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Attorney for Plaintiff

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

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

Plaintiff, )

v. )

STATE OF ALASKA, DEPARTMENT )  
OF ADMINISTRATION, DIVISION )  
OF RETIREMENT AND BENEFITS, )

Defendant. )  
\_\_\_\_\_ )

Case No. 3AN-18-6722 CI

**AMENDED COMPLAINT FOR DECLARATORY,  
INJUNCTIVE AND RESTITUTIONARY RELIEF**

**Jurisdiction and Parties**

1. This is a complaint for declaratory, injunctive and restitutionary relief brought pursuant to AS 09.40.230, AS 22.10.020(g), Rules 57 and 65, *Alaska R. Civ. P.* and applicable law.

2. The Court has jurisdiction over the parties and the subject matter of this dispute pursuant to AS 09.05.015 and AS 22.10.020(g).

3. Plaintiff, the Retired Public Employees of Alaska, Inc. (“RPEA”), is a nonprofit corporation in good standing, organized and operating under the laws of the State of Alaska.

4. The mission of RPEA is to ensure that the constitutionally protected retirement benefits earned by and promised to individuals in accordance with the public employee retirement plans established by the State of Alaska are provided to them, and that nothing is done to diminish or impair those benefits in contravention of Art. XII, § 7 of the Alaska Constitution. Among the ways the RPEA accomplishes its mission is by:

a) informing plan beneficiaries about their retirement benefits and assisting them in obtaining the benefits to which they are legally entitled;

b) receiving and analyzing information about problems, issues and concerns that plan beneficiaries have concerning obtaining the benefits they are eligible to receive;

c) communicating with departments, agencies and boards of the State of Alaska in an effort to alert those state entities to common or repeated issues and problems that plan beneficiaries are having in receiving the benefits which they are eligible to receive under the applicable state retirement plan; and

d) taking appropriate legal action when necessary to ensure that all plan benefits are properly provided to eligible plan beneficiaries as required by law.

5. RPEA has standing to sue on behalf of its constituents and has done so in the past.

6. Defendant Division of Retirement and Benefits (DRB) is a division of the Department of Administration (DOA) of the State of Alaska. The commissioner of the DOA is the administrator of the Alaska Public Employee Retirement Systems established under AS 39.35, AS 14.25 and AS 22.25. (All above referred to collectively hereafter as “Defendant.”)

7. Venue in Anchorage is appropriate because RPEA is headquartered in Anchorage and many retired state employees who are affected by the actions of the Defendant at issue in this suit reside in Anchorage.

### **Legal Framework**

8. Alaska statutes have long provided retirement benefits for eligible state employees. As stated by AS 39.35.001, the purpose of the state retirement benefit plans is to encourage qualified personnel to enter and remain in service to the state.

9. For many years, the Alaska statutes have provided that health care insurance coverage is one of the benefits provided to eligible state employees, retirees and other qualified plan beneficiaries. The health care insurance coverages established by state law have several components, including major medical insurance coverage for the costs of medical treatment and services; dental-vision-audio (“DVA”) treatment and services; and coverage for long-term care (“LTC”) expenses.

10. State employees who have earned vested retirement benefits are entitled to receive major medical insurance coverage at no cost upon retirement and attaining at least 50 years of age.

11. Another benefit provided to eligible state retirees is the option to elect to receive DVA insurance and/or LTC benefits coverage. They may elect such DVA and/or LTC benefits for only themselves or may choose to have their dependents covered as well. If such DVA and LTC benefits are selected, the premiums for those benefits are deducted from the monthly pension benefit payable to the retiree or the retiree's survivors.

12. After an election of health care coverage is made, the health care coverages selected by the retiree begin on the same date as the other monthly retirement benefits begin.

13. The Alaska Constitution, Article XII, § 7 expressly provides that membership in a state employee retirement system constitutes a contractual relationship and that the accrued benefits of these systems "shall not be diminished or impaired."

14. The Alaska Supreme Court has interpreted this provision of the Constitution to mean that a retiree's rights to retirement benefits are regarded as an element of the bargained-for consideration given in exchange for an employee's assumption and performance of the duties of his employment and vest on employment and enrollment in the retirement system.

15. The Alaska Supreme Court has held specifically that the medical insurance benefits available to retirees are part of the benefits protected by the Alaska Constitution, and that such health care coverage therefore may not be diminished or impaired.

16. The Alaska Supreme Court has ruled that the state may make some types of changes to the Plan benefits, but only if a) any resulting diminishment or impairments of

benefits are offset by comparable new advantages; and b) that beneficiaries who would suffer a serious hardship from the changes are given the option to opt out of the proposed new plan changes.

