

**In the Matter Of:**  
**RPEA vs TSHIBAKA**

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**STATUS CONFERENCE**

*November 19, 2019*

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**PACIFIC RIM REPORTING**

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1 P-R-O-C-E-E-D-I-N-G-S

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3 THE COURT: We're on record.

4 This is continuing in 3AN-16-04537 Civil. The  
5 plaintiffs had requested a status hearing. This was  
6 filed on the 14th, and this was to discuss where we  
7 were. There's a motion for enforcement that we spent  
8 some time at the last hearing discussing, and -- and  
9 stated concern with coming up with different plans,  
10 and -- and so some of that has gone into effect, but the  
11 plaintiffs had asked to come to court to discuss this  
12 further.

13 And I think the other part of it, that I found  
14 that we hadn't really resolved before, but apparently we  
15 had talked about it, but I don't -- I -- apparently it  
16 hasn't been resolved yet, is -- is there's some of the  
17 other parts of relief in terms of the -- you know, what  
18 happens to all of the folks that -- going forward, it's  
19 all fine.

20 You've got -- well, maybe it's not all fine, but  
21 there's at least part of a plan, which is there's two  
22 different options; the 2013 plan, and the 20- -- the new  
23 plan that's -- that's -- that's offered. But what  
24 happens to everybody that goes back in the past years  
25 that -- that don't have that option anymore, that that

1 is water under the bridge, what -- what -- what remedy  
2 is there for those folks, if any?

3 And so -- anyway, so, Ms. Orlansky, why don't  
4 you go ahead and tell me kind of the way forward that  
5 you'd like to see it, and I'll hear from Ms. Alloway,  
6 and -- and we'll -- we'll -- we'll go from there.

7 MS. ORLANSKY: All right. Thank -- thank you,  
8 your Honor. We really appreciate you giving us a little  
9 time today.

10 I -- I guess I filed the motion for the  
11 hearing mostly because my clients are just really  
12 frustrated. The feeling is that we won this case back  
13 in April, and the plaintiffs have seen no benefit of  
14 any kind, and RPEA members keep calling the office and  
15 saying, "What's up?"

16 You know, from the beginning, RPEA was  
17 prepared to be realistic and not demand full  
18 compliance with this Court's order in two weeks. We  
19 opposed an eight-month stay that the State sought,  
20 which this Court never actually granted, but the  
21 State's been acting as if it's not obligated to do  
22 anything to respect the retirees' constitutional right  
23 to a non-diminished plan before January 1 of next  
24 year.

25 We had hoped for sort of a spirit of

1 cooperation, but there's been absolutely no  
2 communication from DRB to RPEA outside of the legal  
3 proceedings. So everything we know is gleaned from  
4 the public presentations of DRB's represent- --  
5 representatives.

6 So the enforcement motion we filed back in  
7 September sought two kinds of relief. The first was  
8 some kind of partial interim short-term relief,  
9 something that happened in 2019, at least after the  
10 decision, recognizing that implementing the full 2013  
11 plan again would be complicated, but there didn't seem  
12 -- any reason why the State couldn't and shouldn't be  
13 required to stop denying coverage under the 2014 plan  
14 for at least some of the most obvious services that  
15 would have been covered under the 2013 plan; adult  
16 fluoride is a good example, or the third cleaning in a  
17 year, or get rid of the network penalties.

18 And if the State had gone any direction at  
19 all, we might not be in front of the Court, but we've  
20 seen nothing. So our first request -- and we sketched  
21 out some specifics. Our first request was for some  
22 kind of interim relief in 2019, which showed that the  
23 State recognized that it's making people continue to  
24 live on an unconstitutional plan.

25 The other kind of relief concerns the State's

1 plan to implement the two-plan system going forward,  
2 and we're not disputing that that's a viable option,  
3 but we have a lot of questions about the mechanics of  
4 that implementation. We are now deep into the open  
5 enrollment period, and our biggest concern right now  
6 is the State's decision to make the unconstitutional  
7 2014 plan the default option, if retirees don't get on  
8 the computer and select which plan they want during  
9 this open enrollment period.

10 We understand people can waive their  
11 constitutional rights to a non-diminished plan.  
12 People waive their constitutional rights all the time,  
13 but we don't understand how the State can tell people  
14 they can forfeit a constitutional right through  
15 failure to act, and we would like the Court to order  
16 that the State cannot make the 2014 plan the default  
17 option.

18 And we think that's something that needs to be  
19 decided quickly before the State starts putting people  
20 into one claims-processing program or another. I  
21 don't have -- Ms. Alloway can probably tell you when  
22 the end of the open -- open enrollment period is. I  
23 think it's later this month, but we're definitely  
24 coming up on that.

