IN THE SUPERIOR COURT FOR 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.	3AN-18-06722CI

ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT; AND GRANTING DEFENDANT'S CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff, the Retired Public Employees of Alaska, Inc. (Plaintiff or RPEA), requests this Court grant partial summary judgment and hold, as a matter of law, that the Alaska Care Retiree Health Plan (Plan) Amendment 2016-2 (the Amendment) is null and void. Plaintiff also requests this Court enjoin Defendant State of Alaska, Department of Administration, Division of Retirement and Benefits (Defendant or DRB), from requiring retirees to pay a second deductible as a condition of receiving Plan medical benefits that are supplemental to Medicare. Lastly, Plaintiff requests this Court order DRB to reimburse Plan members who paid a second deductible as required by DRB.

DRB opposes RPEA's Motion for Partial Summary Judgment and argues that the Amendment merely clarified the Plan's language and "resolved any doubt about the manner in which the deductible provisions in Medicare and the Plan interrelate." DRB filed a Cross Motion for Partial Summary Judgment asking this Court to rule, as a matter

of law, that the Amendment is valid. For the following reasons, this Court denies RPEA's motion and grants DRB's cross-motion.

Background

RPEA is a nonprofit corporation organized in Alaska for the benefit of retired public employees. "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."[1] RPEA has standing to sue on behalf of its members and brought this current action against the State of Alaska to invalidate Amendment 2016-2.

The State of Alaska provides an extensive health insurance policy for retired public employees encompassed in the Public Employees' Retirement System of Alaska (PERS). The commissioner of administration oversees PERS.[2] The commissioner delegated to the Division of Retirement and Benefits, *inter alia*, the duties of Plan administration, evaluation and approval or disapproval of benefit claims, to publish informational handbooks about the Plan, and to review significant changes to policies, regulations and benefits.[3] DRB, as designee, may modify the terms of the Plan,[4] adopt internal management regulations,[5] and adopt other regulations to operate the retirement

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[1] Compl. for Declaratory, Injunctive, Restitutionary and Other Relief at 2.
[2] AS 39.35.003.
[3] AS 39.35.004 Powers and duties of the administrator.
[4] 2 AAC 39.390.
[5] AS 39.35.005.

system.[6] DRB publishes the AlaskaCare Employee Health Plan Booklet periodically, detailing the terms and conditions of coverage and benefits provided under the Plan.[7] DRB also publishes pamphlets, informational brochures, and notices outlining the benefits provided. Plan members are required to pay an annual out-of-pocket deductible of $150. Once a member turns 65 years old the Plan functions as a supplemental program to Medicare benefits.[8]

In 2015, a Plan member, C.P., appealed the DRB determination that requires annual deductibles under the Plan "in addition to the annual deductible that [member] was required to pay pursuant to his membership in the Medicare Program."[9] C.P. argued to the Office of Administrative Hearings (OAH) that the language of the Plan was "ambiguous as to whether DRB can require retirees to pay both deductibles sequentially and therefore it must be construed to meet the insured's reasonable expectation that the deductibles may be satisfied concurrently."[10] The disputed language stated that the Plan's payment on a claim is calculated "by subtracting the benefits payable by [Medicare] from 100% of expenses **covered** by the [Plan] on that claim." The Administrative Law Judge (ALJ) focused on the proper interpretation of the Plan's language and whether DRB's practices complied with that interpretation.[11] The ALJ ruled in C.P.'s favor and held that:

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[6] AS 39.35.004 Powers and duties of the administrator.
[7] AS 39.35.004(11).
[8] Retiree Insurance Information Booklet (May 2003).
[9] *In the Matter of C.P.*, OAH No. 15-0283-PER, Agency No. PERS 2015-0122 (April 13, 2016) [hereinafter *ITMO C.P.*].
[10] *Id.*
[11] *Id.*

> The failure to mention the assessment of the Plan deductible in that context, when contrasted with other Plan language generally requiring assessment of the Plan's deductible against members, results in the Plan being, at best, ambiguous as to whether both deductibles can be assessed against a retiree member or, stated differently, whether the expenses left unreimbursed by Medicare can be deemed ineligible to satisfy the Plan deductible. We must construe the Plan, as a contract of adhesion, in favor of the insured's reasonable expectations, that he or she not be charged a higher total of deductibles as a result of having reached age 65.[12]

The OAH decision, *ITMO C.P.*, was final and appealable to the Superior Court in accordance with Alaska R. App. P. 602(a)(2). DRB did not appeal.