### **Statement of Facts**

17. Since 1975, the state has provided health insurance benefits to eligible retirees under a plan, now known as the AlaskaCare [sic] Retiree Health Plan (the “Plan”). The Plan applies to individuals hired by the state as employees before July 1, 2006. The Plan has long included an option to select DVA and LTC health care coverage. The state provides these health care benefits by means of self-insured trust funds.

18. Concerning these trusts, the Alaska Statutes provide that “[t]he corpus or income of the assets held in trust as required by the plan may not be diverted to or used for other than the exclusive benefit of the [Plan] members or their beneficiaries.” AS 39.35.011

19. The health care coverages provided by the Plan were described in a 2003 publication entitled “Retiree Insurance Information Booklet” (the “Booklet”). The Booklet, along with the state’s past practices of providing coverage for claims, established the coverages provided by the Plan.

20. Effective January 1, 2014, the Defendant summarily imposed substantial changes to the Plan that resulted in the diminishment and impairment of benefits. The main changes included: a) the replacement of substantially all of the provisions of the retiree dental benefits plan that had been in effect through 2013, replacing them with

essentially a new and different plan provided and administered by Moda Health/Delta Dental of Alaska (“the Moda plan”); and b) selecting the Aetna Life Insurance Company (“Aetna”) as the third-party claims administrator of the Plan to process claims made by retirees and covered dependents and determine the benefits provided under the retiree medical, vision and audio benefit plans. This change expressly permitted Aetna to use its own internal Clinical Policy Bulletins to determine the coverage and benefits under the Plan. The effect of that was to substantially diminish and/or impair medical coverages and benefits that existed and had been provided to Plan beneficiaries before January 1, 2014, resulting in the wrongful denials of many previously covered claims.

21. The changes to the Plan imposed by the Defendant on and after January 1, 2014 that substantially reduced and impaired the medical benefits and coverages provided to retirees under the retiree health care Plan include, for example:

(a) reduced coverages for treatment and care by chiropractors, physical therapists and massage therapists that had been provided and covered previously by the Plan, including reductions in the number of services previously available to Plan beneficiaries;

(b) changes in the manner in which amounts payable for covered services were determined and reimbursed under the Plan, changes that effectively reduced both coverage and benefits previously provided under the terms of the Plan;

(c) restrictions and other changes in the provision of medical travel benefits previously provided for retirees under the Plan, resulting in a diminishment and impairment of benefits;

(d) the addition of new pre-certification requirements on medical and dental treatment and services that had not previously been required by the Plan, and imposing additional burdens on beneficiaries who apply for required pre-certifications, resulting in losses of coverage and other diminishment and impairments of the benefits that had previously been provided by the Plan;

(e) the imposition of new restrictions on experimental or investigational procedures which resulted in a loss, diminishment and impairment of benefits that had previously been provided by the Plan;

(f) the reduction of benefits for Plan beneficiaries needing organ transplants unless they agree to the new, restrictive requirement that they have their organ transplant operation done at one of Aetna's designated transplant hospitals;

(g) redefining certain Plan terms in an effort to justify denial of certain types of claims benefits, causing a diminishment and impairment of benefits and the wrongful denials of claims for medical care and treatment which, prior to January 1, 2014, had been covered by the Plan;

(h) denying coverage for the cost of certain prescription drugs and medicines that had been covered and paid by the Plan before January 1, 2014;

(i) changing the procedures Plan beneficiaries are required to follow in order to appeal denials of claims, thereby effectively allowing Aetna to wrongfully and repeatedly deny certain types of covered claims without effective oversight or supervision by DRB to correct Aetna's wrongful practices. Such changes included, but were not limited to, allowing Aetna to use forms and generic letters and notices that fail to provide reasonably

clear and understandable explanations for benefit denials and that provide false, misleading, inaccurate or incomplete information to retirees concerning their claims, their rights to appeal denials of their claims, and the proper legal procedures for taking such appeals; and

(j) imposing on Plan members who have Medicare a new requirement that they in addition to paying the annual Medicare deductible, they must also pay an annual deductible amount under the Plan. The assessment of this additional deductible to retirees who are covered by Medicare constitutes a reduction and impairment of benefits. The Defendant has continued to charge such retirees that deductible in spite of a ruling by the Office of Administrative Hearings (“OAH”) that charging such deductible is not allowed under the terms of the Plan.

22. Representatives of RPEA made multiple requests to DOA in 2014, 2015, and 2016, asking to have the 2014 changes rescinded and to reinstate the benefits and coverages that had been provided by the Plan before January 1, 2014.