25 The other relief that RPEA asked for was

1 request for information. It also relates to concerns  
2 that the State is making retirees pay through their  
3 premiums for additional administrative expenses that  
4 the State is incurring because of its unilateral  
5 decision to implement an unconstitutional plan, 2014.

6 We have concerns that the people who are  
7 opting to have the State respect their constitutional  
8 rights to a non-diminished plan may even be paying  
9 more than the people who are rolling over and  
10 accepting the unconstitutional plan.

11 And we're not sure that all of that's what's  
12 happening, so we're not asking for any specific relief  
13 along those lines, other than access to the  
14 information, that RPEA would like to be able to see so  
15 it can determine what's going on, and how the premiums  
16 have been set, and how the administrative costs have  
17 been developed. And we'll be back in court if there's  
18 a problem, and we won't bother your Honor if there's  
19 not a problem, if the State is playing fair and not  
20 assessing the members of the, you know, retiree class  
21 with the cost of the State's own unconstitutional  
22 actions.

23 So we ask for three kinds of information laid  
24 out in the original motion for enforce; request that  
25 it would be the Court order that the State provide

1 those informations.

2 So that's basically where we're coming from.

3 THE COURT: All right. Ms. Alloway.

4 MS. ALLOWAY: Thank you, your Honor.

5 Yes, we are currently in the middle of open  
6 enrollment. My understanding is that it began in the  
7 middle of October for the retirees, and it'll end  
8 November 27th. The State has already communicated to  
9 55,000 members that we are offering two plans; the  
10 prior 2014 plan is referred to as the "Legacy Plan";  
11 the current plan is referred to as the "Standard  
12 Plan."

13 Because the Department did not think it was a  
14 good idea to change unilaterally 55,000 retirees'  
15 plans and put them in what will be a more expensive  
16 plan, the default plan is the standard plan. We've  
17 communicated this to the retirees via letters, via  
18 weekly town halls, via teleconferences, via our  
19 website. It's -- I can't overstate the importance of  
20 the Division's attempt to roll this out in a way that  
21 provides the retirees with the information that they  
22 need.

23 I think the Department has learned from this  
24 experience in how it changed from the 2013 plan to the  
25 2014 plan, and the importance of talking to the

1 retirees and trying to get them to understand in the  
2 undertaking that the Department has gone through since  
3 the Court has issued its April decision, just as  
4 something that we can't take back now. We are  
5 currently in that process right now.

6           So that's where we are. As far as  
7 implementing the two plans, we are on track. As far  
8 as I know, your Honor, open enrollment will end  
9 November 27th, then what will happen -- will be the  
10 retirees will be placed in the two buckets of the  
11 plans, and cards will be issued, and the retirees will  
12 have their new plans as of January 1, 2020.

13           As far as RPEA's request for relief,  
14 there's -- there's a part of me that's a little bit  
15 confused, because, again, I'd like to point out for  
16 the Court, and RPEA, that in their complaint, they did  
17 not ask for any damages. So our understanding is that  
18 from the beginning, RPEA wasn't seeking any damages.

19           If we're talking about from April to  
20 January 1, the State has been clear with the Court all  
21 along that it was impossible for us to change the plan  
22 prior to January -- January 1. It's an automated  
23 process, and we can't process those claims by hand.  
24 And so that's why we can't just lift frequency limits,  
25 change the network, or how plans -- or how process- --

1 claims or processes, because this is all an automated  
2 process run by Delta Dental, or Moda, which is a  
3 completely different third-party administrator than  
4 the administrator that used to run the Legacy Plan, if  
5 you will.

6 And, also, it's a little bit premature,  
7 because we have multiple things to consider before we  
8 even begin the process of considering or repaying  
9 claims, if you will, from the April order. First of  
10 all, we don't know how many retirees will choose to  
11 elect to go back to the old plan. Some of the  
12 retirees will decide to stay in the Standard Plan.  
13 And even for those retirees that choose to go back,  
14 their premiums might need to be adjusted in order for  
15 them to have the claims to be processed under that old  
16 plan.

17 So we're -- we're assuming a lot of things  
18 before -- a lot of questions need to be answered  
19 before the State just all of a sudden, should the  
20 Court order it, start repaying claims that were denied  
21 from April to January 1, 2020.

22 THE COURT: So what -- what -- what is happening  
23 when -- when claims -- I'm assuming some claims are  
24 actually being denied now that would have been granted  
25 under the 2013 plan?

1 MS. ALLOWAY: The State from April 2nd to  
2 January 1 is administering the old -- the 2014 plan.

3 THE COURT: Right. And I'm talking -- right.  
4 So -- but the request is once I entered my order and the  
5 State was on notice that the 2014 plan was no longer a  
6 constitutional -- constitutionally viable plan, and that  
7 the rights that were granted under the 2013 plan are  
8 what the retirees should have been receiving, I am  
9 wondering, is -- when the -- when the -- when DRB,  
10 through its third-party administrator, is denying those  
11 claims, you know, what -- what ends up happen- -- first  
12 of all, are they -- are they -- are they even  
13 identifying that this claim is denied now, but would  
14 have been granted before?

