IN THE SUPREME COURT FOR THE STATE OF ALASKA

KELLY TSHIBAKA, COMMISSIONER OF)
THE DEPARTMENT OF ADMINISTRATION,)
)
Appellant,)
)
v.)
) No. S-17577
THE RETIRED PUBLIC EMPLOYEES OF)
ALASKA, INC.,)
Appellee.)
)
______________________________________)

Superior court: 3AN-16-04537 CI

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE ERIC A. AARSETH, PRESIDING

BRIEF OF APPELLEE

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

AUTHORITIES PRINCIPALLY RELIED ON vii

INTRODUCTION 1

ISSUES PRESENTED 2

STATEMENT OF FACTS 3

In 2014, the State unilaterally changed the dental benefits available to retirees 3

Procedural history 6

STANDARDS OF REVIEW 13

ARGUMENTS 14

I. THE SUPERIOR COURT CORRECTLY DETERMINED THAT THE 2014 RETIREE DENTAL PLAN UNCONSTITUTIONALLY DIMINISHES RETIREES' ACCRUED BENEFITS 14

A. THE ALASKA CONSTITUTION PROTECTS RETIREES' DENTAL INSURANCE BENEFITS AGAINST DIMINISHMENT 14

B. THE SUPERIOR COURT CORRECTLY DETERMINED THAT THE 2014 PLAN OVERALL DIMINISHES COVERAGE AS COMPARED TO THE 2013 PLAN 24

1. The superior court did not err in not considering the premiums charged 25

2. The superior court did not err in not requiring RPEA to present an actuarial analysis to prove diminished coverage 29

II. RPEA WAS ENTITLED TO RECOVER ITS FULL REASONABLE COSTS AS A SUCCESSFUL CONSTITUTIONAL LITIGANT 37

III. THE SUPERIOR COURT APPROPRIATELY ISSUED ORDERS NECESSARY TO ENFORCE ITS RULING THAT THE 2014 PLAN IS UNCONSTITUTIONAL AND TO PROVIDE RPEA RELIEF THAT IS JUST AND EQUITABLE 41

A. THE COURT PROPERLY PRECLUDED THE STATE FROM TREATING THE 2014 PLAN AS THE DEFAULT 42

B. THE SUPERIOR COURT PROPERLY REQUIRED THE STATE TO IDENTIFY SOME OF THE CLAIMS THAT WERE DENIED BECAUSE THE STATE OPERATED AN UNCONSTITUTIONAL PLAN 45

CONCLUSION 48

TABLE OF AUTHORITIES

Cases **Page**

Alaska Association of Naturopathic Physicians v. State, Department of Commerce, Community & Economic Development,
414 P.3d 630 (Alaska 2018) 39

Alaska Civil Liberties Union v. State,
122 P.3d 781 (Alaska 2005) 44

Alaska Conservation Foundation v. Pebble Limited Partnership,
350 P.3d 273 (Alaska 2015) 13, 39, 40

Alaska Spine Center, LLC v. Mat-Su Valley Medical Center, LLC,
440 P.3d 176 (Alaska 2019) 39

Burns v. Burns,
466 P.3d 352 (Alaska 2020) 13

Clark v. State, Department of Corrections,
156 P.3d 384 (Alaska 2007) 43

Duncan v. Retired Public Employees of Alaska, Inc.,
71 P.3d 882 (Alaska 2003) .... *passim*

Everson v. State,
228 P.3d 282 (Haw. 2010) 23

Flisock v. State, Division of Retirement & Benefits,
818 P.2d 640 (Alaska 1991) 18, 19

Hammond v. Hoffbeck,
627 P.2d 1052 (Alaska 1981) 15, 18, 22, 30

Hickel v. Southeast Conference,
868 P.2d 919 (Alaska 1994) 39, 40, 41

Horchover v. Field,
964 P.2d 1278 (Alaska 1998) 13, 43

In re Unisys Corporation Retiree Medical Benefits "ERISA" Litigation,
58 F.3d 896 (3d Cir. 1995) 24

Kanerva v. Weems,
13 N.E.3d 1228 (Ill. 2014) 23

Livingston v. Metropolitan Utilities District,
692 N.W.2d 475 (Neb. 2005) 22

McMullen v. Bell,
128 P.3d 186 (Alaska 2006) 18

Musselman v. Governor,
533 N.W.2d 237 (Mich. 1995), *modified*, 545 N.W.2d 346 (Mich. 1996) 22

O.K. Lumber v. Providence Washington Insurance Co.,
759 P.2d 523 (Alaska 1988) 31

Ott v. Runa,
463 P.3d 180 (Alaska 2020) 13

Recreational Data Services, Inc. v. Trimble Navigation Ltd.,
404 P.3d 120 (Alaska 2017) 48

Retired Public Employees of Alaska, Inc. v. Matiashowski,
2006 WL 463279 (Alaska super. Apr. 2, 2006) 35, 36

Riddle v. Lanser,
421 P.3d 35 (Alaska 2018) 13

Sheffield v. Alaska Public Employees' Association, Inc. ("*APEA*"),
732 P.2d 1082 (Alaska 1987) 15, 17, 19, 21

Sheffield v. Sheffield,
265 P.3d 332 (Alaska 2011) 13

State v. Alaska Civil Liberties Union ("*ACLU II*"),
159 P.3d 513 (Alaska 2006) 44, 45, 48

Taffe v. First National Bank of Alaska,
450 P.3d 239 (Alaska 2019) 13

Constitutional Provisions

Alaska Constitution, art. XII, § 7 .... 1, 7, 14, 15, 18, 19, 22

Hawai'i Constitution, art. XVI, § 2 23

Illinois Constitution, art. XIII, § 5 23

Statutes

AS 09.60.010 .... 10, 37, 39, 40

AS 22.10.020 45

AS 39.30.090 .... 16, 17

AS 39.35.370 17

AS 39.35.510 17

AS 39.35.535 .... 15, 17

SLA 2003, ch 86, § 2 40

SLA 1975, ch 200, § 2 15

Court Rules

Alaska Administrative Rule 7 41

Alaska Civil Procedure Rule 79 .... 2, 10, 11, 38, 39, 40, 41

Alaska Civil Procedure Rule 82 .... 38, 40

Alaska Civil Procedure Rule 94 41

Legislative History Materials

Committee Hearing Meeting Minutes on HB 145
House Finance Committee (May 9, 2003) 39
House Finance Committee (May 12, 2003) 39
House Judiciary Committee (April 28, 2003) 39, 40
House Judiciary Committee (May 7, 2003) 39, 40
Senate Judiciary Committee (May 18, 2003) 39

2003 House Journal (March 3, 2003) 40

Other Authorities

How Are Pensions Protected State-by-State?,
https://www.governing.com/finance101/gov-pension-protections-state-by-state.html.....22

Proceedings of the Alaska Constitutional Convention
January 16, 1956 14
January 20, 1956 14

State of Alaska, Division of Retirement and Benefits website,
www.doa.alaska.gov/drb 3

AUTHORITIES PRINCIPALLY RELIED ON

Alaska Constitution, art. XII, § 7

Membership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired.

AS 09.60.010

(c) In a civil action or appeal concerning the establishment, protection, or enforcement of a right under the United States Constitution or the Constitution of the State of Alaska, the court

(1) shall award, subject to (d) and (e) of this section, full reasonable attorney fees and costs to a claimant, who, as plaintiff, counterclaimant, cross claimant, or third-party plaintiff in the action or on appeal, has prevailed in asserting the right[.]

INTRODUCTION

The Alaska Constitution provides:

> Membership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired.[1]

Effective January 1, 2014, the State made unilateral changes to retiree dental insurance benefits, affecting the more than 50,000 people who participate in the retiree dental insurance program. [Exc. 71-84; R. 1116] The changes were challenged by The Retired Public Employees of Alaska, a non-profit corporation that seeks to educate retirees and to assist them in obtaining the benefits to which they are entitled. [Exc. 1-8] RPEA contended that the changes reduce the available coverage and thereby violate retirees' constitutional rights not to have their benefits diminished. [Exc. 6-7]

RPEA and the State agreed that the central legal question – whether the constitution protects retiree dental insurance benefits – was amenable to resolution as a matter of law. [R. 382-83] Based on comprehensive summary judgment briefing, the superior court ruled that retiree dental insurance benefits, like medical insurance benefits, are constitutionally protected against diminishment. [Exc. 133-34, 142-43]

The State declined to seek interlocutory review of this controlling legal question [R. 2299-2300], so the litigation proceeded to discovery and a six-day trial. [Tr. 5-1282] Following trial, the superior court determined as a matter of fact that the 2014 Plan introduced many changes that decrease the coverage available to participants, that these

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[1] Alaska Constitution, art. XII, § 7.

disadvantages are not offset by corresponding new advantages, and thus the changes as a group violate the non-diminishment clause. [Exc. 170-79]

On appeal, the State principally challenges the superior court's legal ruling that retiree dental benefits are protected by the constitutional guarantee against diminishment. [At. Br. 23-35] Assuming they are, the State next challenges the court's factual finding that the 2014 Plan diminishes coverage compared to the 2013 Plan. [At. Br. 36-46] Finally, the State appeals the superior court's award of certain costs to RPEA as the prevailing litigant and two orders the court entered to enforce its judgment. [At. Br. 46-50]

RPEA responds to each of the State's arguments below, and asks this Court to affirm the superior court's rulings in all respects.

ISSUES PRESENTED

I.A. Does the Alaska Constitution protect retirees' dental insurance benefits against diminishment?

I.B. Did the superior court commit clear error in finding as a matter of fact that the 2014 Plan diminishes coverage as compared to the 2013 Plan?

II. Did the superior court abuse its discretion in awarding costs to RPEA beyond those specifically authorized by Civil Rule 79?

III.A. Did the superior court err when it enjoined the State from providing the unconstitutional 2014 Plan to retirees who did not express a choice between the 2013 and 2014 Plans during the open enrollment period in 2019?

III.B. Did the superior court err in ordering the State to provide RPEA with

information identifying certain claims that were denied as a result of the State's decision to implement the unconstitutional 2014 Plan?

STATEMENT OF FACTS

In 2014, the State unilaterally changed the dental benefits available to retirees.