On May 25, 2016, DRB issued Amendment 2016-2.[13] The Amendment addressed the "Effect of Medicare" and the "Coordination of Benefits" Sections of the Plan. The "Effect of Medicare" provision was amended to include the following language: "Relevant deductibles, coinsurance amounts, and out-of-pocket limits continue to apply to both Medicare and the Plan."[14]

On May 9, 2018, RPEA filed suit against DRB seeking declaratory, injunctive, and restitutionary relief alleging the Amendment: 1) violates the Alaska Constitution, Article XII, § 7; 2) violates due process protections under both the Alaska Constitution and the U.S. Constitution; 3) impairs the Plan in violation of the Alaska Constitution, Article I, § 15; and 4) breaches the agency's fiduciary duties.[15]

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[12] *Id.*

[13] AlaskaCare Retiree Health Plan Amendment 2016-2 (May 25, 2016). This Amendment was issued 42 days after the ALJ's Final Order.

[14] *Id.*; compare with the Plan's previous language of "[t]he primary plan pays benefits first, without regard to any other plan. When the retiree plan is secondary, the amount it will pay will be figured by subtracting the benefits payable by the other plan from 100% of the expenses **covered** by the retiree plan on that claim. The plan pays the difference between the amount the other plan paid and 100% of expenses the retiree plan would cover." Retiree Insurance Information Booklet (May 2003) (emphasis in original).

[15] *See* Compl. for Declaratory, Injunctive, and Restitutionary and Other Relief. This Court further declared in its *Order Re: Plaintiff's Motion for Partial Declaratory Judgment and to Establish Law of the Case Re: The Scope of Fiduciary Duties owed to the Beneficiaries of the AlaskaCare Retiree Health Care Plan by the Alaska Division of Retirement and Benefits* (April 14, 2020) that Defendant, DRB, owes the fiduciary duties of good faith and fair dealing, loyalty and disavowal of self-interest, and due process. This Court declined to enforce the affirmative

Before this Court is RPEA's Motion for Partial Summary Judgment and DRB's Cross Motion for Partial Summary Judgment. The scope of the summary judgment at hand focuses on the validity of Amendment 2016-2 and RPEA's constitutional challenges. This Court heard oral arguments on August 25, 2020.

Legal Standard

Summary judgment is warranted where "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law."[16] Under Alaska Rule of Civil Procedure 56, the non-moving party is only required to show "that a genuine issue of material fact exists to be litigated"[17] and that "the party could produce admissible evidence that reasonably would demonstrate to the court that a triable issue of fact exists."[18] All reasonable inferences must be drawn in favor of the non-moving party, and facts must be viewed in the light most favorable to the non-prevailing party.[19]

Applicable Law

1. Vested Retirement Benefits Under the Alaska Constitution

Article 12, Section 7 of the Alaska Constitution protects retirement benefits of public employees: "Membership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship. Accrued benefits of

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fiduciary duty to advise the affected Plan beneficiary of all the reasons why the claim was denied and of any fact materially affecting their rights and interests or which might reasonably be expected to influence their actions.

[16] Ak. R. Civ. P. 56.

[17] *Id.*

[18] *Burnett v. Covell*, 191 P.3d 985, 991 (Alaska 2008).

[19] *Lewis v. State, Dep't of Corr.*, 139 P.3d 1266, 1268-69 (Alaska 2006).

these systems shall not be diminished or impaired."[20] "Accrued benefits" has been interpreted broadly and encompasses "all retirement benefits that make up the retirement benefit package that becomes part of the contract of employment when the public employee is hired, including health insurance benefits."[21] 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."[22]

