

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.)

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

INTRODUCTION

RPEA commenced this case more than three years ago, alleging that the State's adoption of a new retiree dental plan in 2014 violated retirees' rights under the non-diminishment clause of the Alaska Constitution. This court agreed and, in April 2019, directed the State to begin providing retirees with a constitutionally acceptable dental plan. The court gave the State options on how to do that; one was to offer participants a choice between returning to the constitutional 2013 plan or continuing with the unconstitutional (but likely less expensive) 2014 plan. This is the option the State selected, preferring it over alternatives that would have guaranteed a constitutional non-diminished plan for all retirees.

The State now contends that, having chosen to implement one of the options this

court offered, it may implement it however it chooses and may not be subject to any oversight by RPEA or the court. The State is incorrect.

When the government violates citizens' constitutional rights and the court directs an equitable remedy, the court retains jurisdiction to ensure that the government does in fact remedy the violation and does not merely give lip service to its constitutional obligations to the citizens affected by its actions. It is not true, as the State contends, that RPEA's only option – if it fears the State is continuing to act unconstitutionally regarding the subject matter of the suit – is to file a new suit.

The facts are changing, because the State finally is taking some action, so RPEA necessarily is seeking some specific relief that was not expressly articulated in the complaint. But that does not mean a remedy based on the implementation of a new plan cannot be granted within this lawsuit. The State may not evade its constitutional obligations so easily, postponing a fully constitutional remedy for more years while another suit wends its way through the court system.

ARGUMENTS

I. THE COURT RETAINS BROAD EQUITABLE JURISDICTION TO ENFORCE ITS JUDGMENT.

Alaska Statute 22.10.020(c) grants the superior court authority to issue injunctions “and all other writs necessary or proper to the complete exercise of its jurisdiction.” When the court declares the rights of parties under AS 22.10.020(g), as the court did in this case, it has the authority to grant such “[f]urther necessary or proper relief based on

a declaratory judgment . . . after reasonable notice and hearing, against an adverse party whose rights have been determined by the judgment.”

These broad grants of authority allow the court to issue all “necessary or proper” orders to enforce compliance with its judgment. The State’s proposed narrow reading of the court’s authority would make the court’s authority to issue a declaratory judgment almost meaningless. A losing party could ignore the judgment and assert that the court has no power to force it to do anything, since the post-judgment requests for a specific remedy might be different from – or somewhat less than – the broad relief sought in the complaint or enunciated in the judgment.¹

Here, one of the specific requests for relief that RPEA has sought is partial, short-term relief from the unconstitutional retiree dental plan, during the interim time period that the State says it needs to implement full, long-term relief.² Contrary to the State’s claim, this court did not surrender its power to compel partial, short-term relief when it issued a judgment requiring comprehensive, long-term relief.

Courts around the country have made clear that they retain jurisdiction to order

¹ The State’s view that the court’s power is limited because RPEA did not previously request precisely what it seeks post-judgment is like the losing parent in a custody dispute insisting that the court cannot order that Mom allow Dad to pick up the kids on Friday evening, because all that Dad sought in the complaint was custody and all that the court ordered was joint custody, not specific custody on a particular Friday evening. This court’s power to enforce a judgment on a specific basis is not limited by the fact that it previously ordered more broadly-worded relief.

² See RPEA’s proposed order at (1).

specific relief after issuing a judgment requiring broad relief that compels other branches of government to abide by the constitution. The school desegregation cases are an obvious example. In a follow-up to the first *Brown v. Board of Education* case, the U.S. Supreme Court addressed the continuing jurisdiction of the district courts to ensure that executive branch officials (people running school systems) took steps to comply with the constitution as interpreted by the courts:

School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. . . .

In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. . . .

While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. . . . [The courts] will also consider the adequacy of any plans the defendants may propose to meet these [practical] problems and to effectuate a transition to a racially nondiscriminatory school system. During the period of transition, the courts will retain jurisdiction of these cases.³

Just as the U.S. Supreme Court stated, this court retains jurisdiction to ensure that the State acts in good faith and transitions efficiently to a fully constitutional retiree dental

³ *Brown v. Board of Education*, 349 U.S. 294, 299-301 (1955).

plan. That jurisdiction includes full authority to require short-term steps toward the long-term goal.

On the merits, RPEA's request for short-term relief, such as it requested in paragraph (1) of its proposed order, should be granted. The State has provided no practical argument for why it could not provide even partial relief within 2019; it is clear only that the State does not want to do this. Because the State has shown no willingness to take any good faith steps toward complying with the court's order in any way before 2020, this court should impose the short-term remedy that RPEA proposed.

