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

_____)	
THE RETIRED PUBLIC EMPLOYEES)	
OF ALASKA, INC.,)	
)	
Plaintiff,)	
)	
v.)	
)	Case No. 3AN-18-6722 CI
STATE OF ALASKA, DEPARTMENT)	
OF ADMINISTRATION, DIVISION OF)	
RETIREMENT AND BENEFITS,)	
)	
Defendant.)	
_____)	

OPPOSITION TO DEFENDANTS’ “MOTION TO COMPEL VENUE”

The Defendants’¹ motion takes for granted that the sentence DRB unilaterally inserted in the handbook of the AlaskaCare Retiree Health Plan (“the Plan”) makes Juneau the mandatory venue for this case. Even the title of DRB’s motion (“Motion to

¹ For the sake of brevity and simplicity, in this memo the Defendants are collectively referred to as the Division of Retirement and Benefits or the “DRB,” the state agency whose conduct is principally at issue in this case.

Compel Venue”) suggests that the DRB believes the Court is compelled to transfer the case to Juneau.

At Issue Is a “Juneau-Only” Filing Provision, Not a Venue Selection Clause

The DRB states unequivocally that its motion relies only on the sentence in the Plan booklet that states: “Any and all suits or legal proceedings of any kind that are brought against the State must be **filed** in the First Judicial District, Juneau, Alaska.” (emphasis added).

The DRB’s motion treats the sentence as a venue selection clause and urges that it should be analyzed and enforced the same way the Alaska Supreme Court treats forum selection clauses in commercial contracts that have been freely negotiated and agreed-upon by private parties of equal sophistication and bargaining strength.²

This is not such a provision. Although the title of the provision refers to venue, the provision itself does not specify Juneau as the required venue for cases arising from DRB’s administration of the Plan. Had this case been filed in Juneau, nothing in the provision limits the authority and discretion of the Juneau superior court to transfer a case to a different venue within the state in accordance with standards set out in AS 22.10.040; Alaska Civil Rule 3(d) and applicable case law.

RPEA contends that the “Juneau-only” filing provision does not compel the Court to transfer venue to Juneau because the provision is only a required-place-of-filing provision that does restrict the authority of the court to determine venue. The RPEA

² See Crowson v. Sealaska Corp., 705 P.2d 905 (Alaska 1985) and Volkswagenwerk, A.G., v. Klippen, GmbH, 611 P.2d 498, 503 (Alaska 1980)

also contends that the provision is void on legal and policy grounds and, even if it were valid, any right that the DRB might have had to assert it has been waived.

The DRB cites no prior decision of an Alaska court upholding the validity and effect of the Juneau-only filing provision. RPEA is aware of no such decision. Apparently, the validity and effect of the Juneau-only filing provision is an issue of first impression.

The RPEA submits that if the provision is upheld, it will have a profoundly negative impact on the right and ability of retired public employees of Alaska to seek and obtain judicial review of DRB's conduct and decisions in the Alaska state courts.

Setting Aside the Issue of the Validity of the Juneau-Only Filing Provision, the Filing of the Case in Anchorage Was Authorized by Alaska Civil Rule 3(c) and (e) and Venue in Anchorage Is Proper

The issues in this case affect retired public employees living throughout all Alaska, as well as many living Outside and some living abroad. A substantial percentage of retired public employees of Alaska who are members of RPEA live in and near Anchorage and received their medical care and treatment here from medical providers located in the Anchorage area.³ The alleged diminishment and impairments of Plan medical benefits and the associated denials and reductions in coverage have affected many RPEA members and their health care providers in and around Anchorage.⁴

³ Please see attached supporting affidavit of RPEA President Sharon Hoffbeck.

⁴ Id.