15 Is there any -- I mean, this is what we talk- --  
16 I thought this is what we talked about at our last  
17 hearing in terms of -- of -- of capturing that so that,  
18 you know, people could go back and figure out, "Okay. I  
19 shouldn't have been denied that claim. That -- that  
20 claim should have been actually approved."

21 MS. ALLOWAY: The Department is not currently  
22 doing anything. What Ms. Ricci informed the Court, is  
23 that it's possible for the Department to go back and do  
24 a retroactive claims analysis, but unless the Court  
25 orders us to do that, the Department doesn't have any

1 intent to do that. And what I'm telling the Court, is  
2 that that's premature right now, because some of these  
3 retirees aren't actually going to elect to stay in that  
4 old plan.

5 As of January 1, 2020, we'll have a better  
6 idea of the retirees that want to stay in the  
7 Legacy Plan and those retirees that want to stay in  
8 the Standard Plan. That will narrow the bucket of  
9 people -- of retirees down. And should the Court  
10 order us to go back and do a retroactive claims  
11 analysis because it intends to order the State to pay  
12 damages to those retirees that may have had claims  
13 denied because they've elected to stay -- they wanted  
14 to stay in the Legacy Plan from -- from April to -- to  
15 January 20- -- 2020, the State has the power to do  
16 that, have the ability to do that, my understanding is  
17 by Ms. Ricci, but the State has not done so. The  
18 State has been focusing on implementing the Court's  
19 order and having the ability to roll out two plans as  
20 of January 1, 2020.

21 And I want to point out to the Court that the  
22 State -- the State's actions are not unreasonable. I  
23 mean, we cited to the Court, "State v. Alaska Civil  
24 Liberties Union," which is a Supreme Court case. The  
25 -- the Court ordered the State to stop denying

1 same-sex couples medical benefits and retiree  
2 benefits. That order came out in June. The Court  
3 gave the State until January 1, 2017, the new benefit  
4 year, to begin rolling out that program, because  
5 there's simply -- it's a bureaucratic process, and we  
6 can't just flip a switch and automatically start  
7 offering a completely different dental plan.

8 THE COURT: I -- yeah, and I don't think  
9 that's -- that's where my question was. I -- I -- and I  
10 could be mistaken, my memory. I -- my understanding in  
11 talking to Ms. Ricci when she was here was that the  
12 State was capable of doing it, and my memory -- and  
13 maybe I'm wrong, but my memory was -- was that the fact  
14 the State was going to be doing that, is that they were  
15 going to be capturing that information so that, you  
16 know, there could be a comparison. There --

17 MS. ALLOWAY: Well --

18 THE COURT: -- wasn't going to be this "wait and  
19 see." Maybe I'm wrong, but that's -- that's my memory.

20 MS. ALLOWAY: I mean, what you mean by  
21 "capturing information," the information 's there. It's  
22 in the State's depart- -- in the State's system, but  
23 have they run the report? To my knowledge, no, but I  
24 could be absolutely wrong about that.

25 THE COURT: Okay. I -- I mean, I was -- you

1 know, this -- this is difficult, because I'm -- I can't  
2 possibly foresee every -- everything that's going to  
3 happen, but if -- if the -- and -- and -- and I don't --  
4 I think the Court has been pretty clear that it -- it  
5 tends to agree with the State or understand that it's --  
6 you know, the reason why this is taking a while, you  
7 know, roll out this new plan, make these choices as of  
8 January 1.

9 I don't think I've been asking the State to do  
10 anything different than that, but I have had a concern  
11 that I thought I expressed at the last hearing in terms  
12 of, what are we going to do about all of these people  
13 that in the meantime -- I mean, and I think the words I  
14 used was, is the burden on them to have to call up DRB,  
15 or is DRB going to affirmatively capture, say, "Well,  
16 we're denying this, but under the 2013 plan, it would  
17 have been approved, and" --

18 MS. ALLOWAY: Well, I mean, is the Court  
19 ordering the State to do that?

20 THE COURT: I thought that's what the discussion  
21 that we had before, because there was a lot of, I  
22 suppose, more informal discussion that we had that was  
23 based in good faith. That's kind of what the State was  
24 operating on with the Court in terms of, "afford us the  
25 good faith to be able to figure this out and work

1 through this process," you know, and -- and that's what  
2 I thought I was giving the State, and I thought there  
3 had been a similar discussion with Ms. Ricci that they  
4 understood, your client understood, that -- that they  
5 needed to be doing something to protect and not place  
6 the burden on the retirees in terms of, you know, having  
7 to file umpteen claims in terms of trying to get covered  
8 for whatever it is that should have been covered.