23. Former DOA Commissioners Curtis Thayer and Sheldon Fisher refused to reinstate the benefits and coverage provided to retirees prior to the 2014 Amendment.

24. Based on information and belief, neither Commissioner Fisher nor Commissioner Thayer performed, or had performed for them or for the DRB, any analysis to determine whether the changes imposed by the Defendant on and after January 1, 2014 resulted in the diminishment and impairment of any Plan benefits and, if they did, whether those changes were offset by comparable new Plan benefits and advantages.



25. Instead, Commissioners Fisher and Thayer asserted summarily, without providing any authority, and incorrectly that the Plan benefit changes the Defendant imposed January 1, 2014 did not diminish or impair any of the vested retiree health care benefits protected by the Alaska Constitution.

26. Since the DOA retained Aetna to be the third-party administrator of the Plan, it has failed to perform its statutory and common law duties as the primary administrator of the retiree health care Plan, including failing to exercise appropriate supervision and control over Aetna and its claims administration. As a result, the DOA has allowed and continues to allow Aetna to engage in improper and unfair claims adjudication, including denying claims and appeals based on its own policies rather than based on the terms of the Plan and coverages that had been provided by the Plan before Aetna became the third-party administrator.

27. The Defendant, as a fiduciary of the retiree health care trust funds, has failed to fulfill its statutory and common law duties to ensure the funds are used for the exclusive benefit of the members or their beneficiaries.

28. The Defendant has violated law, including constitutional provisions and certain decisions of the Alaska Supreme Court, and has breached the duties it owes to Plan beneficiaries, by unilaterally and summarily making changes to the Plan without first conducting the legally-required analyses of what the effects of those changes would be on Plan beneficiaries; without providing Plan beneficiaries with legally-required notice and opportunity to be heard before such changes were put into effect; without providing comparable new benefits that offset the benefits that were eliminated,

diminished or impaired by those changes; and without notifying Plan beneficiaries that if the changes are approved and put into effect, they would have the right to retain their existing Plan benefits if the changes made by the Defendant would cause a serious hardship to a particular beneficiary or group of beneficiaries.

29. The Defendant has intentionally and continually breached its duties to certain Plan beneficiaries who suffer from a particular disease or condition by imposing Plan changes that Defendant knew or should have known would serious hardship to those beneficiaries by eliminating or reducing coverage for medical treatment and care previously provided by the Plan to treat that disease or condition.

30. The Defendant has intentionally and continually breached its duties to Plan beneficiaries by failing to make reasonable efforts to notify Plan beneficiaries that if they believe that the Plan changes will cause or are causing them serious harm, they have a right to be heard and, if they can prove to an impartial fact-finder that the coverage changes will cause them serious hardship, they will then have the right to retain the benefit coverages that were provided to them by the Plan before January 1, 2014.

31. The Defendant is now moving forward to make substantial, additional changes to the Plan that it claims are intended to “modernize” it.

32. Defendant has not explained what its proposed “modernization” of the Plan will entail. It has not provided fair and reasonable notice to retirees and other Plan beneficiaries about the substance of the changes it plans to make to “modernize” the Plan or about any analyses it has done or will do, as required by in *Duncan v. Retired Public Employees of Alaska, Inc.*, 71 P.3d 882, 892 (Alaska 2003), to determine if any of the

proposed changes will or might reasonably be expected to result in a diminishment or impairment of any Plan benefits.

33. Defendant has not disclosed if its planned “modernization” of the Plan will or might reasonably be expected to result in any Plan changes that would, or reasonably might, result in the diminishment or impairment any existing benefits and, if so, what new, comparable benefits would be added to compensate.

34. The Defendant has also not disclosed if, before the date it expects to complete and implement the so-called “modernization” of the Plan, it will be doing the analyses required by the Alaska Supreme Court in *Duncan v. Retired Public Employees of Alaska, Inc.*, 71 P.3d 882, 892 (Alaska 2003), in order to ensure that the changes will not violate the guarantees of Art. XII, § 7 of the Alaska Constitution.

35. Defendant also is currently preparing to implement substantial changes to the Plan that will affect the prescription drug benefits provided to retirees who have reached age 65 and become covered by Medicare. Specifically, Defendant is moving forward to change the type of federal drug subsidy program applicable to the Plan from the Retiree Drug Subsidy (“RDS”) program to an Employer Group Waiver Plan (“EGWP,” commonly spoken of as “Egg Whip”).

36. The EGWP would result in the State hiring a pharmacy benefit manager (“PBM”) that would be expected to negotiate with drug companies for favorable prices for prescription drugs, and without any blind kick-backs to the PBM. Defendant claims that its main incentive for wanting to replace the current RDS federal drug subsidy program

with the EGWP is that Defendant believes the latter would result in increased federal drug subsidies and save the State approximately \$20 million per year.