The State of Alaska, since 1979, has offered dental insurance as one of the benefits available to public employees when they retire. [Exc. 112, 159] Dental insurance is offered only as part of a package that also includes vision and audio insurance; the combination is commonly referred to as "DVA insurance." [Exc. 159-60; Tr. 38, 616]

A person contemplating public employment can easily learn of the benefits then promised to retirees.[2] Upon retiring, a State employee completes a form to select the benefits she wishes to receive. [Exc. 19-36] Some retirement benefits are available to all or most retirees without payment of any premium, whereas some require all retirees to make monthly payments, typically through a reduction in the retiree's monthly payment from the State. [Exc. 26, 29; Tr. 607] Retiree DVA insurance requires payment of premiums. [Exc. 26]

Between 1979 and 2003, the State periodically altered the coverage available to retirees selecting DVA insurance.[3] None of these changes was challenged legally, and, from retirees' perspective, the changes were favorable and tended to improve the coverage

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[2] *See, e.g.*, State of Alaska, Division of Retirement and Benefits website, *www.doa.alaska.gov/drb*.

[3] *Compare, e.g.*, Exc. 116-19 (1979 Plan); R. 1328-33 (1984 Plan), 1342-47 (1989 Plan), 1421-38 (2003 Plan).

available.[4] The State made no substantive changes to the retiree dental insurance program between 2003 and 2014. [Tr. 816]

In 2013, the State unilaterally decided to change the dental portion of DVA insurance coverage, with the changes to take effect on January 1, 2014. [Exc. 13 ¶ 16; Tr. 782-91][5] The State implemented the new package of provisions by canceling the then-existing dental insurance plan and replacing it with a different plan provided by Moda Health/Delta Dental of Alaska. [Exc. 13 ¶ 16, 71-84] Prior to 2014, the State offered a custom program, where it selected the benefits to offer, then chose a third-party administrator ("TPA") to manage the claims processing. [Tr. 64-65] The State periodically contracted with a new TPA without changing the benefits package. [Tr. 52-54, 817-18, 910-11] By all accounts, the plan in effect from 2003 through 2013 was generous compared to the plans offered to public employees in many jurisdictions.[6] By contrast, the 2014 Plan was intended to be comparable to those offered in other jurisdictions, and it was essentially an "off-the-shelf" plan developed by Moda, the company the State selected as the new TPA. [Tr. 66, 853-55, 871-78]

The dental insurance plan that took effect on January 1, 2014, contained numerous obvious diminishments in coverage. Some of these included:

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4 *See id.*

5 The State provided only minimal notice of the new plan to retirees before it took effect. Alert retirees understood the changes only by reviewing the Division of Retirement and Benefits' website in early 2014. [Tr. 66, 102-03]

6 *See* Tr. 65; *see also* Tr. 1128-32, 1141-42, 1147-50, 1155-64 (testimony by State's expert identifying aspects of the 2014 Plan that are typical of retiree dental plans, though offering less coverage than the 2013 Plan).

- The 2014 Plan introduced yearly frequency limits on dental cleanings ("prophylaxis"), allowing only specified exceptions, where no fixed limits previously were part of the plan. [Exc. 165; Tr. 135-39, 914-15]

- The 2014 Plan limited coverage for full-mouth x-rays to once in five years, whereas the 2013 Plan covered such x-rays once a year. [Exc. 164; Tr. 129-30] The 2014 Plan also limited the types of x-rays that will be covered when used for diagnosis, where no limitations on type were contained in the 2013 Plan. [Exc. 164; Tr. 127-29]

- The 2014 Plan extended the time limit within which dentures could be replaced from 5 years to 7 years, regardless of the reason for needing replacement dentures. [Exc. 168; Tr. 176-77] The 2014 Plan added a 7-year time limit for covering replacements of crowns, bridges, and partial dentures, where the 2013 Plan had no fixed time limits. [Exc. 167; Tr. 165, 168-71]

- The 2014 Plan deleted coverage for topical fluoride treatments for most adults, and added frequency limits on such treatments for persons under age 19. [Exc. 165; Tr. 134-35]

- The 2014 Plan eliminated coverage for specific services that previously were covered, including diagnostic casts and study molds, palliative emergency care, indirect pulp capping, periodontal splinting, and inlays. [Exc. 164, 166, 167; Tr. 133-34, 149, 152-53, 156-58, 166-67, 936-38]

The only new coverage added by the 2014 Plan was for athletic mouthguards, available to an adult once every two years. [Exc. 168, 170-71; Tr. 183-84]

The 2014 Plan reclassified some services from class II to class III (reducing coverage from 80% to 50% of the allowed cost); it reclassified some other services from class II to class I (increasing coverage from 80% to 100% of the allowed cost). [Exc. 164-66, 168; Tr. 141-43, 147-49, 175-76]

The 2014 Plan also introduced a network with steerage. [*Compare* Exc. 62-64 *with* Exc. 75-76; Exc. 168; Tr. 117-21, 622-23][7] A "network" is, essentially, a list of dentists

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[7] Networks without steerage were part of the retiree dental plan under some previous

who have agreed to charge plan members no more than the TPA's approved prices for various services. [Tr. 54, 120-21][8] In exchange, the TPA provides these dentists' names to members and promotes use of these dentists over non-network dentists. [Tr. 56, 1043; R. 1218] "Steerage" means that patients who see a non-network dentist receive reimbursement for their costs at a lower percentage rate, even if the non-network dentist charges *less* than the TPA's approved price – so the amount subject to balance billing tends to increase. [Tr. 622-27, 693-94][9] The financial penalty for seeing a non-network dentist applies even if a retiree lives in a community with a non-network dentist but no network dentist; this situation applies in a number of communities in rural Alaska and also in parts of other states where Alaska retirees live. [Exc. 169; Tr. 193, 838-40]

The State did not analyze the changes before implementing them to determine whether overall the diminishments were offset by enhancements. [Tr. 807-08]

Procedural history

Complaint

RPEA filed suit against the State in January 2016, contending that imposing the

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TPAs, but the TPA prior to Moda had no network. [Tr. 53-54, 959]

8 In other words, to use the simplest example, for a fully covered service (i.e., a service not subject to deductible or co-pay), the network dentist agrees to accept as full payment a price set by the TPA, whereas a non-network dentist may "balance bill" the patient – i.e., bill the patient the difference between the dentist's standard fee and the fee allowed by the TPA. [Tr. 54-56]

9 Under the 2014 Plan, retirees who reside in Alaska and see a non-network dentist receive coverage at approximately 75% of the allowed cost for services by a network dentist. [Exc. 169; Tr. 121, 1045] Members of the retiree dental plan who reside outside Alaska also are financially penalized for seeing a non-network dentist, but Moda did not disclose the nature or amount of the penalty. [Exc. 75-76, 169; Tr. 120, 1045-47]

2014 Plan on retirees violates the Alaska Constitution's non-diminishment clause. [Exc. 1-8] RPEA principally sought declaratory and injunctive relief. [Exc. 7-8] Its complaint specifically requested declarations that the retiree DVA plan is an accrued benefit protected by Article XII, section 7 of the Alaska Constitution; that the 2014 Plan diminishes the accrued benefits State employees had before January 1, 2014; and that adoption of the 2014 Plan therefore violated these employees' constitutional rights. [Exc. 7] RPEA's complaint sought a permanent injunction prohibiting the State from continuing to use the 2014 Plan for retirees who were hired before January 1, 2014, and requiring the State either to reinstate the previous retiree dental plan or to adopt a new plan that offers comparable advantages. [Exc. 8] RPEA's complaint also sought its costs and attorney fees and "such other relief as the court deems just and equitable." [*Id.*]

Partial summary judgment

The parties agreed to bifurcate the legal and factual questions and, as a first step, to brief the issue whether retiree dental insurance benefits are an accrued benefit protected by the Alaska Constitution. [R. 382-84, 379] Thus, RPEA and the State submitted cross-motions for summary judgment on this legal question.[10]

The court heard oral argument on December 7, 2016 [Exc. 135-43], then ruled from the bench that dental insurance benefits are like medical insurance benefits in the sense that they vest when an employee is hired and therefore may not later be diminished. [Exc. 133-

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[10] *See* RPEA's Motion and Memorandum Supporting Partial Summary Judgment [R. 291-306, with Exhibits at Exc. 19-84 and R. 376-78], State's Opposition and Cross-Motion [R. 222-42, with Exhibits at Exc. 85-132], RPEA's Opposition and Reply [R. 202-19, with Exhibits at R. 220-21, 172-88], State's Reply [R. 189-200].

34, 142-43] The court analogized to an option contract: employees are told when they are hired that they will have an option to purchase DVA insurance when they retire, and the insurance available at retirement must be no less favorable than the insurance available when the employee is hired. [Exc. 143]

Trial

Trial was held over six days in April and July, 2019. [Tr. 5-1282] The trial focused on the factual question whether the 2014 Plan overall diminishes the benefits available to retirees as compared to the 2013 Plan. [R. 639 (RPEA's trial brief), 633 (State's trial brief)]

RPEA presented witnesses who explained the coverage of the 2013 and 2014 Plans, and the way the State administers all of its retiree benefit plans through contracts with a third-party administrator. [Exc. 159-69; Tr. 31-66, 105-86, 907-56] A major controversy at trial concerned whether the 2013 Plan covered a series of services not expressly listed in the plan handbook. [R. 542-48, 464-71, 429-33 (closing arguments)] The court ultimately found that it did. [Exc. 156-58, 162-63 ¶¶ 23-25]

RPEA also presented testimony from two dentists who explained the dental services covered under the 2013 but not the 2014 Plan; they discussed how the changes diminish coverage for certain patients, and they refuted the State's claim that the changes do no more than ensure that coverage is limited to services that are dentally necessary. [Tr. 244-89, 434-510] Both testified that the 2014 Plan does not cover some dentally necessary services that were covered under the 2013 Plan. [*Id.*]

An expert in benefit plan evaluation testified, and explained his opinion that, from the perspective of retirees participating in the dental insurance program, the 2014 Plan is

less advantageous than the 2013 Plan in terms of the services that are covered. [Tr. 356-59, 402]

The State presented two representatives of the Division of Retirement and Benefits [Tr. 604, 1032] and two experts. One expert discussed the changes in the 2014 Plan in terms of how the coverage under the 2014 Plan compares to plans offered to public retirees around the country. [Tr. 1128-65] RPEA asserted that her testimony was irrelevant, since the factual question before the court was how the 2014 Plan compares to the 2013 Plan, not how it compares to any other plan. [Tr. 1081] The State's other expert, Richard Ward, claimed that he had calculated and compared the "actuarial value" of the 2013 Plan and the 2014 Plan [Tr. 649-68] – but the superior court rejected his testimony on a number of grounds. [Exc. 172-75]

After trial, the parties submitted written closing arguments and proposed findings of fact and conclusions of law.[11]

Superior court's decision

On April 16, 2019, the court issued its findings and conclusions. [Exc. 156-80] The court accepted and signed RPEA's proposed findings and conclusions, and added some observations of its own. [*Id.*] In its own words, the court found the State's analysis to have been "biased with a view to protect the decision to change the third-party administrator, MODA, rather than to provide an objective and neutral comparison of the two plans." [Exc.

