're going to
8 do.

9 **MS. ALLOWAY:** Of the three options that the Court
10 provided. I mean, I was very clear in one of my pleadings that
11 the State would not take option three, and so we were choosing
12 between option one and option two.

13 **THE COURT:** I just --

14 **MS. ALLOWAY:** I don't --

15 **THE COURT:** Ms. Alloway, I just -- I don't really want to
16 spend any more time talking about it. I'm just -- I didn't say
17 you're wrong. I didn't say you acted in bad faith. I'm
18 not -- you know, I'm just saying it would have been more prudent
19 in moving this case forward if we would have had this
20 communication, something ahead of time saying, oh, by the way,
21 new information, supplemental briefing, you know that motion to
22 stay that we filed, here's some additional information of why
23 that's appropriate to grant the stay until then, because this is
24 the plan we're planning on rolling out. Does that make sense?
25 **MS. ALLOWAY:** Yes.

Page 48

1 **THE COURT:** Okay. So my suggestion, then, I sort of
2 started this conversation with the idea that there would be a
3 discussion maybe between the plaintiffs and DRB in terms of what
4 plan might get rolled out or what might get rolled out in the
5 interim. My understanding is basically DRB is ready to go, and
6 you've got a plan, you know what you're going to implement, and
7 we'll see which way that goes. Is that what I'm hearing?

8 **MS. ALLOWAY:** Yes, unless told otherwise by you.

9 **THE COURT:** Okay. I have nothing in front of me. I
10 have -- I would have no basis whatsoever to tell you to do
11 something different. I -- right now. I mean, I don't have
12 anything in front of me. I mean, I think the plaintiffs are the
13 ones that have the -- would have the right to, you know, file
14 something and ask for a hearing, and then we could address it in
15 that fashion to say that the actions that you're taking don't
16 really effectively, you know, meet the order or the spirit of
17 the order, you know, whatever the format of that would be is.

18 So I'm not going to give you an advisory opinion of that,
19 that's right or that's wrong or that's not sufficient or that's
20 not an appropriate remedy. I mean, it's not -- that would not
21 be appropriate. Like I said, I was being literal when I was
22 saying I was putting on my mediation hat, thinking I was helping
23 the parties trying to have a discussion and share some
24 information about how to go forward. And when I entered the
25 final judgment and the State -- I denied the stay and the State

Page 49

1 files its appeal -- I mean, you folks are going to litigate
2 maybe with the Supreme Court in terms of whether a stay gets
3 entered or not, but in the meantime you might have a mutually
4 workable and understandable interim plan until the final
5 decision gets made. Okay?

6 **MS. ALLOWAY:** Okay.

7 **THE COURT:** So -- phew. Okay. So, Ms. Orlansky, do you
8 have any additional requests of the Court? I -- like I said, of
9 the two motions that are in front of me, which is one is to
10 enter a final judgment, and one is to grant a stay, you --
11 you've heard what I'm going to do. So the two motions in front
12 of me I've got covered.

13 **MS. ORLANSKY:** The other motion that's pending is a motion
14 for attorney's fees.

15 **THE COURT:** Right. I'm not prepared to address --

16 **MS. ORLANSKY:** Which --

17 **THE COURT:** -- that yet.

18 **MS. ORLANSKY:** -- I wasn't planning on arguing, but
19 just --

20 **THE COURT:** Right.

21 **MS. ORLANSKY:** -- we're cataloguing what's out there.
22 That's --

23 **THE COURT:** Right.

24 **MS. ORLANSKY:** -- the other one that's out there.

25 **THE COURT:** Right.

Page 50

1 **MS. ALLOWAY:** Can I -- for point of clarification, when
2 you say you're going to deny the motion for stay, are you going
3 to deny the motion for a stay to implement by January 1 as well?
4 So we have the two. We have a pending appeal and then we have
5 by January 1.
6 **THE COURT:** Well, what does that mean? I -- what I
7 read -- I'll have to read again what the order is, but it
8 doesn't sound like -- I mean, I issued the order. You're here
9 saying, look, we're operating in good faith. If there wasn't
10 that motion for a stay, which is really -- I guess treat it more
11 of don't hold us in contempt, because we're actually making a
12 good faith effort to comply with the Court's order. What am I
13 staying?
14 **MS. ALLOWAY:** Your order, I think it was issued
15 April 17th, said that the State shall comply with your order by
16 May 1st.
17 **THE COURT:** Right. So --
18 **MS. ALLOWAY:** So that part --
19 **THE COURT:** -- you're asking for an extension.
20 **MS. ALLOWAY:** -- of the order is what's --
21 **THE COURT:** Right.
22 **MS. ALLOWAY:** -- being stayed, because we couldn't do it
23 in 18 --
24 **THE COURT:** Right, and --
25 **MS. ALLOWAY:** -- days and we can't do it before