9 MS. ALLOWAY: I guess I'm -- I've always been  
10 confused, and I want to make clear, that in no --

11 THE COURT: Okay.

12 MS. ALLOWAY: -- situation is it my  
13 understanding that the State made a commitment at the  
14 August -- August status conference that we've not been  
15 complying with.

16 THE COURT: Okay.

17 MS. ALLOWAY: We've argued all along that we  
18 can't implement the order as of April of the new dental  
19 plan, but that seems to be what you're implying, is that  
20 you expect us to administer the Legacy Plan as of April  
21 and pay the claims as if that plan was in place --

22 THE COURT: No.

23 MS. ALLOWAY: -- and we've made clear all along  
24 that we can't do that.

25 THE COURT: I -- I didn't say that. I didn't

1 say it then. I didn't just say it now.

2 MS. ALLOWAY: Well --

3 THE COURT: What -- what I said right now was --  
4 what I said right now was that -- that it is being  
5 highlighted that somehow in the EOBs that are going out  
6 to say, "You're denying this claim, but this may be  
7 available under the 2013 claim," something that tells --  
8 something that highlights that claim where a decision is  
9 being made that lets the retiree know that, "Wait a  
10 minute. You're not done yet. This is not just under  
11 the" -- the analysis isn't under the 2014 plan. An  
12 analysis really has to be done under the 2013 plan.

13 There's an obligation for the State, once the  
14 order went out, to have to go back -- at a minimum, have  
15 to go back to the time that the State -- the Court  
16 issued its order in April and make right in terms of  
17 whatever's going to happen back here. I -- I wasn't --  
18 I thought -- I thought that was exactly the kind of  
19 discussion that I was having with Ms. Ricci at the time.

20 MS. ALLOWAY: That's not what I understood.

21 THE COURT: Okay.

22 MS. ALLOWAY: And -- and, again, you -- you just  
23 now -- my understanding is, what you're telling me is  
24 that the Court's order did go in, in place in April, and  
25 that you expect the State to pay the claims as if the

1 Legacy Plan was in place as of April, and that would be  
2 why we would have the burden to inform the retirees.

3 My understanding, based on the Court's order,  
4 was that we were in compliance as -- in applying the  
5 2014 plan through January 1, 2020, at which point the  
6 retirees would have the option of enrolling in the two  
7 plans, and that the State was not out of compliance  
8 with the Court's order by waiting until January 1,  
9 2020, to start proc- -- processing the claims for  
10 those retirees that let -- elected to go into the  
11 Legacy Plan.

12 THE COURT: I -- I -- I think there's a lot of  
13 -- I don't know what the thinking is, and maybe I've  
14 made an error in terms of exactly cl- -- clearly  
15 communicating it, but if I enter an order in April, then  
16 that means the -- the plaintiffs and all retirees have a  
17 right to have claims processed as the 2013. That  
18 doesn't mean that the State could immediately flip a  
19 switch, as you're saying, and do it right then, but  
20 never was there an idea that it somehow allevi- --  
21 alleviated the State from having to at least  
22 retroactively do that, and that was the conversation  
23 that I was having with Ms. Ric- -- Ricci.

24 The Court understands that coming out with new  
25 options, you know, in terms of effective January 1,

1 that that's going to take a while, you know, to make  
2 all of that happen, the negotiations with the TPA and  
3 everything else, but I don't think that just -- that  
4 just -- that the burden ends up falling on the  
5 shoulders of the retirees to, then, fix what happened  
6 between April and January, and that's -- that's the  
7 conversation I had.

8 MS. ALLOWAY: So, ag- -- again, just to confirm,  
9 you are saying that your order went in place in April?

10 THE COURT: I -- I -- I issued the order when I  
11 issued the order. I mean...

12 MS. ALLOWAY: Well, that's exactly why the State  
13 filed the motion to stay the implementation of the order  
14 until January 1, 2020. I mean, because we --

15 THE COURT: Again -- again, I think there's -- I  
16 think there's an idea that somehow -- that somehow the  
17 plan needed to immediately change. So all the plan is,  
18 is a set of rules. There's nothing magical about this.  
19 Okay? And so if -- if you have a cleaning -- I mean, we  
20 went through the whole trial. It didn't take that long  
21 to do. We went through the cleaning, oh, that would be  
22 granted under 20- -- it would be denied under 2014. At  
23 some point in time, the State is going to have to go  
24 back and do that.