In the seminal case, *Duncan v. Retired Public Employees of Alaska, Inc.*, the Alaska Supreme Court created a strict diminishment analysis for health care benefit changes.[23] Recognizing that health benefits must evolve as health care advances, the Supreme Court adopted an equivalency analysis to determine whether changes to the Plan unconstitutionally diminish protected benefits, noting that, "benefits can be modified so long as the modifications are reasonable, and one condition of reasonableness is that disadvantageous changes must be offset by comparable new beneficial changes."[24] The Supreme Court found that under some circumstances, the Plan may also be amended to keep it from becoming obsolete.[25] *Duncan* claims must be assessed by looking at the group as a whole, rather than on an individualized basis.[26]

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[20] AK CONST. Art. XII, § 7; *Duncan v. Retired Pub. Employees of Alaska, Inc.*, 71 P.3d 882 (Alaska 2003).
[21] *Duncan*, 71 P.3d at 888; *Hammond v. Hoffbeck*, 627 P.2d 1052, 1057 (Alaska 1981).
[22] *Hammond*, 627 P.2d at 1056.
[23] *Duncan*, 71 P.3d at 888.
[24] *Id.* at 886, 891-92 (upholding *Hammond v. Hoffbeck*'s factors to determine reasonableness: changes are reasonable for the purpose of keeping a retirement system flexible, while maintaining the integrity of the system; changes are reasonable if they bear some material relation to the theory of the retirement system and its successful operation; changes are reasonable when the offsetting improvement relates generally to the benefit that was diminished).
[25] *Id.* at 889.
[26] *Id.* at 891.

First, this Court must determine whether the Amendment changed the terms of the Plan. In other words, does the Amendment alter the character of retirees' health care benefits. If the Plan terms were changed, then this Court's task is to determine whether Amendment 2016-2 had disadvantageous effects on Plan members and, if so, to weigh those disadvantages against any advantages that may have accompanied them.

2. Due Process

The Alaska Constitution guarantees that "[n]o person shall be deprived of life, liberty, or property without due process of law."[27] Both parties agree that vested retirement benefits are valuable property rights. "[T]he interest of an individual in continued receipt of … benefits is a statutorily created 'property' interest protected by the Fifth Amendment."[28]

3. Takings Clause

The Alaska Constitution guarantees that "[p]rivate property shall not be taken or damaged for public use without just compensation."[29] Alaska's Takings Clause is liberally interpreted in favor of property owners.[30] Both real and personal property are protected and both temporary and permanent takings are protected.[31] The finding of a taking depends on whether an individual has been deprived of the economic benefits of ownership, not whether the State captures any of those benefits.[32]

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[27] AK CONST. Art. I, § 7.
[28] *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).
[29] AK CONST. Art. I, § 18.
[30] *See, e.g., Anchorage v. Sandberg*, 861 P.2d 554, 557 (Alaska 1993) (citing *State v. Doyle*, 735 P.2d 733, 736 (Alaska 1987) and *State v. Hammer*, 550 P.2d 820, 824 (Alaska 1976)).
[31] *See, e.g., Cannone v. Noey*, 867 P.2d 797, 800 n.3 (Alaska 1994); *Hammer*, 550 P.2d at 827.
[32] *Waiste v. State*, 10 P.3d 1141, 1154 (Alaska 2000).

Discussion

Following oral argument, RPEA filed a request asking this Court to take judicial notice that DRB's separate webpages for benefit clarifications and Plan amendments prove that Amendment 2016-2 changed the terms of the Plan, rather than clarifying the language of the Plan, like the DRB contends.[33] RPEA asserts that the benefit clarifications webpage is for DRB's interpretations of Plan provisions, while the Plan amendments webpage lists changes to the terms of the Plan.[34]

Judicial notice is appropriate if the fact is either: 1) generally known within the state; or 2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.[35] "Facts and inferences about which reasonable minds could differ are not the proper subject of judicial notice."[36]

This Court takes judicial notice of fact that DRB has two separate webpages listing benefit clarifications and Plan amendments, but refrains from taking judicial notice of fact that this proves Amendment 2016-2 changed the terms of the Plan. Whether Amendment 2016-2 actually changed the terms of the Plan, and if so, whether it violates the Alaska Constitution and *Duncan* is at the center of this dispute.