Page 51

1 January 1st.
2 **THE COURT:** Right, and to me a stay is -- I'm interpreting
3 it more as a matter of extension of a certain period of time,
4 and so that's when we started having this discussion about how
5 much more time do you need, what else is developing, what are
6 you going to present, and that was the whole -- that was this
7 whole discussion about, you know -- I mean, the -- you're
8 telling me the ball is going to drop tomorrow, and I wasn't
9 ready for that answer today.
10 **MS. ALLOWAY:** Well, the ball -- I mean, the ball in a
11 sense that we're trying to implement the Court's order and we --
12 **THE COURT:** I got that.
13 **MS. ALLOWAY:** -- we're going to send out some letters to
14 let our retirees know what's --
15 **THE COURT:** Right.
16 **MS. ALLOWAY:** -- going on.
17 **THE COURT:** I'm just saying that it probably would have
18 been -- I mean, I don't know how the plaintiffs feel about it,
19 but I would have thought I would have heard before this, so
20 that -- because it's directly tied to your request as far as
21 extension, stay, whatever you want to call it, that I would have
22 gotten an update on this.
23 **MS. ALLOWAY:** Her -- I wish I understood what I could have
24 done to update you. What part of today should I have --
25 **THE COURT:** If I was --

Page 52

1 **MS. ALLOWAY:** -- told the Court?
2 **THE COURT:** If I was in your chair I would have had a
3 supplemental briefing that would have said to the Court and to
4 the plaintiffs, and it would have said this is -- we have made a
5 choice. We -- before -- we said before we're not going to go
6 with option three. We've made a choice. We're not going with
7 option one. This is the option we're going for. We are going
8 to send out a letter with these options, open enrollment, 2013,
9 2014. We are anticipating the cost is going to be this and this
10 is what -- we just got Delta Dental as a third party --
11 everything that you've told me today would have been filed with
12 the Court, and it could have been done confidentially if it
13 needed to be, you know, to say head's up, this is what we're
14 doing. See, we're operating in good faith. We just need this
15 additional time to implement this specific plan.
16 **MS. ALLOWAY:** I will learn from this experience. I think
17 in the grand scheme of things the State is also -- the State
18 also is asking for a stay pending appeal, and I believe it's
19 entitled to that. So in some respects we don't want to spend a
20 lot -- you know, we're doing the resources as if we have to
21 comply by January 1st, but I was -- also come prepared to ask
22 you for a stay pending appeal. You've denied that, and now we
23 need to comply, extension, stay, by --
24 **THE COURT:** Okay.
25 **MS. ALLOWAY:** -- January 1st.

Page 53

1 **THE COURT:** All right.
2 **MS. ALLOWAY:** And all along the State, the department,
3 read the Court's order and said we are doing what the Court
4 wants. How we get to that is within the discretion of the
5 department, and overseeing that could be, you know, crossing
6 into boundaries of separation of powers and things like that. I
7 mean, there are cases I -- that I'm prepared to argue or was
8 prepared to argue in which the Court said that it was improper
9 for the Superior Court to supervise how the State implemented an
10 order regarding constitutional benefits. We in the end
11 understood the Court's order to say do this or this. We chose
12 that, and we are doing everything we can to implement that by --
13 **THE COURT:** Okay.
14 **MS. ALLOWAY:** -- January 1st.
15 **THE COURT:** All right. Ms. Orlansky.
16 **MS. ORLANSKY:** I don't think I have anything further
17 today, Your Honor. If -- I expect Your Honor to issue some
18 orders, and they may give us some ideas of what we want to do
19 next, but I don't think I have anything else to say today.
20 **THE COURT:** All right. And, Ms. Alloway, I don't disagree
21 with you. I -- that's one of the things that when I had this
22 discussion in -- about my ability to oversee the implementation
23 of the Court's order, that was part of that discussion that I
24 was trying to have with you about that, was where do you think
25 those limits are in terms of -- or can the Court enforce the

1 order and how far does that go, and so there's a number of cases
2 I think that cut on both sides of that issue as far as what the
3 micromanagement is of it.

4 All right. I think the parties know where the Court is
5 going to go. I will look to get the orders issued, final
6 judgment issued, and I don't know, but I think what I'm looking
7 at is probably going to be a report back from the defendants,
8 Ms. Alloway, within a certain period of time, giving the Court
9 an update in terms of declaring this is your exact plan and what
10 you're planning to do as far as compliance and implementing the
11 Court's April decision, okay?

12 And I don't know exactly how much time that's going to --
13 how much time I'm going to give you to do that. It won't be
14 five days, but I don't know that will be two months, either,
15 because I want to give it -- get it over quickly enough to the
16 plaintiffs so that if they have any objections to it, we can get
17 it litigated fairly quickly and figure out whether I'm asking
18 the State to do something different or not. Okay?

19 And maybe that's the time when you're saying, well, Judge,
20 I know you want us to do something different, but it's really
21 not your call. We get to do -- you know, we get to exercise our
22 executive powers to do this. So -- okay? All right. Okay,
23 folks, thank you.

24 (Court recessed)

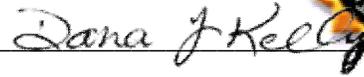
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I, Dana J. Kelly, Certified Electronic Transcriber, hereby certify:

That the foregoing pages numbered 2 through 55 are a true, accurate and complete transcript of proceedings in Case No. 3AN-16-04537 CI, RPEA v. Fisher, et al., transcribed by me from a copy of the electronic sound recording to the best of my knowledge and ability.

DATED: August 21, 2019.


A handwritten signature in cursive script that reads "Dana J. Kelly".

Dana J. Kelly

AAERT No. CET-172