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[11] *See* RPEA's Closing Argument [R. 538-96], RPEA's Proposed Findings and Conclusions [R. 688-709], State's Closing Argument [R. 449-501], State's Proposed Findings and Conclusions [R. 502-36], RPEA's Reply Argument [R. 424-48].

157]

The remedy section declared the 2014 Plan unconstitutional and enjoined the State from continuing to offer that plan as the sole dental plan available to retirees. [Exc. 179] The court offered the State three options: (1) return to using the 2013 Plan; (2) provide retirees with the right to choose between the 2013 Plan and the 2014 Plan; and (3) develop a new plan that RPEA accepted as being comparable to, and not a diminishment from, the 2013 Plan. [*Id.*] The court allowed either party to submit a request for additional briefing on the remedy. [Exc. 180]

Attorney fees and costs

The court declared RPEA the prevailing party, entitled to move for attorney fees and costs under AS 09.60.010(c). [Exc. 180] RPEA filed a timely motion for full reasonable attorney fees and costs. [Exc. 225-35; R. 740-823 (exhibits), 861-65 (cost bill)] The State opposed the request for full attorney fees, contending RPEA was not a public interest litigant. [Exc. 237-42][12] It did not oppose RPEA's request for costs included in the cost bill submitted in accordance with Civil Rule 79. [Exc. 242] The State opposed RPEA's request for additional costs associated with experts, which RPEA contended the court was authorized to award under AS 09.60.010(c)'s language directing the award of "full reasonable attorney fees and costs" to a prevailing constitutional litigant. [Exc. 231-35, 242-45, 253-55]

The court granted RPEA's request for full attorney fees and costs in excess of those

[12] The State does not renew this argument on appeal.

authorized by Rule 79. [Exc. 190]

Post-trial issues: Enforcement of the court's order

The superior court initially declared that its order would take effect on May 1, 2019. [Exc. 158] The State promptly moved for an eight-month stay – until January 1, 2020 – on the ground that it could not put a new retiree dental plan into effect in less time than that. [R. 418-20] It also moved for prompt entry of a final judgment so that it could file an appeal. [R. 421-22]

RPEA opposed the eight-month stay but agreed to non-oppose a shorter stay to give the parties and the court a reasonable time to brief and consider the issues.[13] The court entered an order granting a limited stay by agreement. [R. 682]

RPEA also opposed the motion for entry of final judgment, noting that it already anticipated problems with enforcement of the court's order and did not want to be in an awkward position with proceedings in two courts and a possible need to litigate the jurisdiction of the superior court to act. [R. 402-03; *see also* R. 1006-09 (State's reply), R. 2651-52 (Tr. 2-6)] Final judgment was entered on August 8, 2019. [Exc. 181]

Although the court *denied* the State's motion for a stay until January 2020 [Exc. 257], the State continued to offer only the unconstitutional plan throughout 2019. It announced in August that it would implement a two-plan system effective January 1, 2020, under which retirees could choose whether to participate in the 2013 Plan or the 2014 Plan.

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[13] *See* R. 410-11 (RPEA's non-opposition to limited stay), 398-401 (RPEA's opposition to stay until January 2020); *see also* R. 683-84 (State's unopposed motion for a limited stay), 995-1005 (State's reply in support of its motion for stay until 2020), 987-91 (RPEA's surreply and order accepting it).

[R. 2653 (Tr. 10), 962-84; Exc. 260-61] Later, the State announced that membership in the 2013 Plan would cost slightly more. [Exc. 186]

The court gave the State no orders on how to implement a plan responsive to its April 2019 order, other than to tell the State, in response to a motion by RPEA, that it could not use the unconstitutional 2014 Plan as the default for retirees who, during the 2019 open enrollment period, failed to select which plan they preferred. [Exc. 195][14]

The court also ordered the State to identify certain claims that were denied as a result of the State's operation of an unconstitutional plan; the order applied only to claims submitted after January 29, 2016 (the date RPEA filed its complaint) by retirees who did not select the 2014 Plan. [Exc. 195-96, 223] RPEA did not seek and was not granted the right to seek reimbursement for claims wrongfully denied. [*Id.*][15] Any relief to retirees could come only in separate actions. The order requiring the State to identify these claims has been stayed pending appeal based on RPEA's non-opposition. [At. Br. 21]

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14 The court first made this ruling orally at a status conference on November 19, 2019, but the State failed to ensure that the record on appeal includes the transcript or even the log notes of this hearing. After the State moved to stay that order pending appeal [R. 2306-24], the court issued an order denying the stay, in which it wrote: "The 2014 plan was found to be unconstitutional. The State has provided no justification as to why it could ignore the court's order and require people to continue in that plan unless they opted out. Every retiree has a right to be enrolled in a constitutionally firm plan, but they can voluntarily opt out of it and into a constitutionally infirm plan – not the other way around." [Exc. 214] *See also* Exc. 259-61, 263-64 (RPEA motion for order precluding the State from using the 2014 Plan as the default for retirees who did not select a plan during the open enrollment period), 282-83 (State's opposition), 293 (RPEA reply); R. 2285-2305 (RPEA opposition to motion for stay), 2253-84 (State's reply).

15 *See also* Exc. 264-65 (RPEA's motion), 279 (State's opposition), 291 (RPEA reply); R. 2220-26 (State's motion for reconsideration or clarification), 2210-12 (RPEA's court-invited response).

STANDARDS OF REVIEW

This Court applies its independent judgment when reviewing questions of law, including interpretation of the constitution.[16]

This Court reviews a superior court's fact-findings deferentially, particularly when the fact-findings are based primarily on oral testimony, "because the trial court, not this [C]ourt, judges the credibility of witnesses and weighs conflicting evidence."[17] A fact-finding should be reversed only if it is clearly erroneous. A finding is clearly erroneous if the finding leaves this Court "with a definite and firm conviction on the entire record that a mistake has been made."[18]

This Court reviews most questions concerning the award of costs and attorney fees for abuse of discretion.[19] The interpretation of a statute that applies to the award is reviewed de novo.[20] These same standards apply to review of post-judgment rulings to enforce the court's judgment.[21]

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16 *See Taffe v. First Nat'l Bank of Alaska*, 450 P.3d 239, 242-43 n.8 (Alaska 2019); *Duncan v. Retired Public Employees of Alaska, Inc.*, 71 P.3d 882, 886 (Alaska 2003).

17 *Ott v. Runa*, 463 P.3d 180, 185 (Alaska 2020), quoting *Sheffield v. Sheffield*, 265 P.3d 332, 335 (Alaska 2011); *see Burns v. Burns*, 466 P.3d 352, 359 (Alaska 2020).

18 *Riddle v. Lanser*, 421 P.3d 35, 44 (Alaska 2018) (internal quotation marks omitted).

19 *See id.*

20 *See Alaska Conservation Found. v. Pebble Ltd. P'ship*, 350 P.3d 273, 279 (Alaska 2015).

21 *See Horchover v. Field*, 964 P.2d 1278, 1281 (Alaska 1998) (whether the trial court enforced a judgment or instead added terms is a legal question that this Court reviews de novo; if the court acted to enforce its judgment, this Court reviews the enforcement action for abuse of discretion).

ARGUMENTS

I. THE SUPERIOR COURT CORRECTLY DETERMINED THAT THE 2014 RETIREE DENTAL PLAN UNCONSTITUTIONALLY DIMINISHES RETIREES' ACCRUED BENEFITS.

The Alaska Constitution provides expressly that "[m]embership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship" and "[a]ccrued benefits of these systems shall not be diminished or impaired."[22] The State's appeal challenges the superior court's legal determination that retirees' dental benefits are a type of accrued benefits constitutionally protected against diminishment, and the court's factual determination that the 2014 retiree dental plan provides overall diminished benefits as compared to the 2013 Plan. RPEA contends that the superior court resolved both these issues correctly.

A. THE ALASKA CONSTITUTION PROTECTS RETIREES' DENTAL INSURANCE BENEFITS AGAINST DIMINISHMENT.

The Territorial government of Alaska, even before Statehood, offered retirement benefits to its employees.[23] The framers of the Alaska Constitution drafted Article XII, section 7 to ensure that public employees would not work for years, expecting these benefits, and then have the State or other public employer decide not to provide these benefits.[24] Retirement benefits are important to public employees, since public salaries

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22 Alaska Constitution, art. XII, § 7.

23 *See* Proceedings of the Alaska Constitutional Convention 2288-89 (Jan. 16, 1956); Exc. 131-32.

24 *See* Proceedings of the Alaska Constitutional Convention 2288-90 (Jan. 16, 1956), 2790-91 (Jan. 20, 1956).

often do not match those available in the private sector, but public retirement benefits frequently are more secure and more generous.[25]

In *Hammond v. Hoffbeck*, this Court held that all the benefits that are part of the retirement system are protected by the Alaska Constitution against diminishment.[26] It does not matter that not all retirees ever avail themselves of these programs.[27]

The State began offering medical insurance benefits to State employees in 1975.[28] To receive these benefits, a retiring employee must submit a form electing coverage. [Exc. 33-35] Retirees may waive the benefit.[29] Most retirees electing coverage do not pay out-of-pocket for their retiree medical insurance, although some employees who are eligible to select medical insurance must pay monthly premiums for that coverage.[30] The State has always advised employees that the exact coverage of their medical insurance may change over time. [*E.g.*, R. 177] In *Duncan*, this Court held that medical insurance benefits are protected by Article XII, section 7, even though they likely were not a benefit contemplated by the framers.[31] Consequently, as *Duncan* explained, the State may change the coverage

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[25] *See Hammond v. Hoffbeck*, 627 P.2d 1052, 1057 n.10 (Alaska 1981).

[26] *See id.* at 1055-56.

[27] *See, e.g.*, *Sheffield v. Alaska Public Employees' Ass'n, Inc.* ("*APEA*"), 732 P.2d 1083, 1084-89 (Alaska 1987) (optional early retirement benefits are constitutionally protected); *Hoffbeck*, 627 P.2d at 1058 (occupational disability benefits are constitutionally protected).

[28] *See* AS 39.35.535 (initially enacted as SLA 1975, ch 200, § 2); *Duncan*, 71 P.3d at 885.

[29] *See* Exc. 35 (retiree may check a box electing "No medical coverage").

[30] *See* Exc. 29 (row on "Premiums Required").

