

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

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

Plaintiff,)

v.)

Case No. 3AN-16-04537 CI

KELLY TSHIBAKA, COMMISSIONER)
OF THE ALASKA DEPARTMENT OF)
ADMINISTRATION,)

Defendant.)

**RPEA’S MOTION TO ENFORCE COURT ORDER AND FOR RELATED
RELIEF**

RPEA moves this court for an order directing the State to cease imposing certain age and frequency limitations and out-of-network financial penalties on the retired public employees who participate in the retiree dental plan that this court has determined is unconstitutional. While the State waits to restore a fully constitutional plan for all members, it should at minimum be required promptly to stop imposing certain financial penalties and coverage limitations, which the State has imposed since adopting the 2014 plan.

Further, RPEA asks this court to prohibit the State from making participation in the 2014 plan the “default option,” when the State gives retirees a choice between two dental plans. Public pronouncements by the State indicate that the State intends to conduct a short open enrollment period this fall, and any member of the DVA plan who

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does not in that time frame affirmatively choose to participate in the constitutional 2013 plan will automatically be maintained in the unconstitutional 2014 plan. Continued enrollment in an unconstitutional plan cannot constitutionally be the default option; waiver of a constitutional right requires an informed, affirmative act.

RPEA seeks additional, related relief, as more fully described in the attached memorandum, in order to assist it, in practical terms, in monitoring the State's compliance with this court's order.

This motion is based upon this court's April 16, 2019 Order and comments at the August 8, 2019 status hearing, and is further supported by the accompanying memorandum, affidavit, and exhibits.

Respectfully submitted, this 17 day of September, 2019.

REEVES AMODIO, LLC



Susan Orlansky [ABA 8106042]
Counsel for RPEA

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Certificate of Service:

I certify that I served a copy of the foregoing Motion, and the accompanying Memorandum, affidavit, and exhibits by mail and email on:

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09.17.19

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KELLY TSHIBAKA, COMMISSIONER)
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Defendant.)

**MEMORANDUM IN SUPPORT OF
RPEA'S MOTION TO ENFORCE COURT ORDER AND FOR RELATED
RELIEF**

INTRODUCTION

On April 16, 2019, this court issued its order declaring that the 2014 retiree dental plan unconstitutionally diminishes the dental benefits previously available to members under the 2013 retiree dental plan.¹ The court gave the State three options for providing members with a constitutionally acceptable retiree dental plan: (1) revert to the 2013 plan for all members; (2) offer members a choice between participating in the 2013 plan and the 2014 plan; and (3) develop a new retiree dental plan that could differ from the 2013 plan but that would not diminish the benefits previously available.

Initially, the court gave the State only a short time to implement one of these

¹ This memorandum uses the shorthand "2014 plan" and "2013 plan" in the same way these terms have been used by the court and the parties throughout this case.

options. After hearing from the State about the logistical challenges of changing the dental coverage offerings, the court gave the State an indefinite extension of time to continue working to implement a constitutional retiree dental plan package. However, the court never accepted the State's suggestion that the State should be allowed to do nothing beyond preparing to remedy the problem starting in 2020.

Five months have passed since this court's order. Yet the State continues to operate the 2014 plan and to subject retirees on a daily basis to all of the diminishments they have suffered for the more than five years since that plan took effect. The State has done *nothing* to reduce the impacts of the unconstitutional plan.

Evidently, the State intends at least a long-term solution. It says it is working toward implementing a two-plan approach that will take effect on January 1, 2020. The details of the proposed two-plan solution have not been disclosed, and there are troubling aspects of what has been disclosed. Most notably, the State is intending to implement a preference for the 2014 plan, such that members of the DVA plan who do not affirmatively select the 2013 plan during an upcoming short open enrollment period will, by default, be continued in the unconstitutional 2014 plan. Additionally, it appears that members selecting the 2013 plan will be required to pay more.