37. The problem is that the generalized information that the Defendant has provided about the EGWP it plans to implement—and how the EGWP, if implemented, would affect retirees and other beneficiaries under the Plan—has been vague; incomplete; sometimes self-contradictory; and in general, insufficient to give retirees and other Plan beneficiaries fair and reasonable notice about how the EGWP change, if implemented, would or might reasonably be expected to affect them.

38. In spite of repeated requests for information, the Defendant has failed to provide information that is complete, accurate and clear enough to give retirees and other Plan beneficiaries fair and reasonable notice to allow them to determine whether the EGWP, if implemented, would or could result in the diminishment or impairment of benefits contrary to Art. XII, § 7 of the Alaska Constitution.

**First Cause of Action**  
**Violation of Alaska Constitution Article XII, § 7**

39. State employees hired before July 1, 2006, have the right, as part of their retirement benefits, to all the health care benefits that were provided by the Plan at and at any time after the time they were hired.

40. Article XII, § 7 expressly provides that “[m]embership in employee retirement systems of the state ... shall constitute a contractual relationship” and that “[a]ccrued benefits of these systems shall not be diminished or impaired.” This

45. The changes made to the Plan in 2014 and 2016 that diminished and impaired those vested benefits provided by the Plan deprived those former state employees and their associated beneficiaries of valuable property without a reasonable notice and opportunity to be heard in violation of Article I, § 7 of the Alaska Constitution and Amendment XIV of the Constitution of the United States.

**Third Cause of Action**

**Impairment of Contract in Violation of Art. I, § 15 of the Alaska Constitution**

46. Art. I, § 1 of the Alaska Constitution states that the Alaska Constitution is dedicated to the principles that all persons “have a natural right ... to the enjoyment of the rewards of their industry ....” In furtherance of that goal, Art. I § 15 of the Alaska Constitution mandates that “no law impairing the obligation of contracts ... shall be passed.”

47. The changes made to the Plan in 2014 and 2016 violated Art. I, § 15 of the Alaska Constitution by impairing the important contractual obligations the state promised and owed to its eligible retirees and their associated Plan beneficiaries to provide them with certain retirement benefits.

**Fourth Cause of Action**  
**Breach of Fiduciary Duty**

48. The state has established health care trust funds under AS 39.30.097 for the purpose of prefunding the retiree health care benefits at issue in this lawsuit. AS

39.35.011 requires the Defendant to ensure these trust funds are not used for any purpose other than the exclusive benefit of retirees and their beneficiaries. The Defendant has a fiduciary duty under these statutes and at common law to ensure that the funds held in these trusts are used exclusively for the benefit of plan participant beneficiaries, including for the payment of retiree health care benefits and appropriate administrative costs. Failure of the Defendant to do so is a breach of Defendant's statutory and fiduciary duties to retirees and their beneficiaries.

49. The Defendant has breached its statutory and fiduciary duties to the retirees and beneficiaries of the Plan in a number of ways, including:

a) by failing at least to perform the legally required equivalency analyses of changes to the Plan prior to imposing those changes;

b) by delegating to Aetna the Defendant's duties and responsibilities to manage the Plan and allowing Aetna to make and use its own interpretations of the Plan to determine what medical coverages and related benefits would be provided to retirees, knowing that many of Aetna's clinical and other policies and procedures are inconsistent with and contrary to provisions of the Plan as it had been historically interpreted and applied, and that Aetna applied these policies in a manner that Defendant knew or reasonably should have known would result in the diminishment and impairment of vested benefits, including insurance coverage for medical claims that previously had been provided to retirees and beneficiaries under the Plan;

c) by failing to adequately supervise and direct Aetna to properly apply the terms of the Plan which Defendant knew would and did result in the diminishment and

impairment of benefits and coverage for medical claims previously provided to retirees and beneficiaries under the Plan;

d) by knowingly and repeatedly allowing Aetna to deny legitimate medical claims that, prior to the changes made since 2013, would have been paid by the Plan;

e) by knowingly and repeatedly allowing Aetna and its agents to engage in a pattern and practice of unfair and improper denials of legitimate medical claims covered by the Plan;

f) by knowingly and repeatedly allowing Aetna and its agents to misinform retirees and other Plan beneficiaries of their appeal rights; and

g) by knowingly and intentionally denying eligible retirees and their associated Plan beneficiaries their statutory and due process rights to appeal the repeated denials of their legitimate claims to the Office of Administrative Hearings (“OAH”) by i) wrongfully misinforming claimants who do not get the complete relief they are requesting when they appeal the denial of their claim(s) for benefits that they must request and obtain permission from the DRB in order to file an appeal with the OAH and then withholding permission; and ii) engaging in a pattern and practice of wrongfully denying payment of legitimate, covered claims and then, if the claimant gives notice of his or her intention to appeal the denial, paying the claim with the proviso that the payment is merely a settlement of that particular claim and not an admission that the Plan provides coverage, thereby avoiding a definitive decision by a judicial officer that would firmly establish if the claim at issue, and others like it, are covered by the Plan and if there had been a good-faith basis for the previous denials of coverage.