[31] *See* 71 P.3d at 888.

package over time as health care evolves, but the overall value of the coverage to retirees as a group may not be diminished.[32] At retirement, each employee is entitled to medical insurance benefits equivalent in value to those available to retirees on the day the employee was hired, or to any improved insurance package that the State offered during the employee's tenure.[33]

In 1979, the State added DVA insurance to the benefits available to retirees.[34] As with retiree medical insurance, the State's retiree DVA insurance is available only to participants in one of the State's retirement plans[35]; the insurance is thus a part of the retirement package. To select retiree DVA insurance, a retiring employee completes the same Application for Retirement Benefits she completes to obtain retiree medical insurance benefits. [Exc. 33-35] The form also allows retirees to select other retirement benefits, including long-term care insurance. [*Id.*] Historically, over 80% of retirees select DVA insurance. [Tr. 38, 1253-54; R. 1986]

DVA and long-term care insurance are often termed "optional" or "elective" benefits, where those terms are used in two senses. [At. Br. 8-9] First, the enabling statute

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32 *See id.* at 891.

33 *See id.* at 886. Additionally, an individual retiree may demand to continue to receive the benefits of a former system, rather than the one in place when she retired, if she can show that the change in the package of benefits presents a "serious hardship" to her, even when the changes overall do not disadvantage retirees as a group. *See id.* at 892.

34 *See* Exc. 112; AS 39.30.090(a)(10).

35 *See* AS 39.30.090(a)(10) ("A person receiving benefits under AS 14.25, AS 22.25, AS 39.35, or former AS 39.37 may obtain auditory, visual, and dental insurance for that person and eligible dependents under this section.").

provides that the State *may* offer these benefits,[36] whereas other statutes provide that the State will offer retirement benefits and medical insurance to specified employees.[37] Second, the State calls these benefits "optional" or "elective," because a retiring employee may choose them, whereas nearly all employees are provided retirement and medical benefits.

The fact that some benefits are "optional" in either sense is not legally significant in this case. As to the first meaning of "optional," once the State chooses to offer a certain benefit to retirees, the benefit is part of the package of retirement benefits offered to the employee on the day he is hired.[38] That the State legally could have chosen not to offer this benefit to retirees is immaterial. This case concerns a benefit that the State has chosen to offer throughout the past 40 years. As to the second meaning of "optional," *all* benefits must be elected at the time an employee retires. [Exc. 33-35] A retiree may choose not to participate in any of the benefit programs.[39]

The only true difference between DVA and other optional benefits (on the one hand) and medical benefits (on the other) is that all retirees who select an optional benefit must pay a monthly premium for the insurance, whereas most retirees do not need to pay monthly premiums for their medical insurance. [Exc. 29] However, the State conceded below that

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36 *See* AS 39.30.090(a).

37 *See* AS 39.35.370 (retirement benefits), .535 (medical benefits).

38 *See generally APEA*, 732 P.2d at 1084-89 (constitution protects the benefits of an optional early retirement program, which subsequently was cancelled).

39 *See* AS 39.35.510 (retiree may waive retirement benefits); Exc. 35 (retiree may waive medical benefits).

even retirees who must pay premiums for their medical insurance receive constitutional protection for this benefit.[40] In other words, the State has acknowledged that payment of premiums during retirement cannot be the determinative factor on whether a benefit is protected against diminishment by Article XII, section 7.

The State's position on appeal – that this difference in payment (for most but not all retirees) makes DVA insurance not an "accrued benefit" protected by the constitution [At. Br. 23] – is inconsistent with *Duncan* and other cases.

This Court has held repeatedly that a public employee's retirement benefits "accrue" on the day he or she is hired.[41] That means that the benefits available to a retiree on the day of hiring may not subsequently be diminished.[42] Further, this Court has held that the constitutional term "accrued benefits" must be interpreted broadly,[43] so that the entire retirement package offered at the time of employment is part of the employee's contract. Constitutional protection extends to "all retirement benefits that make up the retirement benefit package that becomes part of the contract of employment when the public employee

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[40] *See* R. 236 ("The State recognizes that not all PERS members are entitled to receive major medical insurance at no cost and that these retirees must pay premiums. *See* [Exc. 29]. The State does not contend that major medical was not a part of the employment contract for those employees that must pay premiums.").

[41] *See McMullen v. Bell*, 128 P.3d 186, 190 (Alaska 2006); *Duncan*, 71 P.3d at 886; *Flisock v. State, Div. of Retirement & Benefits*, 818 P.2d 640, 643 (Alaska 1991); *Hoffbeck*, 627 P.2d at 1057.

[42] *See Duncan*, 71 P.3d at 886 ("system benefits offered to retirees when an employee is first employed and as improved during the employee's tenure may not be 'diminished or impaired'"); *Flisock*, 818 P.2d at 643-45; *Hoffbeck*, 627 P.2d at 1057.

[43] *See Duncan*, 71 P.3d at 887.

is hired."[44] Moreover, this Court has made clear, the constitution protects the details of a benefit that determine its value to the retiree, not just the general concept of the benefit.[45]

Nothing in *Duncan* or in any other case establishes that, to be constitutionally protected, the retirement benefit must be provided during retirement without cost to the retiree. (As noted earlier, even the State has not consistently embraced that position.) The question is solely what was the employee told when first hired about the benefits that would be available upon retirement.[46]

The superior court used a commonsense analogy to an option contract. [Exc. 143] A contract is no less binding merely because it offers the employee an *option* to purchase something at a later point in time, as distinct from stating a binding commitment that the retiree will purchase it. A new employee who is told that dental insurance will be available when she retires can look at the terms of the retiree dental package in effect at that time, and she can rely on having the same – or better – insurance available to her when she retires.[47] Knowing that, an employee can plan. For example, she might opt not to pay for

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44 *Id.* at 888; *see also APEA*, 732 P.2d at 1087 (Article XII, section 7 protects the "practical effect of the whole complex of provisions" provided to retirees (internal quotation marks omitted)).

45 *See Flisock*, 818 P.2d at 643-45 (constitution requires State to use the method of calculating monthly retirement benefits that was in effect when the employee was hired, when that method included counting cashed-in leave when calculating the monthly retirement benefit); *APEA*, 732 P.2d at 1084-89 (constitution requires State to use the actuarial table in effect at the time the employee was hired, not a less advantageous one adopted later, when calculating an employee's early retirement benefit).

46 *See Duncan*, 71 P.3d at 887-88; *Flisock*, 818 P.2d at 643-45; *APEA*, 732 P.2d at 1089.

47 The State contends that the offer to let an employee purchase a retiree dental plan when she retires is not sufficiently definite to create a valid option contract [At. Br. 34-35],

dental insurance while she is employed, preferring to save her money to fund dental insurance in her retirement years, when her dental needs likely will be more expensive. If the State could cancel or diminish the DVA coverage just before or after the employee retires, her long-term planning and expectations would be defeated. Equivalent coverage might not be easily available for an individual of retirement age suddenly forced to shop for a commercial dental insurance plan.[48]

The State also attempts to distinguish medical insurance from DVA insurance by calling medical insurance a form of "deferred compensation," part of a unilateral contract that the employee accepts when she begins working, while insisting that DVA insurance differs because it is offered pursuant to a bilateral contract that the employee may accept, if it is available, when she retires. [At. Br. 24-29] This argument uses different terms, but at base it does not differ from the State's main argument, discussed above. Whether dental insurance is part of the contract that employees form when they are hired is the central question this Court must resolve, not something the State may presume. The State offers no principled basis for defining some retiree benefits as "deferred compensation" while

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but the State's argument begins with a faulty premise: that the package of dental benefits may change. In fact, the point of the constitutional protection is that the package may *not* change, except in ways advantageous to retirees. Thus, the offer of retiree dental benefits to a new employee is very specific: the employee will be able to purchase the retiree dental plan then in effect, or another more advantageous plan if one is subsequently offered.

[48] This is even more true for long-term care insurance. Retirees who select this optional benefit pay premiums to ensure the benefit will be available in the future if they need it. No one would pay premiums – possibly for decades – if there were a risk that the coverage could be withdrawn or diminished right before the retiree or a covered family member needs the health care the premiums have paid for.

others, described in the same employee handbooks, are merely something that might be available later.

This Court's treatment of early retirement benefits provides an instructive analogy. For a period of time prior to 1986, the State offered an optional early retirement benefit, under which eligible employees could opt to retire at age 50 instead of the then-usual minimum retirement age of 55; an early retiree received the regular retiree benefits, but monthly payments were adjusted actuarially to be equivalent over the retiree's lifetime to the benefits that would be available if the employee retired at age 55.[49] In 1980, the PERS board changed the actuarial calculation; as a result, an employee taking early retirement after 1980 would receive less in monthly payments than the employee would have received under the formula in effect when the employee was hired.[50] This Court held that altering the formula, which diminished retirees' benefits, violated the non-diminishment clause.[51] The holding is significant to the current case because, like DVA benefits, the early retirement benefits were entirely "optional." Employees were told when they were hired about this benefit they might choose in the future, but the choice of whether to accept the benefit did not occur until the moment of retirement. Presumably, many employees never selected early retirement benefits. Yet those who chose the benefit were entitled to receive it on the same terms offered to them at the time they were hired.

For the same reasons that the State calls the contract for DVA insurance benefits

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49 *See APEA*, 732 P.2d at 1084 (discussing former AS 39.35.370(a)-(c)).

50 *See id.*

51 *See id.* at 1084-89.

"bilateral," the contract for early retirement benefits can be termed bilateral: In both settings, the available benefit is an offer to contract in the future; the benefit is accepted only if the employee chooses it at the time of retirement. Since the early retirement benefit option is constitutionally protected, so too must the constitution protect the retiree DVA insurance option.

The State discusses case law from other jurisdictions [At. Br. 31-32] – but cases from other states are of limited value. No other court has addressed exactly the issue presented in this case. Only seven states have a constitutional provision equivalent to Alaska's Article XII, section 7,[52] and, even among those that do, some courts distinguish between retiree pension benefits and retiree health insurance benefits.[53] The State cites a Nebraska cases that distinguished between pension benefits and long-term disability benefits,[54] without noting that this Court has held that disability benefits *are* protected against diminishment.[55] Rather than consider the Nebraska case the State cites, this Court might consider cases from Hawai'i and Illinois, two states that (unlike Nebraska) have a

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[52] *See* How Are Pensions Protected State-by-State?, *https://www.governing.com/finance101/gov-pension-protections-state-by-state.html* (last visited September 23, 2020).

[53] *See, e.g.*, *Musselman v. Governor*, 533 N.W.2d 237 (Mich. 1995), *modified*, 545 N.W.2d 346, 347-48 (Mich. 1996).