25 MS. ALLOWAY: We've never understood the Court

1 to say that --

2 THE COURT: I --

3 MS. ALLOWAY: -- and we would --

4 THE COURT: -- understand --

5 MS. ALLOWAY: -- we would appreciate a written  
6 order in which we could potentially seek relief from  
7 that order --

8 THE COURT: I would --

9 MS. ALLOWAY: -- but --

10 THE COURT: That's fine, Ms. Alloway. I -- I am  
11 disappointed in hearing that argument today.

12 MS. ALLOWAY: Well, I apologize, your Honor. I  
13 don't think --

14 THE COURT: I don't think you --

15 MS. ALLOWAY: -- that there's any --

16 THE COURT: I don't think you need to apologize.  
17 I think -- I think this is kind of what I ran into in  
18 the trial with Ms. Ricci and other things. There's a  
19 lot of -- there's a lot of assumptions that get made on  
20 the backs of the retirees that aren't fair.

21 MS. ALLOWAY: Well, your Honor, I want to -- I  
22 want to dispute that a little bit, because I've always  
23 been candid --

24 THE COURT: I -- I don't want to listen --

25 MS. ALLOWAY: -- with the Court, and --

1           THE COURT: Ms. Alloway, I don't want to listen  
2 to you about it. Okay? Because I'm not saying you  
3 personally are doing this. This is not an attack on  
4 Ms. Alloway. All right? But your client -- your  
5 client, okay, is not -- is not -- I gave them the  
6 benefit of good faith, and I had a conversation with the  
7 person that was supposed to be doing this, and I made it  
8 very clear that -- that -- that they needed to -- you  
9 know, they needed to do -- are going to have to do  
10 something. We were going to go back and do something  
11 about what is happening --

12           MS. ALLOWAY: Well, that's still possible.

13           THE COURT: -- and she said --  
14 Right.

15           MS. ALLOWAY: Right?

16           THE COURT: Then why -- then why is it -- then  
17 why is it -- why -- why is it, on behalf of your client,  
18 are you acting as if that is just -- I'm pulling, you  
19 know, I -- I am somehow pulling your toenails out  
20 because this is such a horrible thing?

21           MS. ALLOWAY: Well, because you've never made  
22 clear that that was what your expectation was, your  
23 Honor. I mean, yes, Ms. Ricci always has the ability to  
24 go back and do a retroactive claims review if the Court  
25 wants the State to do that and reprocess those claims,

1 but are we reprocessing it for the claim -- for the  
2 retirees that elect to be in that plan, or the retiree  
3 that elects to -- to go and stay in the Standard Plan?  
4 There's still a lot of questions.

5 And even the Court's response to me today, I  
6 know he's frustrated -- I know you're frustrated with  
7 me, but you've always -- you've said that we've  
8 discussed the possibility, and that possibility still  
9 exists.

10 THE COURT: I -- I -- I am hearing -- I -- I  
11 guess I am understanding what I need to do to  
12 communicate with DRB, because this is not working, and  
13 apparently DRB is not talking to the plaintiffs, which  
14 that was the other thing walking out of here, was there  
15 was going to be a sharing of information, and I'm  
16 hearing that there's no discussion with -- with RPEA.

17 MS. ALLOWAY: Well, your Honor, the State is not  
18 going to communicate and negotiate directly with RPEA,  
19 but to say that there has been no communication is  
20 absolutely not true. The State has been going and  
21 communicating with all retirees about this plan and the  
22 changes that are going to be made.

23 THE COURT: Does DRB have any plan that -- what  
24 is DRB's plan in terms of covering this period of time  
25 when they were on notice that the 2014 plan was found

1 unconstitutional and this new January 1 -- I -- I -- I  
2 think what you said was you're going to wait and see who  
3 elects the 2014 plan, and if they do that, then they  
4 have opted out to getting any kind of remedy for the old  
5 plan under 2013, but if they choose the 2013 plan, then  
6 those folks, they -- they still have a right to go back  
7 and ask for an adjustment of their claims for that April  
8 of 2019 through December 31st. What's the DRB plan?

9 MS. ALLOWAY: The DRB plan is to do what the  
10 Court orders.

11 THE COURT: So the DRB doesn't have -- even have  
12 a plan right now?

13 MS. ALLOWAY: The DRB came to the Court asking  
14 for a stay because we wanted to make clear that we were  
15 not going to reprocess claims or administer the new --  
16 the Legacy Plan until January 1, 2020, and that's where  
17 the confusion lies.

18 If the Court is going to order the State to  
19 reprocess those claims back to its April decision, then  
20 that will be the DRB plan, which will raise a bunch of  
21 additional questions, like, "If the retiree would like  
22 its claims reprocessed, are they going to, then, pay for  
23 the additional premiums that that would have cost had  
24 they elected to be in that plan in the beginning?"  
25 because that plan costs more money. The premiums are

1 higher.