This case was filed in Anchorage based on Alaska Civil Rule 3(c) and (e) the facts alleged in the complaint. Alaska retired public employees covered by the Plan who have been affected by the diminishment and impairment of medical benefits alleged in the complaint live throughout the state, not only in Juneau. Many in the Anchorage area have experienced the consequences of the alleged reductions and impairments of medical benefits when seeking medical treatment in Anchorage.⁶

The effects of denials of coverage for medical treatments that retirees experienced in the Anchorage area, including the resulting denials of treatment by providers and the failure of retirees to obtain treatment when coverage is wrongly denied, make Anchorage a principal “place of injury” and the location where a “substantial part of the events ... giving rise the claim occurred.”⁶ Under Alaska Civil Rule 3(c)(1), that is where the claims arose.⁷

Anchorage is also the primary hub of travel into and out of the state. For most retirees and witnesses living throughout the state and outside of Alaska, factors such as roads, distance, flight paths, weather impediments to travel and transportation costs make Anchorage, for most retired public employees of Alaska covered by the Plan, the most physically and financially accessible venue for the case to be heard.

Anchorage is also the venue where historically the main cases involving public employee retirement benefits have been filed and heard before, including cases filed by

⁶ Id.

⁶ Brooks Range Petroleum Corporation v. Shearer, 425 P.3d 65, 77 (Alaska 2018)

⁷ Id.

the RPEA. The DRB has never before objected to the Anchorage filing of those previous cases.

In its answer to the original and amended complaint, DRB did not object to this case being filed in Anchorage or move to dismiss the case based on the “Juneau-only” filing provision. DRB’s “Motion to Compel Venue” does not assert a “wrongful-place-of-filing” argument.

RPEA submits that under AS 22.10.030 and 040; under Alaska Civil Rule 3; based the facts provided above as supported by the attached affidavit,⁸ and based on applicable case law, Anchorage is presumptively the proper venue for this case.

The threshold issue of the motion is whether the Juneau-only filing provision is valid or void. If it is held to be valid, then other issues arise, including whether the DRB has waived any contractual right it might have had by failing to timely take action to enforce the Juneau-only filing provision.

⁸ Please see the attached affidavit of RPEA President Sharon Hoffbeck, providing facts and reasons why this case was filed in Anchorage.

To withstand a motion based on improper venue, the plaintiff must present a prima facie case that the chosen venue is proper. The trial court may consider evidence outside the pleadings but should take the plaintiff’s uncontradicted allegations as true and construe reasonable inferences and factual conflicts in favor of the plaintiff.

Brooks Range Petroleum Corporation v. Shearer, 425 P.3d 65, 71 (Alaska 2018) (footnotes omitted)

Once the plaintiff has met its threshold burden of showing that the case was filed in a location where venue is proper, a defendant seeking to change venue must present evidence by affidavit of the existence of certain factors that might justify a change of venue. Crowson v. Sealaska Corp., 705 P.2d 905, 908 (Alaska 1985) “[U]nless the balance of these factors is strongly in favor of defendants, plaintiff’s choice of forum should rarely be disturbed.” Id.

RPEA v. State of Alaska, Dept of Administration, Div. of Retirement & Benefits, 3AN-18-6722 CI Plaintiff’s Opposition to Defendants’ Motion to Compel Venue

I. The Juneau-Only Filing Provision Is Void

A. The DRB Lacks Authority to Unilaterally Impose a Juneau-Only Filing Restriction and If Enforced Would Violate Separation of Powers

Where a case may be commenced—that is, where it may be filed, is a separate issue than what is the appropriate venue for that case.

Alaska Civil Rule 3(c) and (e)⁹ govern where civil actions such as this one may be commenced.

In keeping with the avowed public policy of providing fair and reasonable access to the courts for all persons throughout Alaska,¹⁰ Alaska Civil Rule 3 provides broad options for where actions may be commenced in the courts of Alaska.¹¹

No Alaska statute or court rule recognizes the right of the DRB override or restrict the rights conferred by court rule for filing cases in the state courts of Alaska.