I. Was DRB required to appeal *ITMO C.P.*?

RPEA insists that Amendment 2016-2 is a run-around of the appellate process and that DRB was required to appeal *ITMO C.P.* to the Superior Court in order to correct the

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[33] Pl.'s Req./Mot. for the Court to Take Judicial Notice of Facts Relevant to Pending Motions Regarding Plan Amendment 2016-2 at 2.
[34] *Id.*
[35] Alaska R. Evid. 201(b).
[36] *Angleton v. Cox*, 238 P.3d 610, 617 (Alaska 2010) (quoting *F.T. v. State*, 862 P.2d 857, 864 (Alaska 1993)).

ALJ's adverse decision against it. RPEA argues rather than appealing the OAH decision, that DRB "unilaterally and summarily amend[ed] the Plan to change it to what the DRB thinks the Plan should be[.]"[37] DRB asserts that it did not appeal the ALJ decision because: 1) the ALJ decision applies only to C.P.'s claim; 2) the OAH does not have the legal authority to change the terms of the Plan; and 3) DRB possesses the authority to correct an ALJ interpretation.[38] Both parties agree that the OAH has jurisdiction over PERS appeals. However, the parties disagree as to the scope of the OAH's jurisdiction.

For the sake of argument, let us assume that DRB did in fact appeal the adverse decision, *ITMO C.P.* to the Superior Court. In that instance the Superior Court must apply one of four possible standards of review when deciding an administrative appeal: 1) the substantial evidence test for questions of fact; 2) the reasonable basis test for questions of law involving agency expertise; 3) the substitution of judgment test for questions of law where no expertise is involved; and 4) the reasonable and not arbitrary test for review of administrative regulations.[39] Regardless of which standard the Superior Court applied on review, the decision would only apply to C.P., not all Plan members.

The legislature conferred upon the OAH original jurisdiction to hear appeals challenging any of the administrator's decisions.[40] Aggrieved Plan members are afforded the right to appeal the Plan administrator's decision to the OAH.[41] For example, a frequent challenge presented to the OAH pertains to denial of coverage under the Plan.

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[37] Pl.'s Mot. for Partial Summ. Judgment at 15; RPEA Combined Reply and Opp. to Def.'s Opp. and Cross-Mot. RE: Plan Amendment 2016-2 at 9-10.
[38] Opp. to Mot. for Partial Summ. Judgment and Cross-Mot. at 15.
[39] *Jager v. State*, 537 P.2d 1100, 1107 (Alaska 1975).
[40] AS 39.35.006.
[41] *Id.*

In *ITMO C.P.*, C.P. challenged a coverage decision requiring him to pay both Medicare and Plan deductibles.[42] The parties agreed that the out-of-pocket cost paid by C.P. was $44.60.[43] The relief available to C.P. if he prevailed was limited to recoupment of his out-of-pocket costs. Therefore, even if the Superior Court affirmed the ALJ's decision, it would only apply to C.P. and not to every Plan member, like RPEA contends.[44]

DRB would still have the authority to issue Amendment 2016-2.[45] RPEA could appeal this decision to the OAH under AS 39.35.006.[46] However, because RPEA attacks the constitutionality of Amendment 2016-2, it could not force DRB to resolve it in its favor by way of administrative action. The OAH does not have the authority to resolve that assertion because "[a]dministrative agencies do not have the jurisdiction to decide issues of constitutional law."[47] An administrative agencies' jurisdiction is limited by statute; it cannot hear actions outside the bounds of their prescribed authority.[48] While the OAH may certainly consider RPEA's complaint and submit a proposed decision, it cannot force DRB to change the Plan at any level of administrative appeal.[49] Thus, RPEA's contention that DRB was mandated to appeal *ITMO C.P.* instead of issuing Amendment 2016-2 would not lead to the outcome it hopes it would.