2 THE COURT: All right. And what about the  
3 RFI's? What about the request for informations made by  
4 RPEA?

5 MS. ALLOWAY: Your Honor, I don't know what  
6 else -- whether -- what other information the State  
7 could provide to RPEA that it hasn't provided to you,  
8 all the retirees, and the Retiree Health Advisory Board.

9 In our opposition, the State filed the decision  
10 from the Commissioner, letters from the State's  
11 actuaries explaining how the State came to the premium  
12 costs, as well as notifying RPEA of what the premiums  
13 would be. We meet with the Retiree Health Advisory  
14 Board regularly. My understanding is that they met this  
15 week and met -- representatives from RPEA were there,  
16 Mr. Ward gave a presentation on how the premiums were  
17 calculated.

18 The State has been very open with the process.  
19 We've been trying to communicate with all retirees,  
20 not just RPEA, so I don't know what additional  
21 information the State could be providing to RPEA that  
22 it's not providing to all of the retirees.

23 THE COURT: All right. Ms. Orlansky.

24 MS. ORLANSKY: Your Honor, our motion's set out  
25 pretty specifically, the additional information we want,

1 and I'll just read the headlines again. "The State  
2 should be directed to -- to conduct a complete  
3 retrospective review of claims denied under the 2014  
4 plan that would have been granted had the 2013 plan  
5 remained in effect." That's not something the State is  
6 planning on providing to all retirees and public. I  
7 don't think there's any reason they should, but we asked  
8 for that. We've been talking today about, at minimum,  
9 doing that for the period since April 2019. RPEA asked  
10 for it to go back to the beginning of time, beginning of  
11 the -- beginning of 2014.

12 Item 4 in our motion was that, "The State  
13 should be directed to provide RPEA with its complete  
14 premium rate analysis and all data used in the  
15 analysis to determine the new rates." The State may  
16 have been public about its -- you know, what its new  
17 premiums are, but it sure isn't providing the public  
18 with all of the data that was used in its analysis.  
19 We need to have another expert take a look at it.

20 But, your Honor, the trust level between my  
21 client and DRB is pretty low, so they want to be able  
22 to do a little bit of looking at what they're being  
23 charged with and why, and the State should be directed  
24 to disclose to RPEA all costs it incurs to develop and  
25 implement the two-plan system in order to ensure that

1 no premium funds are being used. Those were our  
2 requests for information, and I don't think that's  
3 anywhere near the kind of information that DRB has  
4 presented to the public.

5 I'd also like it to be on record today that --  
6 dispelling the notion that people who opt into what  
7 the State is now calling the Standard Plan effective  
8 2020, have somehow given up their rights to a  
9 constitutional plan in 2019. If there is any kind  
10 of a, you know, retrospective remedy back to, you  
11 know, April of 2019, I think it has to apply to all  
12 retirees regardless of the plan they choose effective  
13 2020. DRB's publicity to members has certainly not  
14 told anybody that, "If you decide to go in to stay  
15 with this Standard Plan effective in 2020, it means  
16 you were happy with that plan in 2019 and you can't  
17 seek the kinds of remedies that other people who are  
18 making the choice to go back to the 2013 plan do."

19 So I want that to be on record, on that point  
20 today, so that I don't hear from the State in January,  
21 like, "We had no idea we were supposed to do that.  
22 It's only part of it. We look at the people who have  
23 gone -- want to go back to the 2013 plan." I don't  
24 think that's right, and I don't think that's a request  
25 for damages. I think that's a request for prospective

1 relief from the date of the decision.

2 THE COURT: All right. I'm planning on granting  
3 the proposed order. I'm disappointed with what I'm  
4 hearing. It is not at all consistent with what I  
5 thought I was going to accomplish after our August  
6 meeting. And Ms. Alloway has said that DRB is not going  
7 to act without a Court order, and so I'm entering the  
8 Court order.

9 The only concern I have is Paragraph 1 in the  
10 proposed order, Ms. Orlansky, and that is -- and --  
11 and I'm just not sure what I need to say in that  
12 order. I -- I understand where the State, they've got  
13 a process in place, and to make it immediately happen,  
14 where they're immediately making a review from the  
15 2014 in comparison to the 2013, I -- I think that  
16 right still exists. I just -- I -- the conversation  
17 that I thought I was having with Ms. Ricci was that  
18 that was going to be a rolling process, that was going  
19 to be gone through -- that is, things were denied.  
20 They were going to be looking at, "Okay. Would this  
21 have been granted in 2013?" And apparently that's not  
22 been going on.

23 So that's -- in -- in Paragraph Number 1, I --  
24 I don't disagree with what you're being -- what is  
25 being proposed. I -- I -- I think it should be more

1 along the lines of that as claims are denied, there is  
2 going to be an ongoing comparison to the 2013 plan and  
3 notice to the retirees that, you know, this -- this  
4 claim would have been -- this claim would have been  
5 approved under the 2013 plan.