⁹ Subsections (c) and (e) of Alaska Civil Rule 3 provide:

(c) If, in a civil action other than one specified in (b) of this rule, a defendant can be personally served within a judicial district of the State of Alaska, the action may be commenced either in: (1) the judicial district in which the claim arose; or (2) a judicial district where the defendant may be personally served; or (3) a venue district where the claim arose if the superior court in the district accepts such cases for filing.

(e) Actions in cases not otherwise covered under this rule may be commenced in any judicial district of the state.

¹⁰ See Alvarado v. State, 486 P.2d 891, 905–06 (Alaska 1971)

¹¹ Civil Rule 3(e) is the clearest expression of the policy of providing access to persons throughout the state: “Actions in cases not otherwise covered under this rule may be commenced in any judicial district of the state.”

The Juneau-only filing provision also contravenes AS 39.35.006. That statute provides:

An employer, member, annuitant, or beneficiary may appeal a decision made by the administrator to the office of administrative hearings established under AS 44.64. An aggrieved party may appeal a final decision to the superior court.

The statute does not limit the right to appeal only to the superior court in Juneau. The plain meaning of the statute is that an aggrieved party can file an appeal in any superior court in the state. If the DRB's filing restriction were given effect, it would restrict the broad right that Plan members have by statute to appeal to any superior court.

In sum, the DRB has no authority to override AS 39.35.006 and Alaska Civil Rule 3(c) and (e). Its effort to do so by forcing retirees to file actions only in Juneau, if given effect, would violate constitutional separation of powers. The provision is void for that reason.

B. The Provision Was Not Negotiated and Agreed-Upon by the Parties to a Contract and Is Invalid Per Se

The two cases principally relied upon by DRB in support of its motion are not applicable.¹² Those cases each involved forum selection clauses in a commercial contract that was freely negotiated and mutually agreed-upon by private parties of equal sophistication and bargaining power. Those factors of negotiation and agreement were

¹² Crowson v. Sealaska Corp., 705 P.2d 905 (Alaska 1985) and Volkswagenwerk, A.G., v. Klippen, GmbH, 611 P.2d 498, 503 (Alaska 1980)

of critical importance to the Court's decisions upholding the forum selection clauses¹³ and are not present here.

The Court in Volkswagenverk noted that “[a]t common law, forum selection clauses were generally considered per se invalid on the grounds that a court's jurisdiction could not be contravened by an agreement between litigating parties or that they were against public policy.”¹⁴

The RPEA submits that the Juneau-only filing provision unilaterally inserted into the Plan by the DRB should be held to be invalid per se on the grounds that it was not mutually negotiated and agreed-upon by the parties, and that it contravenes the policy goals, expressed in Alaska Civil Rule 3(c) and (e) and AS 39.35.006, of providing broad and equal access to justice through liberal case-filing options.

The United States Supreme Court has stated that “unless the defendant has also consented to be [sued] in [the district in question], he has a right to invoke the protection which Congress has afforded him.”¹⁵ The same rule should be applied when a defendant seeks to invoke a forum or venue selection clause that it has unilaterally inserted in a contract of adhesion. In that case, unless the plaintiff has consented to having claims arising from the contract heard only in specific venue, then the plaintiff should have the right to invoke the protections and privileges

¹³ Crowson, 705 at 911; Volkswagenverk, 611 P.2d at 503-04.

¹⁴ Volkswagenverk, 611 P.2d at 503.

¹⁵ Olberding v. Illinois Cent. R. Co., 346 U.S. 338, 340 (1953)

provided by law that afford the plaintiffs the freedom to file in any court where venue is authorized by statute and court rule.

The RPEA respectfully submits that for the foregoing reasons and in accordance with the reasoning of Justice Stevens, joined by Justice Marshall, in his dissent in the Carnival Cruise Lines case,¹⁶ the Alaska Supreme Court would likely hold that the unilaterally imposed Juneau-only filing requirement is void and does not “compel venue” of all cases challenging the actions of the DRB to be heard and decided by the superior court at Juneau.