STATEMENT OF FACTS

The court is familiar with the State's comments at the August 8 status conference and the written Status Report that the State filed on August 16. These were the first times that the State disclosed anything about how it intended to respond to this court's April 16

order. Both August statements described, in very general terms, the State's intention to implement a two-plan system, where retirees could select between the 2013 plan and the 2014 plan. Few details were provided then about how the shift to the two-plan system would be implemented.

Some details were provided on August 22, when representatives of the Division of Retirement and Benefits ("DRB") presented a series of slides to the Retiree Health Plan Advisory Board.² Slide page 4 describes a two-plan system where retirees can choose between the so-called "Legacy Plan" (the 2013 plan) and the "Standard Plan" (the 2014 plan).³ Slide page 5 states that the two dental plans will have different coverage provisions and different monthly premium rates, but it provides no specific information about the differences.⁴

Slide page 9 describes the intended open enrollment process: An enrollment

² A full copy of this DRB slide presentation can be viewed at: http://doa.alaska.gov/drb/alaskaCare/retiree/RHPAB-MeetingMaterials_08222019.pdf. Copies of the specific slides discussed in this memorandum are provided as Exhibit A to the Affidavit of Bradley Owens, attached to this memorandum.

³ These names are potentially misleading. It would be more accurate to refer to the plan in effect for at least ten years between 2003 and 2013 as the "Standard Plan" and to call the newer plan the "Modified Plan."

⁴ Obviously, DRB will need to provide members with complete and accurate information about the different coverages available under the two different options. If the State were willing to share its proposed language with RPEA in advance of publicizing the details to all retirees, RPEA could communicate in good faith to ensure that the descriptions are accurate and clear. If the State declines to work with RPEA in this way (which does *not* involve "negotiating" over the details of plans in the way the State has already refused), then RPEA will have no alternative other than to seek emergency relief from the court if the differences are not set forth clearly and accurately.

period will open for three weeks in November (November 6-27). The slide states that, “[i]f no plan selection is made, members will remain in the plan they currently have today, the Standard Plan.” In other words, the State intends to make the current, unconstitutional 2014 plan the default option. Only if a member affirmatively selects the 2013 plan during the short open enrollment period will that member receive the coverage guaranteed by the constitution.

On September 10, the State posted additional information about the two-plan system on its website,⁵ along with answers to some Frequently Asked Questions (“FAQs”).⁶ The answer to FAQ 9 reaffirms that the current, unconstitutional 2014 plan will be the default plan:

If you are currently enrolled in the DVA plan and take no action, meaning you do not make any plan selection by the end of the open enrollment period, you will remain in the plan you currently have today, the AlaskaCare Retiree Standard DVA Plan.

The answer to FAQ 17 explains that, if a member does not elect to change from the current, unconstitutional dental plan during the brief open enrollment period, then the member typically must wait another year:

[Y]ou will only be able to make changes to your plan each year during open enrollment (this year’s open enrollment period is November 6 to 27, 2019). You will not be able to make changes to your plan outside the open enrollment period, unless you have a qualifying household status change.

⁵ This additional information can be viewed at:
<http://doa.alaska.gov/drb/alaskacare/retiree/plans/dva.html>

⁶ The Retiree DVA Plan FAQs can be viewed at:
<http://doa.alaska.gov/drb/alaskaCare/retiree/faqs/retireeGeneralFaqs.html#dental>

REQUESTED RELIEF

At the status conference, RPEA expressed its dismay that there had been no communication from the State to RPEA (directly to its members, leaders, or counsel) about how the State intended to respond to this court's order. Since that time, DRB has shared some information with retirees, and RPEA representatives have been able to obtain some information by attending meetings and reviewing the website.

This court indicated at the status conference that it would allow the State to proceed to implement the plans it deemed appropriate, without micromanaging the effort, but allowed RPEA to return to court to ask for relief if RPEA believed the State's actions do not meet the letter or spirit of the court's April 16 order. Because of the absence of any ability to work with the State outside of court, RPEA believes it has no choice but to ask this court now for relief.