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[42] *ITMO C.P.*
[43] *Id.*
[44] RPEA does not provide statutory or case law support to suggest that the OAH decision was sweeping as to all Plan members or that an OAH decision may change the terms of the Plan. RPEA also does not point to language in the OAH decision that suggests the decision was binding beyond C.P. and this Court has been unable to locate any case law or regulation to support the position.
[45] AS 39.35.003, 39.35.005, 39.35.006; 2AAC 39.390.
[46] AS 39.35.006 ("An employer, member, annuitant, or beneficiary may appeal a decision made by the administrator to the office of administrative hearings under AS 44.64. An aggrieved party may appeal a final decision to the superior court."). Under *Duncan*, C. P. is protected from Amendment 2016-2 and is entitled to pay one deductible to receive both Plan and Medicare coverage.
[47] *Alaska Public Interest Research Group v. State*, 167 P.3d 27, 36 (Alaska 2007).
[48] *Id.* at 36-37.
[49] *Id.*

In its briefing and at oral argument, RPEA suggested that DRB was required to notify retirees of the *ITMO C.P.* decision.[50] But publishing the decision was not DRB's responsibility. Under AS 44.64.090, the "office [of administrative hearings] shall make final agency decisions reached after administrative hearings available online through an electronic data base."[51]

At oral argument, RPEA suggested that DRB's failure to inform retirees of *ITMO C.P.*, was a breach of its fiduciary duties to retirees. It was previously found that DRB owes retirees the fiduciary duties of good faith and fair dealing, loyalty and disavowal of self-interest, and due process.[52] However, none of these duties are breached by DRB's failure to provide notice of *ITMO C.P.* because the ALJ decision does not injure or affect the rights of the retirees.[53]

II. The OAH does not possess the power to change the terms of the Plan.

DRB explains that it did not appeal *ITMO C.P.* because the decision does not apply to every Plan member, and did not change the terms of the Plan, like RPEA contends. The OAH cannot amend the terms or language of the Plan, only the

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[50] Pl.'s Mot. for Partial Summ. Judgment Re: Plan Amendment 2016-2 at 15.
[51] AS 44.64.090 Administrative Hearing Records.
[52] *Order Re: Plaintiff's Motion for Partial Declaratory Judgment and to Establish Law of the Case Re: The Scope of Fiduciary Duties owed to the Beneficiaries of the AlaskaCare Retiree Health Care Plan by the Alaska Division of Retirement and Benefits* (April 14, 2020).
[53] *Id.* (stating that DRB owes Plan members the duty of good faith and fair dealing to not do anything to injure the rights of the beneficiaries; the duty of loyalty and disavowal of self-interest to act solely "in the best interests of Plan beneficiaries to ensure that A) the claim of Plan beneficiaries get a full and fair review; b) their legitimate, covered claims for medical benefits are timely paid; and C) that no claims are paid that are not legitimate or not otherwise covered by the Plan;" duty of due process to give notice and opportunity to be heard regarding proposed changes to Plan benefits or administration and to provide a statement regarding these changes and what the Defendant has done to offset the changes so that no benefit is diminished pursuant to *Duncan*).

commissioner of administration or its designee has the power to do so.[54] Nowhere in the retiree health insurance statutes is the OAH granted the power to unilaterally change the Plan terms, make substantive law, or establish public policy.[55] The legislature could have included such language, but did not. Rather, the only specific grant of "lawmaking" is in regard to ethical conduct of state hearing officers.[56] Therefore, any decision issued by the OAH regarding PERS is limited to the aggrieved party bringing the claim, not every Plan member.[57]

III. DRB was entitled to correct an ALJ interpretation.

It is well established, consistent under both Alaska law and decisions of the United States Supreme Court,[58] that agencies may overrule prior agency decisions if convinced it was wrongly decided.[59] "When overruling a prior decision, the agency must provide a reasoned analysis that explains why the change is being made. Moreover, it may not act in an arbitrary, unreasonable, or discriminatory fashion."[60]

DRB, in briefing, explains that Amendment 2016-2 was issued to correct *ITMO C.P.*, specifically asserting that the ALJ "ignor[ed] the Division's historical practices and

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[54] AS 39.35.003, 39.35.005, 39.35.006; 2 AAC 39.390 ("If necessary, the administrator may change the premiums and the terms of major medical insurance coverage.").
[55] *See ITMO T.N.S.*, OAH No. 09-0025-PER (June 2009) ("OAH judges are generalists who may have developed expertise in some areas of the law but whose decisions are not meant to make new law.").
[56] AS 44.64.020(a)(11), 44.64.050(b).
[57] *See* AS 39.35.006 (stating who can bring a claim against the administrator of PERS).
[58] *See S.E.C. v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (affirming the well-established practice that the choice between modifying an existing policy by rule or by individual ad hoc litigation is one that lies in the informed discretion of the agency).
[59] *Chocknok v. State, Commercial Fisheries Entry Comm'n*, 696 P.2d 669, 676 n.10 (Alaska 1985) (holding agencies hold a discretionary power to correct wrongly decided policies through adjudicatory determinations).
[60] *May v. State, Commercial Fisheries Entry Comm'n*, 168 P.3d 873, 884 (Alaska 2007).