C. The Provision Is Void Because It Is Unreasonable, Unjust and Is the Result of Overreaching By a Governmental Body that Owes Fiduciary Duties of Good Faith and Loyalty

Even if the “reasonableness” test used for evaluating the validity of negotiated and agreed-upon forum-selection clauses were applied here, the provision would fail. Under the reasonableness test, a forum-selection clause is upheld unless there is a clear showing “that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.”¹⁷

Here there was overreaching in that the DRB simply inserted the provision into the Plan booklet. The provision is also unreasonable and unjust in that, if enforced, it would erect a significant and unreasonable barrier to Plan members living outside of

¹⁶ Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 600-01 (1991) (Stevens, J. joined by Marshall, J., dissenting)

¹⁷ Crowson, 705 P.2d at 911, quoting M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972)

Juneau who want to file an action in state court to resolve an issue concerning their retirement medical benefits.

For these same reasons, the RPEA also contends that the Juneau-only filing requirement that the DRB inserted into the Plan handbook is void because in doing so, the DRB violated the fiduciary duties of good faith and loyalty it owes to the retirees it serves by unfairly and unjustly imposing, without just cause, a substantial burden and hardship on those who wish to seek judicial review of DRB decisions that have resulted in reductions or impairments of retirement medical benefits. The RPEA here incorporates by reference the arguments and authorities presented in its pending motion to establish the scope of the fiduciary duties that the DRB owes to those retirees.

It is significant that some courts hold that when a contract contains an enforceable forum or venue selection clause, as long as the venue issue was raised by the defendant in a response pleading, the defendant may move to dismiss the case or transfer venue at any time before final judgment.

The DRB apparently inserted the provision into the Plan with the intent that it would be a mandatory venue provision, as it argues now. To the best of RPEA's knowledge, DRB has never, until now, invoked the provision. Perhaps that was oversight, but the fact that venue was pled as a defense suggests it was not.

It may be that DRB intended the provision to be a kind of hip-pocket litigation weapon that it could hold in reserve in case there came a time when it was displeased

with how a case was progressing. Then it could bring out the weapon in an effort to either dismiss the case or have it transferred to Juneau.

DRB provides no explanation why it waited so long to make the venue motion it is making now. Presumably DRB is relying on the case law in some jurisdictions holding that defendants who have a defense based on an agreed-upon choice of forum or choice of venue clause in a negotiated contract may wait a long time to dismiss the case or move for a change of venue.

In jurisdictions that give defendants extended time to move to dismiss or change venue based on agreed-upon forum or venue selection clauses, those clauses are sometimes referred to as “waiver-resistant vehicles.” Allowing defendants to delay invoking the contractual right can result in serious problems for the plaintiff and frustrate the judicial policy of securing “the just, speedy and inexpensive determination of every action and proceeding.”¹⁸ As noted by the author of a law review “comment:”

Allowing a defendant to wait months, or even years, before bringing his motion to dismiss would needlessly squander [judicial] resources. Moreover, resources of the litigants are limited. A defendant with deep pockets could drain the coffers of his opponent by purposely delaying his motion to dismiss, thus lengthening the case and increasing its expense.

Another cost of waiver-resistant vehicles is that they give the defendant an extra swing at the ball. The defendant can take advantage of this opportunity by purposely allowing the case to continue in the wrong forum just to see how it goes. If the case is going well then the defendant can let it continue, but, if the case starts to turn against him, he can file his motion

¹⁸ Rule 1, Alaska R. Civ. P.

to dismiss and force the plaintiff to start over in the proper forum, thus giving him another shot at victory or settlement.^[19]

There is no legitimate reason for requiring Plan members to file actions concerning their retirement medical benefits only in Juneau. The RPEA is aware of no such filing restriction on retirees who file actions against the DRB concerning other kinds of retirement benefits. The DRB's Juneau-only filing restriction only purports to apply to retired public employees of Alaska who file actions arising from the AlaskaCare Retiree Health Plan.