6 So I'm going to cross out that -- I'm going to  
7 cross out the "in particular" language, because  
8 apparently DRB needs something, you know, in writing.  
9 I need to -- as far as that last sentence, I don't  
10 know if you can propose a different order.

11 MS. ORLANSKY: If your Honor would give me until  
12 tomorrow morning. I think better at my computer than  
13 right here in the courtroom. I'd --

14 THE COURT: Right.

15 MS. ORLANSKY: -- be happy to submit something  
16 tomorrow morning.

17 THE COURT: Yes, that's fine.

18 Ms. Alloway, I think a big part of this order  
19 is that -- and maybe I just didn't understand the  
20 significance of it before when the motion first got  
21 filed, but as far as the -- offering the 2014 as the  
22 default plan, I don't think the State can do that. I  
23 think that is -- there needs to be an affirmative  
24 selection to opt out of the 2013 plan. So I'm  
25 granting that request --

1 MS. ALLOWAY: Your Honor --

2 THE COURT: I'm not going to hear anymore  
3 argument about it, Ms. Alloway.

4 MS. ALLOWAY: I'd just like to point for the  
5 record, though, that we --

6 THE COURT: You can make a record on writing if  
7 you want to, but I'm done with hearing what you have to  
8 say on this right here today.

9 If the Department needs more time, then they  
10 can extend open enrollment or whatever they need to  
11 do, but you're going to have -- your -- your client is  
12 going to have to get something out and tell people  
13 that, "No, the 2013, the constitutional plan, is going  
14 to have to be the default plan," and they're going to  
15 have to make an affirmative -- affirmative opt out to  
16 that, if that's what they want. And so if that delays  
17 when open enrollment closes, that's not that big of a  
18 deal, but -- but --

19 MS. ALLOWAY: It -- it is a big deal.

20 THE COURT: -- you're going to have to --  
21 Well, it's a big -- it's a big --

22 MS. ALLOWAY: It is a big deal in the sense that  
23 the Department --

24 THE COURT: -- it's a big -- it's a big deal --

25 MS. ALLOWAY: -- has already --

1 THE COURT: Ms. Alloway, you're arguing with me.  
2 Okay. You're -- you're --

3 MS. ALLOWAY: I would like --

4 THE COURT: -- you're trying to engage --

5 MS. ALLOWAY: -- to make my record.

6 THE COURT: No. You're trying to engage this  
7 into -- you and your client came in in August and made a  
8 lot of representations about what good faith the State  
9 is making --

10 MS. ALLOWAY: And all of those --

11 THE COURT: -- and when -- and when the rubber  
12 met the road and I had a conversation with you today,  
13 nothing, nothing is happening. And so I -- I am -- I am  
14 done hearing about these representations, and I'm going  
15 to enter the order to make sure that what I said in my  
16 April order is going to be put in effect, and DRB is  
17 going to honor it.

18 MS. ALLOWAY: Your Honor, I'd like to, again,  
19 represent to the Court that none of the things that I  
20 said in the August hearing were made in bad faith, and  
21 the statement that "nothing has happened" is not true.

22 THE COURT: You can go ahead and parse my words  
23 as much as you want, but the spirit of what I was saying  
24 is pretty clear.

25 The remainder of the order is granted. It

1 creates a very affirmative duty on the part of DRB in  
2 terms of providing information.

3 As far as the concern about premium  
4 adjustment, as rep- -- as argued by the State, that  
5 question does not need to get answered first. That  
6 question -- first, we need to figure out what's being  
7 denied, and what these costs are that are going to be  
8 there, and then the retirees are able to make that  
9 choice, but they're not the ones that have to be  
10 taking a risk here. This is the -- this -- the  
11 problem was created by the State in the way they did  
12 it, and they're the ones that are going to have to  
13 bear the burden to fix it.

14 Does that alleviate the retirees from what  
15 might have been an additional premium cost? That's  
16 not a question that's in front of me right now that I  
17 have to answer. That's certainly something that can  
18 be captured, but that's going to be captured by DRB.  
19 They're the ones that are going to explain it.  
20 They're the ones that are going to show what the  
21 claims are that are -- that were denied, and what  
22 would have been covered, and -- and then we can take  
23 that next step.

24 But it is clear that I have to be much more  
25 involved in terms of how my order is going to get

1     executed in terms of making sure that DRB is in  
2     compliance with the Constitution of the State of  
3     Alaska.

4             So I'm going to get a new order supplementing  
5     Paragraph Number 1. The remainder of this order is  
6     signed and dated today. It is effective -- it is  
7     effective start of business tomorrow morning, so you  
8     need to get it to your clients so that they know what  
9     they're expected to do.