[54] At. Br. 31-32, citing *Livingston v. Metro. Util. Dist.*, 692 N.W.2d 475, 480-81 (Neb. 2005).

[55] *See Hammond v. Hoffbeck*, 627 P.2d 1052, 1055-58 (Alaska 1981). RPEA recognizes that Nebraska disability benefits differ from Alaska's long-term disability benefits because Nebraska retirees must select the benefits and pay a premium. *See Livingston*, 629 N.W.2d at 480.

non-diminishment clause in their constitutions.[56] In a decision comparable to *Duncan*, the Hawai'i Supreme Court held that retirees' health benefits are protected just like retirement benefits.[57] The critical factor in the court's analysis was that both are based on membership in the state retirement system.[58] Notably, the Hawai'i court did *not* distinguish between retirement benefits and medical insurance on the ground that, in Hawai'i, retirement benefits are funded by contributions made by the state and employees during their years of active service, whereas participation in the retiree medical insurance plan may require retirees to pay premiums.[59] The Illinois Supreme Court held (like *Duncan*) that the constitutional non-diminishment clause protects retiree medical benefits.[60] Like the Hawai'i court, the Illinois court focused on the fact that the benefit "is derived from membership in one of the State's public pension systems. If it qualifies as a benefit of membership, it is protected."[61] The logic of the Hawai'i and Illinois cases applies to Alaska's retiree DVA insurance. The DVA benefit is available only to members in one of the State's public retirement systems; in other words, it "derives from membership in one of the State's public pension systems." Consequently, this Court should hold that the

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[56] *See* Haw. Const. art. XVI, § 2; Ill. Const. art. XIII, § 5.

[57] *See Everson v. State*, 228 P.3d 282, 297-99 (Haw. 2010).

[58] *See id.*

[59] *See id.* at 298.

[60] *See Kanerva v. Weems*, 13 N.E.3d 1228, 1239-44 (Ill. 2014).

[61] *Id.* at 1244; *see also id.* at 1240 ("Although some of the benefits are governed by a group health insurance statute and others are covered by the Pension Code, eligibility for all of the benefits is limited to, conditioned on, and flows directly from membership in one of the State's various public pension systems.").

Alaska Constitution protects retiree DVA benefits against diminishment.

As a fallback position, the State asks this Court to hold that at most the constitution protects the opportunity to purchase DVA coverage, rather than the scope of coverage. [At. Br. 32-35][62] This Court should reject this argument, because the "protection" offered under this theory is meaningless, as a single example illustrates. Under the State's theory, the State could offer a robust dental insurance plan to retirees in 1990, when an employee is first hired. When the employee retires 30 years later, in 2020, all the State would have to offer to satisfy the constitution is dental insurance that covers one cleaning per year, with no other service. This protection against diminishment of benefits is illusory. This is not a sensible reading of a constitutional guarantee.

This Court should affirm the superior court's conclusion that, when public employees are hired, they are offered the opportunity to purchase, when they retire, the specific retiree dental insurance plan then available to retirees or another one of equivalent or enhanced value. That benefit therefore is protected against diminishment.

B. THE SUPERIOR COURT CORRECTLY DETERMINED THAT THE 2014 PLAN OVERALL DIMINISHES COVERAGE AS COMPARED TO THE 2013 PLAN.

The superior court's conclusion that the 2014 Plan diminishes coverage compared to the 2013 Plan is based on numerous specific findings of fact. [Exc. 159-75] The centerpiece of the court's analysis is the table that summarizes the changes the State made

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[62] The State cites an ERISA case on medical benefits. [At. Br. 35, citing *In re Unisys Corp. Retiree Medical Benefits "ERISA" Litigation*, 58 F.3d 896 (3d Cir. 1995)] This Court in *Duncan* specifically rejected the holding in that case as inapposite to a constitutionally protected benefit. *See* 71 P.3d at 887.

in 2014. [Exc. 164-68] The State does not contend that any fact-finding in the table is erroneous. [At. Br. 36-46] This Court can look at the table, as the superior court did, and reach the same conclusion: The 2014 Plan introduced many diminishments and very few enhancements.

Instead of properly applying the standard of review appropriate to fact-findings – where the appellate court accepts the trial court's findings unless they are clearly erroneous[63] – the State asks this Court to accept the testimony of its own witnesses. [At. Br. 39, 43-45] RPEA asks this Court to adhere to the well-established standard for reviewing facts, and, on that basis, to affirm the superior court's findings.

(1) The superior court did not err in not considering the premiums charged.

The State's main defense to its decision to adopt the 2014 Plan was its claim that the 2014 Plan offers retirees lower premiums. [Exc. 157 ("The defendant's focus was solely on the premium paid rather than the impact on the benefits offered."); R. 452-56] The State renews this argument on appeal, asserting that "premiums must play a part" in evaluating whether the 2014 changes enhance or diminish coverage. [At. Br. 37] The State does not make clear precisely what part in the analysis reduced premiums should play – and it should be clear to this Court that a plan that costs less but provides less coverage is not a non-diminished plan under *Duncan*.

Duncan expressly rejected the State's claim that medical insurance benefits were not diminished because the State continued to pay the same premium per retiree, even

[63] *See supra* at 13.

though the dollars bought less due to the increasing cost of medical care.[64] This Court held that the constitution protects coverage, not premiums.[65]

As discussed in the preceding argument, the fact that retirees pay the premiums for DVA insurance, while most retirees do not pay premiums for their medical insurance, should not support a different analysis of coverage, which would compel a different interpretation of the constitution. The State alone sets the premiums. [Tr. 42, 620-21] To set the premium, the State takes into account the estimated cost of covered dental services, the administrative fees of the TPA, the State's own administrative and legal expenses, and the State's decisions on funding a reserve account. [Tr. 620, 884] To let concern for premiums determine whether retirees' benefits are diminished would mean that retirees' guarantee against diminished benefits would depend on the State's choices in negotiating contracts with TPAs and the expenses the State chooses to incur to administer its plans.[66] Retirees' protection against excessive premiums inheres in their right to discontinue participation in the DVA plan if they find the premiums unreasonably expensive for the coverage offered. Further, the State may use the fact that retirees pay premiums to offer two plans – one that preserves the existing coverage with increasing premiums and another with reduced coverage and reduced premiums. This is, of course, exactly what the State

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64 *See* 71 P.3d at 888-89.

65 *See id.* ("The natural and ordinary meaning of 'benefits' in a health insurance context refers to the coverage provided rather than the cost of the insurance.").

66 Further, there actually is no "dental insurance" premium. Retirees purchase DVA insurance [R. 1903], so the premium also is affected by health care costs and administrative costs associated with vision and audio insurance.

did after losing at trial.

The doomsday scenario that the State paints concerning the "actuarial death spiral" [At. Br. 38-39] resembles the argument the State presented in *Duncan*: that it should be allowed to reduce coverage because increasing medical costs threatened the State's long-term ability to pay any benefits to retirees.[67] This Court understood the practical realities and respected the State's concern as "serious," but found the argument was not "sufficient to change the meaning of the constitutional language in question."[68] That same response is appropriate here.

Moreover, the State is wrong that the record establishes that any diminishment in coverage is offset by the reduction in premiums. [At. Br. 40] No such evidence was presented at trial. If, hypothetically, there is a way to compute the overall benefit to retirees of a package that offers lower premiums and less coverage and compare that to a package with higher premiums and more coverage, no witness offered such an analysis.

Also, factually contrary to the State's claim [At. Br. 40], the credible trial evidence did not establish that the 2014 Plan pays a higher percentage of the cost of covered care. Although the State's expert, Richard Ward, offered that opinion [Tr. 651-68; R. 2122], his methodology was suspect and his conclusions were rejected by the trial court on a number of grounds [Exc. 173-75]:

- Most critically, Ward was mistaken in multiple respects regarding what he

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67 *See* 71 P.3d at 888-89.

68 *Id.* at 889.

treated as covered and not covered under the 2013 Plan. The parties contested whether the 2013 Plan covered a series of services not expressly listed in the plan handbook.[69] The court accepted RPEA's evidence that it did [Exc. 156-58, 162-63 ¶¶ 23-25, 177-78] – and the State does not challenge this fact-finding on appeal. Ward's analysis is unreliable because it depended on an interpretation of coverage under the 2013 Plan that the superior court rejected.[70]

- In calculating the percentage of costs covered by the 2014 Plan, Ward excluded all out-of-network claims [Tr. 659], for which retirees typically receive reimbursement at a lower percentage. [Tr. 624; Exc. 173][71] His exclusion of non-network claims skewed the analysis in favor of the State. [Exc. 173][72]

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[69] *See supra* at 8.

[70] *Compare* R. 2121, 2130 (Ward's lists of changes that he believed had no actuarial impact and those that he considered diminishments and enhancements) *with* Exc. 164-68, 170-71 (court's findings on changes and diminishments); *see also* R. 579-83 (RPEA's closing argument providing greater details on Ward's erroneous assumptions about coverage under the 2013 Plan); *see generally* Tr. 894-95, 922-26, 946 (RPEA witness who helped administer the 2013 Plan testified that Exhibit 1001 [R. 1043-49] accurately lists services covered under the 2013 Plan and Exhibit 1007 [R. 1100-05] accurately describes coverage under the 2013 Plan).

[71] Out-of-network claims submitted by Alaska retirees comprised 25-35% of their total claims in 2014-2016; out-of-network claims from retirees residing outside Alaska comprised 12-17% of their total for those years. [Tr. 190; R. 1115]

[72] RPEA demonstrated this using Moda's data, as reported to the State, which included both network and out-of-network claims. For each year for which data were available, RPEA calculated the percentage of covered claims that was paid by the 2014 Plan. For each year, the percentage paid by the plan considering all claims is *less* than the percentage Ward calculated using just network claims. *See* R. 575-79 (explaining the calculation based on dividing the average amount the plan paid per member per month ("PMPM") by the average total amount of covered charges per member per month). For the data RPEA used, see R. 1286 (listing "Spend Per Member Per Month" and "Allowed PMPM" for 2014-2016); for Ward's calculations, see R. 2122. RPEA's calculations for the percentage

- In calculating the percentage paid by the 2013 Plan, Ward adjusted for inflation, but he made no inflation adjustment for the years covered by the 2014 Plan. [Tr. 664-65, 716-18] Ward explained that, in any plan with a fixed deductible – and both the 2013 and 2014 Plan have a $50 deductible applicable to class II and class III services – the effect of inflation is to increase the percentage of covered services paid by the plan. [Tr. 665, 714-16, 720] Thus, adjusting for inflation for 2013, but not for 2014-2017, also tended to exaggerate the percentage of covered claims paid by the 2014 Plan. [R. 577]

For these reasons and others, the trial court expressly rejected Ward's opinions. [Exc. 173-75] Because the trial court's bases for rejecting Ward's opinions were reasonable, this Court must accept them. Based on the trial court's fact-findings, this Court cannot accept the State's claim that the record shows that the 2014 Plan offers better coverage for lower premiums.