RPEA outlines below its specific requests for orders to the State, so that the court and RPEA can be ensured that retirees receive the relief that this court ordered in April.

- (1) **The State should not be permitted to continue offering only the unconstitutional 2014 plan throughout 2019, but should be required to provide members some short-term relief.**

As noted above, all members of the retiree dental plan continue to suffer the restraints unconstitutionally imposed in 2014. RPEA previously listed several short-term options that the State could implement, seemingly without undue difficulty; doing that much would at least give members partial relief, as a stopgap, while the State moves forward with implementing a long-term constitutional solution. In particular, RPEA

suggested that the State easily could (i) stop enforcing the new frequency and age limitations that it added into the 2014 plan and (ii) stop imposing out-of-network penalties on members who receive covered services from a non-network provider. As far as RPEA can tell, the State has not adopted these options or taken any other action to reduce the harms of the 2014 plan; certainly, it has not contacted RPEA to discuss these or other options.

RPEA believes it rightfully could demand that the State immediately make *all* of the 2013 benefits available to all members of the retiree dental plan, but it is not pushing quite that hard. However, because the State appears to be making no good faith efforts to ameliorate any of the effects of the 2013 plan on a short-term basis, RPEA asks the court to direct the State immediately to stop enforcing the frequency and age limitations and financial penalties that it added in 2014. These limitations and penalties later may be restored only as to those who choose to participate in the 2014 plan after being given an opportunity to select instead to participate in a fully constitutional plan.

- (2) **The State should be prohibited from establishing the unconstitutional 2014 plan as the default plan under the two-plan system it is designing for 2020.**

The court declared the 2014 plan unconstitutional. It allowed the State to give retirees the option of continuing with the plan, if they prefer its coverages to the coverages provided by the 2013 plan. But selecting the 2014 plan entails a waiver of the constitutional right to undiminished benefits. For a waiver of constitutional rights to be effective, it must be knowing and voluntary; even in a civil setting, waiver requires an

affirmative act and cannot be inferred from silence and non-action.⁷ Thus, the only way the 2014 plan can be a lawful plan for a retiree is if a retiree knowingly and affirmatively selects it as his or her preferred plan, in lieu of any other constitutional plan the State is then offering. The State's proposal to make the 2014 plan the default plan means that any retiree who, for any reason, fails to submit a choice within a certain three-week period will be treated as having waived the constitutional right to undiminished benefits without any showing that the retiree did so knowingly and voluntarily. RPEA therefore asks the court to preclude the State from making the 2014 plan the default option.

- (3) **The State should be directed to conduct a complete retrospective review of claims denied under the 2014 plan that would have been granted had the 2013 plan remained in effect.**

During the August 8 status conference, the court inquired whether the State was doing anything to identify the services that had been requested by members under the 2014 plan, which were denied but would have been covered under the 2013 plan. Emily Ricci responded for DRB. She advised that no such review had been undertaken but that DRB absolutely could do this type of retrospective claim analysis to identify which members were affected in this way. RPEA suggested that reimbursements for denied services would be appropriate, at minimum for members who received such denials after April 16, 2019.

To the best of RPEA's knowledge, the State has not yet conducted this type of

⁷ See *Brandner v. Providence Health & Services—Washington*, 394 P.3d 581, 588 (Alaska 2017).

analysis. RPEA requests that the court direct the State to commence this kind of review promptly and to notify the court and RPEA when it begins, how long it should take, and when it is concluded. RPEA further requests that the court order the State to provide RPEA with a complete copy of correspondence between the State and Moda or Segal (or whoever is engaged to conduct the review), so that RPEA is informed about the scope and nature of the review, and the data that are used. When the review is complete, the State should be required to provide a copy of the report that identifies the claims that were denied.⁸

RPEA is not asking now that this court order reimbursement to members who were denied coverage for services under the 2014 plan who would have received coverage under the 2013 plan, but it reserves the right to do so after the analysis is complete.