The DRB argues that its Juneau-only filing provision "does not represent the selection of an alien forum designed to cause serious inconvenience of parties challenging the terms, conditions or design of the Plan" and summarily concludes that "it is reasonable to enforce the plain terms of the Plan's forum selection clause."²⁰

The DRB does not explain why it is not at least "a serious inconvenience" to the retired Alaska public employees who are covered by the Plan and living in, say, Kotzebue, Kenai, Fairbanks, Utqiagvik or Ketchikan, to have to file an action concerning

¹⁹ Comment, "Forum Non Conveniens: A Vehicle for Federal Court Enforcement of Forum Selection Clauses that Name Non-Federal Forums as Proper," 97 NW. U. L. Rev. 1853, 1874 (Summer 2003)

²⁰ DRB motion at p. 6. The DRB seems to overlook the distinction between a forum selection clause and a venue selection clause. Forum means "[a] court or other judicial body; a place of jurisdiction." Venue means "[t]he territory, such as a country or other political subdivision, over which a trial court has jurisdiction." Black's Law Dictionary 725, 1695 (9th ed. 2009) This motion involves neither. The provision at issue purports to require all cases concerning retirement medical benefits to be filed in Juneau. It does not specify forum or venue.

Plan medical benefits in Juneau and then either litigate there or undertake efforts to have the case transferred to another superior court location.

A Juneau-only filing requirement, if enforced, would impose a substantially greater hardship and impediment on Alaska's retired public employees living outside of Juneau than a similar capital-city-only filing requirement would impose on the retired public employees of, say, Rhode Island or Delaware.

RPEA submits that if the Juneau-only filing requirement were upheld, retired public employees of Alaska living everywhere except Juneau would be at the mercy of the DRB and its Plan administrators as a result of having no practical access to the courts to obtain relief from wrongful reductions of benefits and denials of claims.

DRB certainly understands that fact.

Allowing the DRB to Enforce the Provision Would Constitute a Diminishment and Impairment of Benefits in Violation of Art. XII, § 7 of the Alaska Constitution

The Juneau-only filing provision was unilaterally inserted into the Plan booklet sometime after 1979 and before 1983.²¹ Before the DRB inserted the provision into the Plan, there was no question that retirees covered by the Plan had the right to file an action concerning their retirement benefits in any state court as permitted by Alaska Civil Rule 3(c) and (e).

²¹ Affidavit of RPEA President Sharon Hoffbeck, attached.

The benefit of being able to file an action challenging a DRB coverage decision or other aspect of its administration of the Plan in any appropriate Alaska state court is particularly important given the immense size of Alaska and its limited infrastructure.

Allowing the DRB to enforce the provision would diminish and impair an important, previously-existing right/benefit—that is, the right and benefit that retirees had under the Plan to file their actions in any appropriate state court in Alaska. For this reason, upholding the filing restriction would violate the Alaska constitutional guarantee in Art, XII § 7 against such diminishment and impairments of retirement benefits.

If Upheld, the Provision Would Deny Inherent Constitutional Rights; Equal Protection; Fundamental Fairness Required by Due Process and Fair and Equal Access to Courts

The Juneau-only filing provision, if enforced, would violate the equal protection guarantee of Art I, § 1 of the Alaska Constitution. That section states:

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

The right to receive the vested retirement benefits that a retired public employee of Alaska has earned is a right to “the enjoyment of the rewards of their own industry.” That right is such an important public policy in Alaska that it is also protected by a separate constitutional section devoted solely to guaranteeing that the vested retirement benefits earned by the public employees of Alaska shall not be diminished or impaired. Art. XII, § 7, Alaska Constitution.

The Juneau-only filing provision, if enforced, would violate the constitutional guarantee of equal protection by unfairly discriminating without just cause against Plan members based solely on the fact that they live in parts of Alaska other than Juneau. The farther away the retiree lives from Juneau, the greater the difficulty of having to file in Juneau. The requirement infringes on fundamental rights to access to state courts in order to litigate to protect retirees' fundamental constitutional rights to receive vested retirement medical benefits.²² There is no legitimate reason, much less a compelling state interest, for requiring Plan members to file actions concerning retirement medical benefits only in Juneau.²³ Therefore, a Juneau-only filing requirement violates the constitutional guarantee of equal protection.