This Court should reject the State's claim that, because the superior court did not focus on premiums, this Court should find that it erred in concluding that the 2014 Plan offers diminished coverage compared to the 2013 Plan.

(2) The superior court did not err in not requiring RPEA to present an actuarial analysis to prove diminished coverage.

Duncan required this Court to resolve three legal questions: whether the Alaska Constitution protects retiree medical insurance coverage against diminishment, whether diminishment should be evaluated by examining premiums or coverage, and whether

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of allowed cost paid by the plan were, for 2014, 68.4% (compared to Ward's 72.1%); for 2015, 68.8% (compared to Ward's 72.6%); and for 2016, 69.5% (compared to Ward's 73.0%).

diminishment in the context of medical insurance should be measured from the perspective of an individual retiree or from the perspective of retirees as a group.[73] After addressing those issues, this Court offered "a number of cautions that may help to guide any equivalency analysis of health coverage changes."[74] The first caution the Court offered was that "equivalent value must be proven by reliable evidence."[75] This means, the Court continued, "offsetting advantages and disadvantages should be established under the group approach by solid, statistical data drawn from actual experience – including accepted actuarial sources – rather than by unsupported hypothetical projections."[76]

Drawing on this language, the State contends that RPEA could not prove diminished benefits without a formal actuarial analysis. [At. Br. 40-42] This Court should reject that claim as unsupported by *Duncan*. First, the quoted part of *Duncan* is unquestionably dicta; it cannot fairly be read as a holding prescribing how all parties in all diminishment cases must prove their claims.[77] Second, *Duncan* states only that reliable proof *may* use accepted actuarial sources in lieu of data drawn from actual experience; it does not state that actuarial analysis is required. Third, the passage in *Duncan* on which the State relies – "equivalent

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[73] *See* 71 P.3d at 886.

[74] *Id.* at 891-92.

[75] *Id.* at 892.

[76] *Id.*

[77] The *Duncan* Court was reacting to arguments the State advanced in *Hoffbeck*, where the State attempted to defend certain changes as non-diminishments based on hypotheticals that did not correspond to the circumstances of the individuals who sued. *See Duncan*, 71 P.3d at 892, referring to *Hoffbeck*, 627 P.2d at 1058.

value must be proven by reliable evidence . . . including accepted actuarial sources"[78] – implicitly addresses the State, rather than a plaintiff challenging the State's plan, because the *challenger* will want to show *non-equivalent* values. *Duncan*'s language suggests that the State should not introduce a new plan unless and until it has subjected the proposed plan to rigorous analysis to satisfy itself and members that the new plan does not diminish the coverage that is constitutionally protected.[79] Arguably, the State should be required to provide a credible, *Duncan*-compliant analysis demonstrating equivalence before a challenger has any burden of proving that the State's analysis is flawed. Unquestionably, the State performed no such analysis before it implemented significant changes in the retiree dental plan. [Tr. 807] It developed its analysis only for litigation. [Tr. 671][80]

Most important, this Court's central point in *Duncan* was to stress that any analysis of equivalency must be based on "reliable evidence," rather than "unsupported hypothetical projections." RPEA met this test. It did not rely on hypothetical projections. It did rely on reliable evidence – principally the language of the 2013 Plan as compared to the 2014

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78 71 P.3d at 892.

79 The State acknowledged its fiduciary duty to retirees in administering health insurance contracts. [Tr. 628] A fiduciary should never act in a way that would violate retirees' constitutional rights. *See generally O.K. Lumber v. Providence Wash. Ins. Co.*, 759 P.2d 523, 525 (Alaska 1988) (recognizing the fiduciary relationship inherent in every insurance contract).

80 The superior court observed: "The defendant was in the best position to provide a complete and thorough evaluation of the 2013 and 2014 dental plans, but did not conduct that evaluation except to prepare for litigation. The analysis/comparison by the defendant was biased with a view to protect the decision to change the third-party administrator, MODA, rather than to provide an objective and neutral comparison of the two plans." [Exc. 157]

Plan, supplemented by reliable first-hand testimony of how the 2013 Plan was administered in practice.[81] Unlike the retiree medical plan, which encompasses 45 pages in one of the State's plan handbooks, the dental plan can be described in 8 pages.[82] The dental plan covers just 34 distinct services. [Exc. 164-68] Thus, it is possible to compare two plans by looking at each item separately and determining whether coverage for each remained the same, was enhanced, or was diminished. The trial court did exactly that; after reviewing the plan booklets and listening to trial testimony, the court itemized the changes in a table. [*Id.*] The court found that coverage for 24 services was diminished and coverage for three services was enhanced. [Exc. 170][83] The State has not claimed that any of these findings is mistaken.

In the clearest case, where a plan change includes *only* diminishments and no enhancements, it would be nonsensical to suggest that a plaintiff challenging the changes would fail if it did not offer an actuarial analysis. The present case is nearly that clearcut.

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81 *See* R. 588-91 (Table 1 to RPEA closing argument) (providing citations to specific exhibits and testimony to establish the coverage of the 2013 Plan and 2014 Plan), 550-54, 436-39 (narrative descriptions of changes in RPEA's closing argument).

82 *Compare* R. 1781-1826 (medical plan description in the Retiree Insurance Information Booklet for the 2003 Plan, as amended through 2016) *with* R. 1735-42 (amended dental plan description in the same booklet) *and* R. 1834-42 (dental plan description before 2014 amendments).

83 The court (evidently inadvertently) omitted coverage for two services from the summary count; coverage for both (root canal and retreatment, and denture adjustment, repair, and relining) is shown in the court's table as diminished. [Exc. 166, 168] The table also shows that coverage for three services was unchanged. [Exc. 166-67] The court deliberately did not list benefits associated with implants as either a diminishment or improvement, because the preponderance of the evidence did not establish that benefits were improved rather than remaining unchanged. [Exc. 170-71] *See generally* R. 553 (discussing the evidence relating to implants).

Here, simply counting the services for which coverage was enhanced and those for which coverage was diminished should be sufficient to demonstrate reliably that the diminishments are not offset by corresponding enhancements. But the superior court did more than that. It also considered "the magnitude of each change, the number of members affected by the changes, the fact that two of the enhancements are in themselves a mix of an enhancement (improvement of the class of coverage) and a diminishment (frequency limitations were imposed), and the fact that the only unequivocal enhancement (coverage for athletic mouthguards) is of limited utility to a largely retired population." [Exc. 171] The court observed that, if the balance between enhancements and diminishments were close, it would want to defer to an expert – but the comparison here is not close. [Exc. 177][84]

The State attacks one portion of the court's findings – the phrase that states the court considered the number of people affected by the changes. [At. Br. 42] The State misunderstands what the court evidently meant. The trial testimony established that a major way in which retirees were affected by the 2014 changes was that many decided *not* to seek treatment for services they knew would not be covered.[85] Therefore, simply

[84] The court also had expert testimony from RPEA's witness, who was accepted as an expert benefit consultant; that expert testimony supported the court's conclusion. [Exc. 171; Tr. 331-402]

[85] RPEA's witness Kathleen ("Kelly") Farmer was operations manager for the TPA who administered the 2013 Plan from 2009 through 2013. [Tr. 894-95] She testified from firsthand experience that retirees typically are very knowledgeable about their coverage and tend not to receive treatment that will not be covered. [Tr. 971] RPEA's two expert dentists corroborated this. Both testified that their patients considered whether services

counting claim denials, as the State does, does not capture the number of people adversely affected by the changes. Another aspect of considering the number of people affected by the changes was to examine age categories; although some changes enhanced benefits for participants under age 19, they had a minimal effect on participants in the retiree dental program, because only a tiny percentage of plan participants are that young.[86]

In short, the superior court appropriately found that, even though RPEA did not offer an actuarial analysis, RPEA proved with reliable evidence that the 2014 Plan offers diminished coverage to retirees as a group.

The State touts the testimony of its own expert, Richard Ward, but, as already discussed, the trial judge listed multiple reasons for rejecting Ward's testimony. [Exc. 173-75] In asking this Court to substitute its own findings on credibility, the State contends that Ward's methodology should be accepted because, the State says, Ward used both the methodology required by the Affordable Care Act ("ACA") and the methodology used by the State's experts on remand in *Duncan*. [At. Br. 43] Even were this Court inclined to re-assess credibility, the State's references to the ACA and to the reports presented during the *Duncan* remand provide no sound basis for overriding the superior court's credibility findings.

The ACA methodology was developed so applicants can compare plans to

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would be covered by insurance, and that some refused necessary care because it would not be covered. [Tr. 238, 432-23]

[86] *See* R. 1288 (in 2017, only approximately 6% of all plan participants were under age 50).

determine the percentage of the overall covered costs the plan will likely cover. [R. 1224][87] However, defining actuarial value in terms of the average percentage of covered costs paid by the plan rather than by the consumer does not take into account what services are or are not covered. [Tr. 668, 730-31] Two examples make this point clearly. If the 2013 Plan paid 100% of the allowed cost for any number of cleanings per year (and there is evidence it did [Tr. 914-15]), and the 2014 Plan paid 100% of the allowed cost for only two cleanings per year (which it did for most members [Exc. 78-79]), both have the same actuarial value – but clearly the earlier plan provided greater coverage. And if the 2013 and 2014 Plans generally covered the same services, but the 2013 Plan also covered additional services at 50% or 80% of the approved cost, while the 2014 Plan did not cover those services at all, the 2014 Plan would have a higher actuarial value under Ward's definition.

As to whether Ward actually used the same mathematical approach as the experts on remand in *Duncan*, the record is unclear,[88] but it seems doubtful. The experts in *Duncan* needed to value two medical plans, which required assessing their comparative values to a member over his or her lifetime.[89] Ward at best compared claims-handling decisions in

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[87] An admitted exhibit, a letter from the American Academy of Actuaries, explains the calculation of actuarial value for purposes of the ACA: "The calculation takes into account a plan's various cost-sharing features, such as deductibles, coinsurance, copayments, and out-of-pocket limits. Aside from cost-sharing features, however, the calculation does not reflect other plan features that may be important for consumers who are choosing plans." [R. 1224]

[88] The experts' model, which was accepted by the superior court on remand, is not described in detail in the superior court's opinion. *See Retired Public Employees of Alaska, Inc. v. Matiashowski*, 2006 WL 463279 (Alaska super. Apr. 27, 2006).