- (4) The State should be directed to provide RPEA with its complete premium rate analysis and all data used in the analysis to determine the new rates.**

The State has disclosed publicly that it expects different premiums for the two plans it intends to offer, and that the 2013 plan premiums will be more expensive. Because premiums most likely will affect members' choices in the open enrollment period, the data and assumptions used should be subject to review by independent experts, to make sure that the analysis is done fairly and properly. RPEA requests that the court

⁸ Such a report would be provided to RPEA subject to the protective order in place in this case, which allows RPEA to receive HIPAA-protected information and requires RPEA to protect its confidentiality.

direct the State to provide all the information to RPEA as soon as it is available, and at least 30 days before the open enrollment period, so that any challenges to the rate determinations can be made before members start selecting between plans.

- (5) **The State should be directed to disclose to RPEA and the court all costs it incurs to develop and implement the two-plan system, in order to ensure that no premium funds are used.**

The State has disclosed that it expects to pay \$60,000 to Segal Consulting to have it build and maintain an online benefit enrollment platform for retirees to use when choosing between the two dental plans. RPEA believes this cost is indicative of the high administrative costs involved in developing and implementing a two-plan system. These costs are being incurred solely because of the State's decision to implement an unconstitutional retiree dental plan in 2014. The State and not retirees should bear all the added costs of "becoming constitutional," since the costs of having a two-plan system would never have arisen if the State had done a proper diminishment analysis before abandoning the 2013 plan in favor of the more limited 2014 plan.

So that RPEA and the court can monitor who pays for the State's mistakes, the State should be required to disclose to RPEA the amount of funds taken from retirees' premiums that are being used in developing and implementing the new two-plan system to rectify the adoption of the unconstitutional 2014 plan. Only with such disclosure can RPEA and the court be assured that the State is not using any of the retirees' money to pay for correcting the unconstitutional situation the State created.

Respectfully submitted, this 17 day of September, 2019.

REEVES AMODIO, LLC



Susan Orlansky [ABA 8106042]

Counsel for RPEA

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AFFIDAVIT OF BRADLEY OWENS

I, Bradley D. Owens, having been duly sworn upon oath, depose and state as follows:

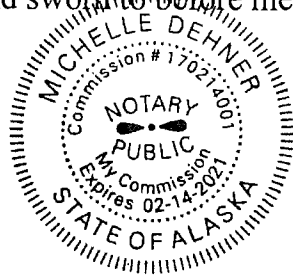
1. I am an individual who resides in Anchorage, Alaska. I have personal knowledge of the facts stated in this affidavit.
2. I am a member of the Retired Public Employees of Alaska (RPEA) and currently hold the position of Executive Vice President of RPEA.
3. I attended a meeting of the AlaskaCare Retiree Health Plan Advisory Board (Board) on August 8, 2019. During this meeting, Emily Ricci, the Health Care Policy Administrator for the Division of Retirement and Benefits (DRB), presented a report to the Board which was entitled "Retiree Dental, Vision, and Audio Plan Overview and Update" (Report). During this presentation, DRB provided printed copies of this Report to the Board. I was also provided a copy of this Report by DRB at this meeting. A complete copy of the report is also posted on the Board webpage at: http://doa.alaska.gov/drb/alaskaCare/retiree/RHPAB-MeetingMaterials_08222019.pdf

4. I have attached copies of several pages, or slides, from this Report as Exhibit A to the RPEA Motion to Enforce Court Order and Related Relief. These pages include the cover slide, as well as pages/slides # 4, 5 and 9.
5. The information provided in the accompanying memorandum concerning statements at the August 8, 2019 Status Hearing, which I attended telephonically, are based upon a transcript of that hearing which I have reviewed and confirm to be accurate descriptions of those statements and discussions.

Further your affiant sayeth naught.