fail[ed] to properly interpret the Plan as a whole..."[61] DRB, to clarify any ambiguity of the Plan language, issued Amendment 2016-2.[62]

DRB provided this Court with support that it collected both Plan and Medicare deductibles prior to *ITMO C.P.* and Amendment 2016-2. DRB supplied an affidavit of Larry Davis, an employee with personal knowledge of the policies and procedures surrounding the Plan and who also participated in *ITMO C.P.*[63] Mr. Davis affies that since the Plan's inception in 1975, both Plan and Medicare deductibles must be satisfied for supplemental coverage.[64] Mr. Davis has been employed with DRB since 1997 and during his employment it has been "the long standing practice of the Plan to charge its deductible in addition to any deductible change [sic] by Medicare or any other primary insurer."[65] Mr. Davis also affies this long standing practice is consistently applied to Plan members.[66]

In addition to Mr. Davis' affidavit, DRB also published numerous Plan supplements that specifically explain how the Plan works in conjunction with Medicare coverage.[67] The June 2006 "Guide for Members of the AlaskaCare Retiree Health Plan" (Guide) provides two examples of how claims are paid when a member has both Medicare and Plan coverage.[68] Each example contains the language: "assuming the

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[61] Opp. to Mot. for Partial Summ. Judgment and Cross-Mot. at 15.
[62] *Id.*
[63] *See* Opp. to Mot. for Partial Summ. Judgment and Cross-Mot., Ex. G, Aff. of Larry Davis ("I was directly involved with the Division's review, response, and defense of the administrative appeal *ITMO CP*; OAH No. 15-0283-PER.").
[64] *Id.* at 3, ¶ 12.
[65] *Id.* at 2.
[66] *Id.*
[67] *See* Opp. to Mot. for Partial Summ. Judgment and Cross-Mot., Ex. D at 3-5, 11-12.
[68] *Id.* at 3, 4.

service is covered by both plans and **deductibles** are met."[69] The June 2007 version of the Guide also contains an example of how a claim is paid when a member has both Plan and Medicare coverage, and again contains the same language indicating a member is required to pay both **deductibles**.[70] A 2010 report issued by the Department of Administration also explains the interwoven nature of the Plan and Medicare, again providing an example of a claim payout and containing language indicating a member is responsible for more than one deductible.[71] The supplements support DRB's assertion that charging both Medicare and Plan deductibles is the long standing practice of DRB prior to *ITMO C.P.* and the Amendment 2016-2.

It is clear that DRB has required both Medicare and Plan deductibles since before *ITMO C.P.* Therefore it is not unreasonable that DRB would want to rectify the ALJ's interpretation of the Plan. DRB is in the best position to interpret the PERS statutes, the Plan, and its terms.[72] This Court finds that DRB provided sufficient evidence indicating it passed Amendment 2016-2 to clarify its practice of requiring two deductibles, and that the Amendment was not arbitrary, unreasonable, or discriminatory.

IV. The *Duncan* diminishment test

Duncan created an equivalency analysis to determine whether changes to the Plan unconstitutionally diminish protected benefits.[73] *Duncan* is only applicable if this Court

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[69] *Id.* (emphasis added).
[70] *Id.* at 5 (emphasis added).
[71] *Id.* at 9 "AlaskaCare Retiree Health Plan and How it Relates to Medicare" (February 10, 2010).
[72] *Davis Right Tremaine LLP v. State, Dep't of Admin.*, 324 P.3d 293, 301-02 (Alaska (2014) (reaffirming the notion that an agency's interpretation of its own regulations are entitled to particular deference, especially when the interpretation is longstanding).
[73] *Duncan*, 71 P.3d at 882.

finds that the Amendment changed the terms of the Plan, or in other words altered the character of provided health benefits.