[89] *See generally Duncan*, 71 P.3d at 885 n.7 (summarizing some of the changes in coverage in the medical plan, including an increase in the lifetime medical benefits).

one year of the 2013 Plan to four individual years of the 2014 Plan. [R. 2122; Exc. 173] More important, even if Ward used an appropriate model, his conclusions are valid only if he inputted good data; Ward acknowledged this. [Tr. 721-23] Ward himself characterized the HealthSmart claim-handling data for 2013 as incomplete and impossible to work with. [Tr. 653-54; Exc. 174] No reliable analysis can be based on such data.[90] Beyond that, as discussed above, Ward made a series of mistakes regarding the services that were and were not covered by the 2013 Plan, so he did not do an accurate comparison[91]; his analysis of claims-handling under the 2014 Plan was incomplete, because he excluded all non-network claims, which increased the percentage of the costs that the Plan appeared to pay[92]; and he adjusted for inflation only for the 2013 Plan.[93] All of these problems made his purported actuarial analysis unreliable. The trial court did not err in finding that the State did not offer a reliable actuarial calculation to refute RPEA's evidence of diminishments. [Exc. 157, 172-75]

The State also attacks the trial court's conclusion that loss of freedom to choose one's dentist without incurring a financial penalty is a kind of diminishment, even if it

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90 The problems with the data may explain why the dollar amounts Ward listed as paid for certain services by the 2013 Plan differ significantly from the dollars paid as reported by the TPA to the State. *Compare, e.g.*, R. 2130 (amounts reported spent in 2013 on bridges and dentures) *with* R. 1190 (same); *see generally* R. 440 (explaining the comparison).

91 *See supra* at 27-28; Exc. 174-75.

92 *See supra* at 28. Contrary to the State's claim [At. Br. 44 & n.110], nothing in the *Matiashowski* opinion establishes that the experts excluded non-network claims when computing the actuarial value of two plans.

93 *See supra* at 29; Tr. 716.

cannot be measured economically. [At. Br. 45; *see* Exc. 171] This Court need not consider this issue, because the superior court's analysis, based on its careful examination of the coverages that were diminished and enhanced, is sound, and standing alone it supports the court's conclusion that the 2014 Plan overall provides diminished coverage to participants.

In sum, this Court should uphold the superior court's fact-findings and its conclusion that the 2014 retiree dental plan offers members diminished benefits compared to the 2013 Plan. This Court should not accept the State's position that, to succeed with a diminishment claim, a plaintiff must present a sophisticated actuarial analysis, even where a commonsense examination of the changes establishes diminishments without corresponding enhancements. An actuarial analysis is expensive,[94] and any plaintiff challenging a plan necessarily must rely on the State and its agents to produce the raw data in a useable form. That was a problem here. [Tr. 961] RPEA ultimately paid Moda, the third-party administrator, to conduct some simple analyses, which Moda then provided to the State as well as RPEA. [Exc. 231-32]

This Court should uphold the superior court's conclusion that, even without an actuarial analysis, RPEA met its burden of proving that the 2014 Plan diminishes coverage as compared to the 2013 Plan.

II. RPEA WAS ENTITLED TO RECOVER ITS FULL REASONABLE COSTS AS A SUCCESSFUL CONSTITUTIONAL LITIGANT.

Alaska Statute 09.60.010(c)(1) provides that, in a civil action concerning the

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94 The State contracted to pay Ward up to $40,000 for his actuarial analysis and testimony. [Tr. 670]

establishment, protection, or enforcement of a right under the Alaska Constitution, the court "*shall award . . . full reasonable* attorney fees and *costs*" to a prevailing plaintiff. (The elided passage refers to limitations not at issue in this case.)

Relying on the unambiguous statutory direction to award "full reasonable attorney fees and costs," RPEA moved for an award of full reasonable attorney fees and, not literally full reasonable costs, but certain reasonable costs beyond those authorized in Civil Rule 79 – specifically, expenditures for data analysis that benefited both parties, full costs for the fees charged by two of its testifying expert witnesses, and the costs of a non-testifying consulting expert. [Exc. 231-35][95] The State did not contend the costs were unreasonable, but it argued that nothing beyond Civil Rule 79 costs should be awarded. [Exc. 242-45] The court granted RPEA's motion. [Exc. 190]

On appeal, the State renews its argument that a prevailing constitutional litigant's recoverable costs should be limited to those allowed by Rule 79. [At. Br. 49]

This Court should reject that argument and should hold that the superior court did not err in interpreting the statutory language directing the award of full reasonable costs in accordance with its plain meaning. Alternatively, without reaching the statutory construction question, this Court can reaffirm its prior ruling that a trial court has discretion

[95] Two of RPEA's expert witnesses provided their services *pro bono*, and RPEA did not seek to recover any costs for their work. [Exc. 233] RPEA also observed that the largest component of its request for non-Rule 79 costs was for fees paid to its expert Kelly Farmer, and much of the out-of-court work she did in reviewing discovery could be characterized as contract paralegal work; her hourly rate of $110/hour is lower than most paralegals charge; thus, RPEA pointed out, those fees properly could have been claimed under Civil Rule 82(b)(2). [Exc. 233]

to award costs beyond those listed in Rule 79,[96] and on that basis conclude that the trial court did not abuse its discretion in awarding the requested costs here.

In construing any statute, this Court considers the plain language of the statute, the legislative history, and the purpose behind the law.[97] The clearer the statutory language, the more compelling must be the evidence in the legislative history and purpose that establishes that the legislature intended the statute to have a different meaning than the plain language supports.[98]

The State cites no legislative history that shows an intent to limit costs recoverable by a successful constitutional litigant to those authorized by Rule 79. Review of the minutes of the five committee hearings devoted to the bill that enacted AS 09.60.010(c) reveals no discussion at all of costs.[99]

The State's only basis for disregarding the statutory language is to note that the legislature, in enacting AS 09.60.010(b)-(e), intended to limit, not expand, payments to public interest litigants. [At. Br. 48-49] This broad claim is only partly true. The pertinent

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96 *See Hickel v. Southeast Conference*, 868 P.2d 919, 931 (Alaska 1994).

97 *See Alaska Spine Center, LLC v. Mat-Su Valley Medical Center, LLC,* 440 P.3d 176, 180-81 (Alaska 2019); *Alaska Conservation Found. v. Pebble Ltd. P'ship*, 350 P.3d 273, 279 (Alaska 2015).

98 *See Alaska Spine Center*, 440 P.3d at 181; *Alaska Ass'n of Naturopathic Physicians v. State, Dep't of Commerce, Cmty & Econ. Dev.*, 414 P.3d 630, 634 (Alaska 2018).

99 For hearings on HB 145, see House Jud. Comm. Hearing Minutes, starting at Tape 03-45 Side B at 0776 (Apr. 28, 2003); House Jud. Comm. Hearing Minutes, starting at Tape 03-52 Side B at 0506 (May 7, 2003); House Finance Comm. Hearing Minutes, starting at Tape HFC 03-86 Side A (May 9, 2003); House Finance Comm. Hearing Minutes, starting at Tape HFC 03-88 Side A (May 12, 2003); Sen. Jud. Comm. Hearing Minutes, starting at Tape 03-53 Side A (May 18, 2003).

sections of AS 09.60.010 were enacted in 2003.[100] For a decade before that, various legislators tried each year, without success, to eliminate the court-created public interest litigant exception to Civil Rule 82.[101] In 2003, the governor tried a different tactic and had legislators introduce a bill to eliminate the public interest litigant exception only for certain natural resource cases.[102] The final version of the bill reflects that legislators expanded the governor's proposal, eliminating the public interest litigant exception to Rule 82 for all non-constitutional litigation, while creating a statutory exception to Rule 82 for constitutional cases. In taking this approach, legislators endorsed the goals articulated by this Court in adopting the public interest litigant exception: to encourage citizens to bring important litigation challenging government action by making it possible for citizens to recover the expenses they incurred.[103] Upholding the award of reasonable, non-Rule 79 costs to RPEA is consistent with that purpose as well as with the statutory language, and is not contradictory to any legislative history.[104]

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100 *See* SLA 2003, ch 86, § 2.

101 *See* House Jud. Comm. Hearing Minutes (Apr. 28, 2003) (statements of Asst. Attorney General Craig Tillery); House Jud. Comm. Minutes (May 7, 2003) (statement of Rep. Les Gara at Tape 03-54 Side A at 0001).

102 *See* 2003 House Journal (March 3, 2003) at pages 360-61 (Governor's Transmittal Letter).

103 *See Alaska Conservation Found.*, 350 P.3d at 280 (legislature "replaced our public interest litigation exception to Rule 82 with a new statutory provision that encourages and protects parties bringing constitutional claims").

104 *See Hickel v. Southeast Conference*, 868 P.2d 919, 933 (Alaska 1994) (Rabinowitz & Matthews, JJ., dissenting) (expressing their opinion that denying recovery of expert witness costs to prevailing litigants will tend to discourage important public interest litigation).

Alternatively, this Court has stated that, even when Rule 79 applies, a superior court has discretion to use Rule 94 to relax Rule 79.[105] This provides an alternative basis for upholding the award of non-Rule 79 costs to RPEA.

Finally, if this Court rejects these arguments, at minimum it should remand to permit RPEA to request payment of Ms. Farmer's fees to the extent they can be documented as reasonable paralegal fees.

III. THE SUPERIOR COURT APPROPRIATELY ISSUED ORDERS NECESSARY TO ENFORCE ITS RULING THAT THE 2014 PLAN IS UNCONSTITUTIONAL AND TO PROVIDE RPEA RELIEF THAT IS JUST AND EQUITABLE.

RPEA, in its complaint, sought declaratory and injunctive relief, an award of its attorney fees and costs, and "such other relief as the court deems just and equitable." [Exc. 7-8]

The court's April 17 order awarded RPEA the declaratory and injunctive relief it sought. [Exc. 175, 179] The court initially directed the State to begin providing a constitutional – i.e., non-diminished – retiree dental plan by May 1, 2019. [Exc. 158] The court later recognized that the allowed time was unreasonably short, but the court *denied* the State's motion to be allowed until January 1, 2020, to implement a constitutional plan. [Exc. 257] Still, the State adhered to its own preferred timetable and did not provide

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[105] *See Southeast Conference*, 868 P.2d at 931 (superior court has discretion to relax Civil Rule 79 and Administrative Rule 7(c) and to award costs beyond what the rules allow when "leaving plaintiffs with uncompensated expert costs would unjustly chill public interest litigation or undercut the purpose of the public interest attorney rule").

retirees the ability to participate in a non-diminished dental insurance program until January 2020, more than eight months after the court's April 17 order. [Exc. 182]

The State now objects to two of the orders the court issued in response to RPEA's efforts to enforce the April 17 order and the final judgment based on that order. [At. Br. 46-48] Neither order was error.