RPEA's third request is a first step toward another possible request for short-term, partial relief from the unconstitutional retiree dental plan the State has forced on participants for years. This court told the State in April that the 2014 plan is not constitutional, but the State continues to rely solely on that plan; even after the order, the State has continued to deny coverage for services that would have been covered under the 2013 plan. At this point, it may be reasonable for RPEA to ask the court to require the State to compensate retirees for the ongoing diminishment of coverage – at minimum for the months since the decision was announced. Ms. Ricci, the State's representative, said in August that the information about such denials would not be hard to develop. The request for the information about the denial of coverage should be granted so RPEA can explore whether to follow up and ask for a remedy for people who have wrongfully been denied coverage after this court issued its judgment.

II. THE STATE’S NOTICE OF APPEAL DID NOT DEPRIVE THIS COURT OF JURISDICTION TO ENFORCE ITS ORDER.

The State also is mistaken that its notice of appeal deprived this court of authority to grant RPEA’s motion. As this court will recall, RPEA initially opposed entry of final judgment, because it feared that the State would argue that the appeal divested this court of jurisdiction over post-judgment enforcement, and RPEA would be forced to file a motion with the Supreme Court to stay the appeal and return jurisdiction to the superior court whenever post-judgment enforcement action was required. RPEA withdrew its objection to entry of judgment – so that the State could move forward with filing its notice of appeal – only after this court asserted that it believed it would retain jurisdiction to enforce its order even after the appeal was filed. The State did not disagree at that time.

The enforcement actions that RPEA has requested do not implicate the issues that will be presented in the appeal. The pending appeal does not deprive this court of jurisdiction to grant any of the relief that RPEA has sought.

III. RPEA’S REQUESTED REMEDIES DO NOT IMPLICATE THE DOCTRINE OF SEPARATION OF POWERS.

There is equally no merit to the State’s invocation of separation of powers as a reason for denying any of RPEA’s requested relief. The judicial branch unquestionably had authority to hear and to rule on RPEA’s allegations that the State adopted an unconstitutional retiree dental plan in 2014. After a court properly declares the law, separation of powers does not suddenly deprive the court of jurisdiction to compel a

recalcitrant litigant to take specific steps to comply with the court's judgment.

Only one of RPEA's specific requests for action by this court even comes close to asking this court to tell the State how to implement the new two-plan system it has decided to use. That is RPEA's second request: that the court prohibit the State from designating the 2014 plan the "default" plan. This request is proper and does not involve the court in infringing on prerogatives of the executive branch.

This court ruled that the 2014 plan represents an unconstitutional diminishment. This court's April 2019 order allows the State to offer this plan to retirees who *choose* it, but the court order does not allow the State to *impose* the 2014 plan on any retiree in 2020. Such a reading would be fundamentally inconsistent with the court's order. Yet that is exactly what the State is proposing to do in designating the 2014 plan as the default: Anyone who does not affirmatively choose to have his or her constitutional rights protected will automatically be placed into an unconstitutional plan. It is entirely appropriate and not a violation of separation of powers for this court to tell the State it may not *require* any retiree to participate in an unconstitutional plan simply because the retiree fails to take specific action within a narrow window of time.

RPEA's requests for information – paragraphs 4 and 5 of its proposed order – do not in any way involve the court in telling the State how to administer its dental plans. These requests for information should be granted because the information sought will enable RPEA and the court to know whether the implementation that the State adopts is or is not constitutional. RPEA is concerned that the State's implementation will

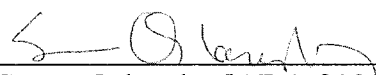
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improperly burden those who wish to exercise their constitutional right to a non-diminished dental plan. This court already voiced a concern that requiring only those who choose a constitutional plan to pay for it seems to shift the entire burden onto retirees, when arguably the State alone should be paying for the mistake it made in implementing an unconstitutional plan.

The State, as administrator of a dental plan that is funded entirely by participants, has a fiduciary duty to use participants' funds in the participants' best interest. Retirees therefore should not have to shoulder any extra expenses that the State incurs in belatedly rectifying the unconstitutional situation it created. Information establishing how the State calculated the differential premiums is essential so that RPEA can evaluate whether it has a claim to present to the court about the State's misuse of retirees' money in remedying the unconstitutional situation the State created. The requests for information are appropriate and do not violate the separation of powers doctrine.

Respectfully submitted, this 14 day of October, 2019.

REEVES AMODIO, LLC



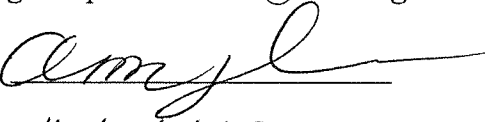
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