The RPEA also submits that enforcing a Juneau-only filing provision would violate the principles of fundamental fairness that are inherent in constitutional notions of Due Process.²⁴ Typically, the issue of fundamental fairness required by due process comes up in the context of criminal cases where some procedural issue arises that impairs the right or ability of the defendant to develop or present a defense.²⁵

²² Public Employees' Retirement System v. Gallant, 153 P.3d 346, 349–50 (Alaska 2007)

²³ Id.

²⁴ Alaska Constitution, Art. I, §7.

²⁵ See e.g., State v. Mouser, 806 P.2d 330, 336 (Alaska App.1991) (“Because the essence of due process is basic fairness, the chief concern of the rule prohibiting unreasonable preaccusation delay is the impact of the delay on the accused's ability to present a defense.”)

But similar issues of fundamental fairness apply where, as here, retirees who are often on limited, fixed incomes are unable to get coverage for medical treatments they need and have reached the point where they have no other option but to file a court action. Forcing those retirees who live far from Juneau to have to undertake the substantial procedural hurdles and costs of filing their cases in Juneau imposes a substantial hardship on individuals who often are already very vulnerable as a result of their financial circumstances and medical condition. That is fundamentally unfair, and it would be fundamentally unfair to require those retirees to apply for a waiver of the Juneau filing requirement.

II The Motion Is Untimely and Any Contractual Right DRB May Have Had to Invoke It Has Been Waived

Assuming that the Juneau-only filing provision is a venue selection provision and otherwise valid, it would be a venue privilege provided to the DRB by contract. Being such a privilege, “[i]t may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct.”²⁶ As noted by the U.S. Supreme Court, it makes no difference whether the surrender of the privilege is “conceived negatively as a waiver or positively as a consent to be sued” in a certain location.²⁷ The result is the same.

²⁶ Neirbo Co. v. Bethlehem Shipbuilding Corporation, 308 U.S. 165, 168 (1939)

²⁷ Id.

A party may waive a right it might otherwise have by contract by failing to timely assert it.²⁸ When a party merely pleads a defense and then permits it to lie dormant while subjecting an opponent to burdensome litigation on the merits, the dormant defense may be waived.

RPEA contends that even if the Juneau-only filing restriction were held to be valid, the DRB waived it by its unreasonable delay in asserting it in this case. If the case were to be transferred to Juneau, it would cause substantial financial hardship to the RPEA with resulting prejudice.

It would also be profoundly unfair to the many hundreds and perhaps thousands of Plan members who have been negatively impacted by the Plan amendments and Aetna's "reinterpretations" at issue in this case—Plan changes that have resulted in reductions and denials of medical benefits previously provided by the Plan. In some case they have experienced immediate and irremediable harm to their physical and financial health, as well as harm to their sense of financial security and mental peace-of-mind.²⁹

The RPEA also submits that DRB's past failures to actively assert the Juneau-only filing provision in other cases also waived any right the DRB might otherwise have had to force compliance with the filing provision and constituted a consent that retirees may file actions arising from the Plan in any state court in accordance with Alaska Civil Rule 3. Those past failures to invoke the provision gave rise to a reasonable

²⁸ Automobile Mechanics Local 701 Welfare and Pension Funds v. Vanguard Car Rental USA, Inc., 502 F.3d 740, 747 (7th Cir. 2007)

²⁹ Please see attached affidavit of RPEA President Sharon Hoffbeck.

expectation and reliance on the part of prospective, then current and now retired Alaska public employees that DRB does not invoke the Juneau-only filing provision. As shown in the attached supporting affidavit, one of the reasons the RPEA chose to hire a lawyer in Anchorage to file this case is the DRB's past practice of not invoking the Juneau-only filing provision and RPEA's resulting reasonable expectations and reliance that DRB does not invoke that provision as a defense.