10            Ms. Orlansky, do we have a future date? I  
11     don't know that there's any future date I can give you  
12     right now, based on what we have.

13            MS. ORLANSKY: (Indiscernible).

14            THE COURT: Ms. Alloway?

15            MS. ALLOWAY: No.

16            THE COURT: If you want to make a further  
17     record, you can file a motion for reconsideration, you  
18     know, whatever you want to do, but I -- I -- I am now  
19     understanding what needs to happen, and that is -- is --  
20     you know, it -- it -- there -- there -- I -- I -- I --  
21     this Court offered the opportunity for DRB, your client,  
22     to operate in good faith, and I think they took  
23     advantage of the Court, and I'm not --

24            MS. ALLOWAY: Your Honor, that makes me --

25            THE COURT: -- and I am not --

1 MS. ALLOWAY: -- very uncomfortable, because  
2 basically you're calling my credibility into question on  
3 the open record --

4 THE COURT: You aren't the --

5 MS. ALLOWAY: -- and --

6 THE COURT: You aren't the client. You aren't  
7 the client.

8 MS. ALLOWAY: I represent the client, and I can  
9 tell you, I was at that hearing, and I did not  
10 understand that that was what the Court was ordered, and  
11 the Court -- and the State has been working in good  
12 faith since the April order and since the August hearing  
13 to try to get this fixed by January 1, and I can say  
14 that until I'm blue in the face, but --

15 THE COURT: Every -- every --

16 MS. ALLOWAY: -- to call my credibility into  
17 question on the open record, I do have a problem with  
18 that, and I'd like to make the record clear, that the  
19 State in no way, me personally or my client, thought  
20 that it was defying a Court order.

21 THE COURT: Ms. Alloway, first of all, you  
22 aren't the client. All right? You're an advocate, and  
23 I think, frankly, in every case I've had you in, I've  
24 enjoyed having you in my Court, and I've never, ever  
25 questioned, and I won't question the next case that I

1 have you in, your credibility at all. That -- that --  
2 you are misunderstanding. This is not -- this -- this  
3 is not a commentary on the attorney who's in front of  
4 me, the Assistant Attorney General.

5 This is a commentary on the witnesses that came  
6 out of DRB, and you can't control that. That is an  
7 agency. That is your client, and you can't control  
8 them. You can simply argue, as you have to as an  
9 attorney and zealously defend them, and I get that.  
10 This is not personal about you, but this is about an  
11 order that had a very specific meaning, and I explained  
12 that in August, and I think I explained it well enough  
13 to indicate that I did not want the burden falling on  
14 the shoulders of the retirees to have to fight with DRB  
15 in terms of being able to get their claims proved, and  
16 that DRB needed to operate in good faith, and that means  
17 -- that's that -- that whole concept of being a -- you  
18 know, being the -- to put it in layman's terms -- of  
19 really having the retirees' back, you know? If there's  
20 two options to take, they choose the one that's going to  
21 benefit the retiree the most, and making sure that it's  
22 clear.

23 And this -- and -- and -- and, you know, what  
24 I'm hearing in terms of, you know, the -- the defaults  
25 and things, is that DRB does not like my order, and they

1 are working at every little edge in terms of saying,  
2 "Judge Aarseth doesn't know what he's talking about.  
3 That's crazy. We don't have to do that," otherwise,  
4 there never would have been this default to the 2014  
5 plan, or the -- whatever the new plan is. There would  
6 have been a default back to the 2013 plan with the  
7 option to opt out of it, and to me, I think that's a  
8 pretty basic concept. But that would be the most  
9 uncomfortable for DRB to have to figure that out, and so  
10 they took the easy road.

11           Anyway, I -- I -- I really don't know what  
12 everybody is thinking, and I shouldn't go to those  
13 ends to say -- to -- to say what they're thinking, but  
14 that's the effect of it.

15           I really don't want you personally walking out  
16 of here thinking that I have challenged you personally  
17 as an attorney, who I've had in Court many times and  
18 has done a fantastic job representing the State. This  
19 is not personal to you. This is about an agency that  
20 is not doing what it's supposed to be doing, and  
21 you're kind of stuck in the middle. You're going to  
22 have to take heat for your client, but it's not you  
23 personally. I hope you can understand that.

24           All right. That will be the order of the  
25 Court.

1 (Proceedings concluded.)

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CERTIFICATE

I certify that I am a disinterested person and am in no way interested in the outcome of this action or connected with or related to any of the parties in this action or to their respective Counsel.

IN WITNESS WHEREOF, I have subscribed my name this 3rd day of December, 2019.



KASIDY PIGHINI, CA CSR NO. 14046  
My Commission Expires 8/25/2020

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