A. THE COURT PROPERLY PRECLUDED THE STATE FROM TREATING THE 2014 PLAN AS THE DEFAULT.

The State announced in August 2019 that it had decided to comply with the court's April order by offering retirees the option of enrolling in either the 2013 Plan or the 2014 Plan (renamed the Legacy Plan and the Standard Plan). [R. 2653 (Tr. 10); Exc. 166] The 2013 Plan would have higher premiums. [R. 2655 (Tr. 20-21); Exc. 186] The State began publicly disclosing additional details of how it would implement the two-plan system in late August, with more information posted to its website in September. [Exc. 260-61] These pronouncements made clear for the first time that the State would declare an open enrollment period to start in November, and that the State would place any retiree who did not affirmatively select one plan or the other into the 2014 Plan. [Exc. 260-61, 273] RPEA protested. It asserted that retirees who prefer lower premiums are free to waive their constitutional right to a non-diminished plan – but constitutionally the State may not treat a retiree's non-action as a waiver of constitutional rights. [Exc. 263-64, 293] The superior court agreed and prohibited the State from making the 2014 Plan the default option for

retirees who did not select a plan for 2020. [Exc. 195][106]

Contrary to the State's contentions, the order prohibiting the State from treating the 2014 Plan as the default option neither granted new relief nor amended the final judgment. [At. Br. 46-47] The court's November 19 order enforced the August 8 final judgment. The entire point of the litigation and the judgment in RPEA's favor was to require the State to respect retirees' constitutional right to participate in a non-diminished dental insurance plan. The State's announcement that it would continue to provide only the unconstitutional plan to any retiree who did not take specific action in a specific time period was patently inconsistent with the judgment. The State may not avoid complying with the fundamental purpose of an order by insisting that the court did not specifically tell it everything it could not do in its purported efforts to comply. No case compels a court to draft an order or judgment in such a way as to anticipate and expressly forbid every attempt by the defendant

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[106] After failing to obtain a stay pending appeal [R. 2306-24; Exc. 214], the State complied with this order. It extended the open enrollment period and sent out new information. [Exc. 206; R. 2301-02] It advised that retirees who selected or were defaulted into one plan would be free to change between plans during the open enrollment period in any following year. [Exc. 184] By the time this appeal is fully briefed and this Court issues its decision, the "default" enrollment for anyone who failed to select a plan during the initial open enrollment period will have expired, effectively mooting the issues raised by the State concerning the court's authority to direct which plan could be the default option. This Court could choose not to address the State's appeal on this point. *See Clark v. State, Dep't of Corrs.*, 156 P.3d 384, 387 (Alaska 2007) ("We will not generally decide questions of law where the facts have rendered the legal issues moot. A claim is moot where a decision on the issue is no longer relevant to resolving the litigation, or where it has lost its character as a present, live controversy, that is, where a party bringing the issue would not be entitled to any relief even if he or she prevailed." (footnotes and internal quotation marks omitted)).

to circumvent an order.[107]

The court's order was not improper under *State v. Alaska Civil Liberties Union.*[108] The circumstances of this case are very different. In the *ACLU* litigation, this Court, in its first opinion, held that public employers' refusals to provide spousal benefits to same-sex couples who could not then legally marry in Alaska violated the Alaska Constitution's equal protection clause.[109] After additional briefing on appropriate remedies, this Court remanded to the superior court with directions to enter such orders as it deemed necessary to ensure compliance with this Court's decision within seven more months.[110] The Department of Administration then developed new regulations conferring medical and retirement systems benefits on same-sex partners of state employees.[111] When plaintiffs objected to some of those regulations, the superior court directed various revisions – and this Court, granting a petition for review by the State, held that it had not intended to authorize the superior court to review those details.[112] Rather, this Court explained, it had set a short deadline for compliance and thus, "absent a basis for finding bad faith, discriminatory intent, or clear facial invalidity," the usual presumption of regularity applied

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107 *Cf. Horchover v. Field*, 964 P.2d 1278, 1282-85 (Alaska 1998) (upholding superior court's post-judgment order to require defendant to provide an accounting, where the accounting was necessary to determine whether the recalcitrant defendant had complied with the court's judgment).

108 159 P.3d 513 (Alaska 2006) ("*ACLU II*").

109 *See Alaska Civil Liberties Union v. State*, 122 P.3d 781, 783 (Alaska 2005).

110 *See ACLU II*, 159 P.3d at 514.

111 *See id.*

112 *See id.*

to the new regulations, and any new constitutional challenges to particular regulations should be addressed in separate proceedings.[113]

In the current case, the superior court order forbidding the State from designating the 2014 Plan as the default addressed a "clear facial invalidity" in the State's proposal for complying with the court's judgment. Having held the 2014 Plan unconstitutional, the court quite properly could prohibit the State from forcing anyone to participate in it. Nor was the superior court's order problematic as an overbroad interpretation of limited authority granted by this Court; the superior interpreted and enforced its own order. Courts have inherent authority to do just that.[114]

This Court should find no problem with the order preventing the State from treating the 2014 Plan as the default plan for retirees who did not select a plan during the 2019 open enrollment period.

B. THE SUPERIOR COURT PROPERLY REQUIRED THE STATE TO IDENTIFY SOME OF THE CLAIMS THAT WERE DENIED BECAUSE THE STATE OPERATED AN UNCONSTITUTIONAL PLAN.

The State operated its unconstitutional plan for over six years, including eight and one-half months after the superior court's order declaring the plan unconstitutional. During those months, both the court and RPEA expressed concern that retirees continued to be

113 *See id.* at 514-15.

114 *See* AS 22.10.020(c) ("The superior court and its judges may issue injunctions . . . and all writs necessary or proper to the complete exercise of its jurisdiction."), (g) ("Further necessary or proper relief based on a declaratory judgment . . . may be granted, after reasonable notice and hearing, against an adverse party whose rights have been determined by the judgment."); *see generally* Exc. 288-94 (RPEA's arguments to the superior court).

denied the benefits to which the court had determined they were entitled. [R. 2653-55 (Tr. 12-20); Exc. 262-65, 291] The court inquired in August 2019 whether the State was keeping any records of claims denied that would have been granted under the 2013 Plan, and the State said it was not. [R. 2653 (Tr. 12-13)] The State's representative in the courtroom, Emily Ricci, advised that "we could absolutely do a retrospective claims review and make sure that we are capturing any sort of denied claims and who those individuals were." [R. 2654 (Tr. 15)] The court indicated the State should do that, at minimum, and Ms. Ricci answered, "Yeah." [*Id.* (Tr. 15-16); *see also* R. 2657 (Tr. 26-27) (reiterating court's concern to identify at least the people whose claims had been denied since the court's order was announced)]

Despite this conversation between the court and Ms. Ricci, the State took no steps to identify any denied claims that would have been granted under the 2013 Plan. [Exc. 264-65] RPEA therefore sought an order directing the State to do what it had agreed to do. [*Id.*] The court heard from the parties in writing and at a status conference on November 19,[115] then entered an order directing the State to conduct the analysis it had said it could do to identify certain claims that had been denied that would have been granted if the State had not implemented the unconstitutional 2014 Plan. [Exc. 223][116] The order applies only

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[115] *See* Exc. 274-86 (State's opposition), 287-94 (RPEA reply); R. 2190 (order setting status conference for November 19, 2019); *see also supra* at 12 n.14 (noting State's failure to make the transcript or log notes of the November 19 status conference part of the record on appeal).

[116] This portion of the court's order was stayed, based on RPEA's non-opposition, after the State declared that the review would cost over $1.2 million and the cost would have to be borne by retirees. [At. Br. 21] For briefing on this issue, see State's motion for reconsideration and clarification [R. 2220-26, with exhibits at Exc. 197-207 and R. 2238-

to retirees who were enrolled in the 2013 Plan after January 1, 2020; it extends back to the date in January 2016 when RPEA filed its complaint. [*Id.*]

The State maintains that this order was improper and inconsistent with both the complaint and the superior court's April 2019 order. [At. Br. 47] This Court should reject this claim.

RPEA's complaint expressly sought declaratory and injunctive relief and "such other relief as the court deems just and equitable." [Exc. 8] When the superior ruled in April 2019 that the 2014 Plan represents an unconstitutional diminishment of retirees' benefits, it became both just and equitable, and fully consistent with the complaint, to consider how best to rectify the unconstitutional situation the State had created, particularly when the State opted to prolong for eight months the period of time in which it operated only the unconstitutional plan.

An order for money damages at that stage would have been an improper expansion of the relief requested in the complaint, but the order to identify some of the claims that were wrongfully denied while the unconstitutional plan was in effect was an appropriate equitable remedy within the court's discretion. Individual retirees might then, in separate actions, apply for reimbursement or other relief; those potential individual claims and the kinds of relief that could or should be granted are not before this Court. This kind of litigation, in separate proceedings, is akin to the separate proceedings the Court said would

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52], Order requesting response from RPEA regarding motion for clarification [Exc. 208-13], RPEA's response [R. 2210-12], State's reply [R. 2697-2711], Order [Exc. 221-24].

be required in *ACLU II*, if the plaintiffs there, or other parties, sought to challenge the State's actions in ways beyond those addressed in the original complaint.[117]

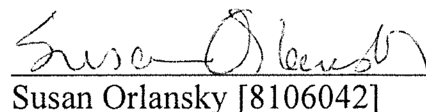
This Court should uphold the superior court's right to exercise its discretion to award equitable relief beyond that specifically requested in the complaint, where the complaint broadly asked for all equitable relief that the court deemed just.[118]

CONCLUSION

This Court should affirm in all respects the trial court's orders that the State has challenged.

Respectfully submitted, this 28th day of September, 2020.

REEVES AMODIO LLC



Susan Orlansky [8106042]

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[117] *See* 159 P.3d at 514-15. As noted earlier, RPEA agreed to stay the court's order, after learning the astronomical cost the State assigned to the project that it earlier had volunteered that it "absolutely could do." Further proceedings on remand might narrow the order.

[118] *See generally Recreational Data Servs., Inc. v. Trimble Navigation Ltd.*, 404 P.3d 120, 139-40 (Alaska 2017) (ordering award of nominal damages even where nominal damages were not specifically requested in the complaint, noting that plaintiff had sought general damages and "such other relief [as it is] entitled to under law").