Bradley Owens

Subscribed and sworn to before me, this 14th day of September 2019



Michelle Dehner

Notary public

My commission expires 02.14.21

AlaskaCare Retiree Health Plan Advisory Board

Retiree Dental, Vision, and Audio Plan Overview and Update



Division of Retirement and Benefits
Department of Administration

Ex. A
2011

Remedy

- The case is ongoing, and the State has determined it will appeal the superior court decision.
- However, in an effort to mitigate the uncertainty to retiree's dental benefits caused by the litigation, beginning January 1, 2020, and for the foreseeable future, the Division will offer members of the AlaskaCare retiree dental plan a choice between two DVA plans:
 1. the plan that was in place prior to 2014, the **AlaskaCare Retiree Legacy Dental Plan**, and
 2. the plan that is currently in place now, the **AlaskaCare Retiree Standard Dental Plan**.



Ex. A
2011

Considerations

- The Legacy Dental Plan will have different coverage provisions and different monthly premium rates than the Standard Dental Plan.
 - Premiums for each plan are under development and will be provided when available to members
 - A benefit comparison between the two plans is under review and will be provided to members when available.
- Offering two plans will provide stability by allowing members who prefer their current benefits to stay in the current, Standard Plan.
- Offering two plans will provide choice by allowing members who preferred the previous plan to elect the 2013 Legacy Plan.



Ex A.
4 of 4

1st Annual Open Enrollment

- Opens November 6th – Closes November 27th.
- Current DVA plan members, and retirees who retired, or dropped or reduced coverage on or after January 1st 2014 will be eligible to participate.
- Members will use an online portal to make benefit elections.
 - Paper forms will be provided to members upon request.
- If no plan selection is made, members will remain in the plan they currently have today, the Standard Plan.
- If a member changes their elections, they will receive a new ID card in early January.



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[Proposed]
ORDER GRANTING RPEA'S MOTION
TO ENFORCE COURT ORDER AND FOR RELATED RELIEF

The court has considered RPEA's motion, the State's response, and RPEA's reply.

It concludes that the relief requested is reasonably necessary to enforce this court's order of April 16, 2019. Accordingly, the motion is granted, and the court orders as follows:

(1) The State is prohibited from continuing to offer only the unconstitutional 2014 plan throughout 2019; the State must offer members some short-term relief from the unconstitutional diminishment of benefits. In particular, the State shall immediately (a) cease enforcing the new frequency and age limitations that it added into the 2014 plan and (b) cease imposing out-of-network penalties on members who receive covered services from a non-network provider.

(2) The State is prohibited from establishing the unconstitutional 2014 plan as the default plan under the two-plan system it is designing for 2020. Any member who

does not affirmatively select participation in the 2014 plan shall be treated as having chosen to participate in the 2013 plan.

(3) The State is directed to begin promptly to conduct a complete retrospective review of claims denied under the 2014 plan that would have been granted had the 2013 plan remained in effect. The State shall notify the court and RPEA when the review begins, how long it should take, and when it is concluded. The State also shall provide RPEA with a complete copy of correspondence between the State and Moda or Segal (or whoever is engaged to conduct the review), so that RPEA is informed about the scope and nature of the review, and the data that are used. When the review is complete, the State shall provide a copy of the report that identifies the claims that were denied.¹

(4) The State shall provide RPEA with its complete premium rate analysis and all data used in the analysis to determine the new rates. This information shall be provided as soon as it is available, and at least 30 days before the open enrollment period.

(5) The State shall disclose to RPEA and the court all costs it incurs to develop and implement the two-plan system, and shall specify which funds, if any, are taken from members' premiums. The initial disclosure shall be made within 10 days of this order, with follow-ups at regular intervals of not less than 30 days, as additional funds are expended.

¹ Such a report will be subject to the protective order in place in this case, which allows RPEA to receive HIPAA-protected information and requires RPEA to protect its confidentiality.

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Entered at Anchorage, Alaska, this ____ day of September 2019.

Eric A. Aarseth
Superior Court Judge