h) by failing to keep and make reasonably available to each Plan beneficiary accurate records showing the total amount of money the Plan has paid in medical benefits for that beneficiary and the amount remaining of that beneficiary's \$2 million lifetime cap on the payment of covered medical claims.

50. In spite of having been repeatedly notified by RPEA of these improper practices, and in spite of the repeated requests by RPEA for the Defendant to take action to correct these violations, Defendant knowingly and intentionally failed and refused to correct those and similar abuses which constituted breaches of the duties owed by Defendant to the retirees and beneficiaries of the Plan and to the health care trusts.

### **Request for Relief**

Based upon the legal framework and facts set forth above, RPEA requests judgment in its favor as follows:

#### **A. Declaratory Judgment**

1. providing that the benefit changes made to the retiree health care Plan since 2013 improperly diminished and impaired the accrued benefits owed to plan members who were hired by the state before July 1, 2006; that such changes violated Article XII, § 7 and Article I, § 15 of the Alaska Constitution and the constitutional rights of due process guaranteed by Article I, § 7 of the Alaska Constitution and Amendment XIV to the Constitution of the United States; and that those changes are null, void and without force and effect; and



2. ruling that individuals who are aggrieved by a final decision made by the Alaska Division of Retirement and Benefits have the right, pursuant to AS 35.39.006 and AS 14.25.006, to appeal such DRB decisions to the Alaska Office of Administrative Hearings without obtaining the permission of the DRB.

**B. Permanent Injunctive Relief:**

1. prohibiting the Defendant from continuing to apply the benefit changes imposed on the Plan since 2013;

2. requiring the Defendant to reinstate the retiree health care Plan and all related benefits that were provided to retirees before January 1, 2014;

3. requiring the Defendant to comply with orders and decisions of the OAH, including but not limited to the OAH decision that Defendant may not charge an annual deductible to retirees who are covered by Medicare and have paid the annual Medicare deductible amount;

4. requiring the Defendant to refrain from making any future changes to the Plan that will result in any diminishment or impairment of any benefit unless and until any future proposed Plan benefit changes are a) shown to satisfy the substantive and procedural requirements of Art. XII, § 7 of the Alaska Constitution as established by the Alaska Supreme Court, and b) approved and implemented in accordance with the constitutionally guaranteed procedural requirements of due process of law, including providing Plan beneficiaries with reasonable notice and opportunity to be heard concerning all the proposed changes;

5. directing the Defendant to refrain from telling Plan beneficiaries who want to appeal all or part of a decision by DRB concerning a claim for benefits that they must seek and obtain permission from the DOA/DRB in order to appeal the DRB decision to the Alaska Office of Administrative hearings and further, to affirmatively inform such individuals of their right to appeal to the OAH; and

6. requiring the Defendant to keep and make reasonably available to each Plan member and other beneficiary, accurate records showing the total amount of money the Plan has paid in medical benefits for that Plan participant and the amount remaining of the Plan participant's \$2 million lifetime cap on the payment of covered medical claims.

**C. Restitutionary Relief**

For an order requiring Defendant to make restitution to affected Plan beneficiaries for the expenses they incurred as a result of wrongful denials of coverage and benefits caused by the imposition of the improper changes made to the Plan since 2013.

D. For an award of RPEA's costs and attorney fees incurred in connection with obtaining relief in this proceeding; and

E. For such other relief at law and equity as the Court deems just and equitable.

DATED this 12th day of July, 2018.

LAW OFFICES OF WM. GRANT CALLOW



WM. GRANT CALLOW [ABA 7807062]

Counsel to Plaintiff

### Certificate of Service

By my signature below, I certify that on this 12th day of July, 2018, an true and complete copy of the foregoing document was served upon Katherine Demarest, Assistant Attorney General of the State of Alaska, counsel to Appellant, by email and hand-delivery to her address of record in Anchorage, Alaska, and via email to co-counsel Kevin Dilg, Asst. Attorney General.

  
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Wm. Grant Callow