CONCLUSION

For the foregoing reasons, the RPEA respectfully urges the Court to deny the motion, preferably on the grounds that the Juneau-only filing provision is void and invalid in hopes that by doing so, DRB will cease to raise the issue again.

DATED this 25th day of July 2019.

LAW OFFICES OF WM. GRANT CALLOW



WM. GRANT CALLOW

ABA No.: 7807062

Certificate of Service

By my signature below, I certify that on this 25th day of July 2019, I caused a true and complete copy of the foregoing Opposition to Motion to Compel Venue, with a copy of the attached affidavit, to be served upon Jeff Pickett, Assistant Attorney General of the State of Alaska, counsel to Defendant, by email and hand-delivery and on Kevin McKenzie Dilg, Assistant Attorney General of the State of Alaska, counsel to Defendant, by email and U.S mail, first class postage pre-paid and addressed to their respective addresses of record.



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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,)	
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v.)	
)	Case No. 3AN-18-6722 CI
STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION, DIVISION OF RETIREMENT AND BENEFITS,)	
)	
Defendant.)	

**AFFIDAVIT OF SHARON HOFFBECK IN SUPPORT OF OPPOSITION
 TO DRB’S “MOTION TO COMPEL VENUE”**

STATE OF ALASKA)
) ss
 THIRD JUDICIAL DISTRICT)

I, Sharon Hoffbeck, state under oath or affirmation, the following:

1. I am a member and president of the Retired Public Employees of Alaska (“RPEA”), the Plaintiff in this case. I have served as the president of the RPEA for over 3 years.

2. The statements I am making in this affidavit are based on the personal knowledge and belief that I have acquired as a result of my membership and work for the RPEA and its members.

3. The RPEA is a voluntary membership organization whose membership includes thousands of individuals who are retired public employees of Alaska who live throughout Alaska as well as in other states and countries.

4. A large percentage of RPEA's members live in or relatively close to Anchorage.

5. 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.

6. In January 2014 the Aetna Life Insurance Company (Aetna") took over as the third-party administrator (TPA") of the AlaskaCare Retiree Health Plan ("the Plan"). The Plan is a defined benefit medical insurance plan that provides medical insurance coverage to all retired public employees of Alaska who were hired before July 1, 2007 and who earned vested retirement benefits by their public service.

7. After Aetna took over as the Plan TPA, it began reinterpreting certain words and phrases used in the Plan language, substituting its own definitions and standards contained in its proprietary Clinical Policy Bulletins ("CPBs") in place of the plain meaning

of those words and phrases and the meanings that historically had been applied to determine the medical benefits provided by the Plan.

8. The RPEA contends in this case that Aetna's use of its own CPBs to reinterpret the Plan language has led to eliminations, reductions and impairment of medical benefits, resulting in wrongful denials of claims for medical benefits that historically had been covered by the Plan.

9. In addition, since Aetna took over as the Plan TPA, the DRB has summarily imposed a number of amendments to the Plan that RPEA contends have resulted in additional diminishment and impairments of medical benefits. The RPEA contends that those amendments were done in violation of the limitations on Plan changes that the Alaska Supreme Court recognized in Duncan v. Retired Public Employees of Alaska, Inc., 71 P.3d 882 (Alaska 2003) were imposed by the Alaska Constitution. The RPEA contends the DRB made those changes without undertaking, much less fulfilling, the procedural and substantive requirements established in Duncan for making such changes.

10. After the Plan changes were implemented by the DRB and Aetna, RPEA began receiving reports from many of its members that they were getting notices of denials of claims for medical coverage from Aetna for many different types of medical treatment that had previously been covered by the Plan. RPEA encouraged those members to appeal the denials of those claims. RPEA also reached out to the DRB to alert the Division of the problems being reported and to try to determine the reason for the denials of the claims. RPEA was initially told that the wrongful denials were the result

of normal and expected problems that needed to be resolved by Aetna as it modified its claims-handling system to comport with the coverages provided by the AlaskaCare Plan, and that Aetna and the DRB were working to resolve those problems.

11. Based on information and belief, the RPEA believes it is highly likely that the DRB also received many more reports of denials of coverage than the many hundreds that RPEA has received from retirees covered by the Plan.

12. It eventually became apparent that many denials of claims being reported to RPEA were not accidental but instead were the result of both Aetna's reinterpretation of certain terms and phrases used in the Plan and the amendments to the Plan that were summarily imposed by the DRB. When informal efforts undertaken by the RPEA to resolve the problem of the reductions and impairments of medical benefits, the RPEA filed this case.

13. This case was filed in Anchorage for a number of reasons. First, a large percentage of Alaska's retired public employees who are RPEA members live in and around Anchorage and receive their medical treatment in Anchorage. Many of the reports that the RPEA has received concerning denials of medical benefits based on the Plan changes imposed by DRB's amendments and Aetna's use of its CBPs have come from retirees living in or near Anchorage. Therefore, many of the effects of the Plan changes imposed by the DRB and Aetna have been and are being experienced by retirees living in and around Anchorage, and those denials frequently affect health care providers who are in and around Anchorage.

14. Second, the RPEA members and other retirees covered by the Plan live throughout the state. Anchorage is the location that is the most universally accessible for retired Alaska public employees living throughout the state, based on road networks, air routes, weather and availability of accommodations.

15. Third, the RPEA and some of its members have filed previous cases in Anchorage concerning Plan issues without the DRB objecting to the filing in Anchorage or moving to compel the court to transfer venue to Juneau based on the plan provision the DRB is raising now for the first time, regardless of the fact that venue in Anchorage would otherwise be appropriate. Based on this, the RPEA believed that the DRB either did not care about the provision or had determined that it was unenforceable. In reliance on DRB's past conduct of not attempting to invoke the Juneau-only filing provision, the RPEA has hired Anchorage lawyers to represent it and the interests of its members filed its cases in Anchorage.

16. Based on what I have been able to determine so far, the Juneau-only filing restriction was not always part of the Plan but was inserted into it by the DRB sometime after 1979, probably in 1983. I am unaware of DRB ever having invoked the Juneau-only filing provision in any previous case concerning wrongful denials of claims or reductions and impairments in Plan benefits.

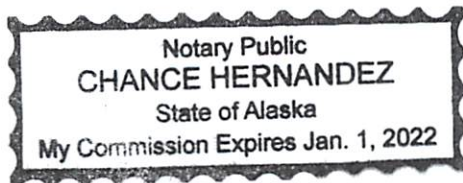
17. Transferring this case to Juneau now, 14 months after filing, will result in a significant financial hardship to the RPEA based on travel costs and the likely need to retain a Juneau lawyer to assist in and perhaps take over the representation of the RPEA in this case. What would be even more unfair and prejudicial is that the transfer of this

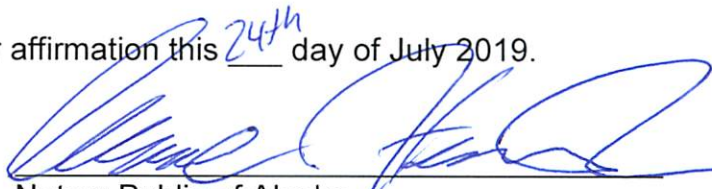
case is likely to cause even more of a delay in the final resolution of the case. The delay works a substantial hardship and, in some cases, immediate and irremediable harm on retirees whose medical claims have been and are being denied claims, especially those who by virtue of their economic circumstances are unable to pay for needed medical treatments.

DATED this 24 day of July 2019.


Sharon Hoffbeck

Subscribed before me on oath or affirmation this 24th day of July 2019.




Notary Public of Alaska
My commission expires: Jan 1 2022