RPEA asserts that because *ITMO C.P.* held that C.P. is not required to pay both the Medicare and Plan deductibles, this meant that moving forward, **all** retirees would likewise not be subjected to pay both the Medicare and Plan deductibles. Thus, Amendment 2016-2 constituted a change in the terms of the Plan when it was issued forty-two days after *ITMO C.P.* became final.

Duncan permits reasonable modifications to the Plan, but only if the changes result in disadvantages being accompanied by comparable new advantages.[74] In *Duncan*, retirees attacked changes to the Plan that included: improved coverage increasing the lifetime maximum payment from $1 million to $2 million, changing travel benefits from one-way to round trip, increasing from $15 per visit to 80% payment for precertified mental health and chemical dependency treatment, providing free mail-order service for generic or brand name drugs (previous coverage was $5 for each brand name drug while generic brands were free), and reimbursing Medicare eligible retirees for 100% of covered expenses not paid by Medicare rather than the previous 80%.[75] The Supreme

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

[75] *Id.* at 885 n.7 (detailing the changes at issue. "The Medicare change was by far the most important and expensive change. The reductions in benefits included increasing the deductible from $100 to $150 per year, eliminating a provision that waived the annual deductible once $50,000 in claims were paid, eliminating the lifetime co-insurance of 100% once $50,000 in claims were paid, changing co-insurance from 80% of $1,950, 90% of the next $3,000, and 100% of the remainder to co-insurance of 80% of the first $4,000 and 100% of the remainder. This resulted in a change of maximum out-of-pocket payments from $690 per year to $800 per year. In addition, if the retiree does not use the mail-order service for drugs, the cost for generic drugs increased from $0 to $4 and the cost for brand name drugs increased from $5 to $8.").

Court remanded the case for a determination of whether these changes passed the equivalency analysis.[76]

Putting aside RPEA's argument that *ITMO C.P.* applies to all Plan members, a review of Amendment 2016-2 leads this Court to conclude that it does not alter the terms of the Plan. Before Amendment 2016-2, with the exception of C.P., members were responsible for both the Plan and Medicare deductibles. After Amendment 2016-2 was adopted, both deductibles continued to be required for coverage under both policies.

Amendment 2016-2 thus did not change the terms of the Plan, the existing coverage, or the substance of coverage, but rather more clearly stated that Plan members must pay both the Plan and Medicare deductibles in order to receive coverage under each policy. Therefore, a *Duncan* analysis is not warranted.

This Court does not need to evaluate RPEA's request that DRB be enjoined from requiring a second deductible or that DRB pay restitution since the date *ITMO C.P.* became final because this Court holds that Amendment 2016-2 did not alter the substantive terms of the Plan. However, it is important to note that the remedy the Alaska Supreme Court laid out in *Duncan* is not one of restitution, but of allowing an affected individual to retain existing coverage when he demonstrates the change causes a serious hardship that is not offset by comparable advantages.[77]

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[76] *Id.* at 892.
[77] *Id.*

V. ***Duncan*** **does not require DRB to seek Court permission before implementing changes to the Plan.**

Even though this Court finds that a *Duncan* analysis is not necessary, this Court will address RPEA's contention that *Duncan* requires DRB to obtain court approval before it can make changes to the Plan.

Duncan created an equivalency analysis to determine whether changes to the Plan unconstitutionally diminish protected benefits.[78] The Court created a strict *ex post facto* review, rather than an *a priori* review, like RPEA suggests.[79] Nowhere in the opinion, does the Alaska Supreme Court require that the Plan administrator petition to the Court each change it intends to make to the Plan. Rather, the Supreme Court repeatedly expressed the importance of allowing health insurance benefits to change with flexibility, while prohibiting the State from freely changing the nature of health benefits vested in public employees.[80]

Further, the Courts are not third party insurance providers equipped or empowered to regulate the Plan. It would be inefficient, impracticable, time consuming, and costly for DRB to petition the Courts every time it needed to modify the Plan. As health care evolves, so must health care coverage in order to meet the medical needs of each individual.[81]

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[78] *Id.* at 882.
[79] *See id.* at 891-92 (prescribing "a number of cautions that may help to guide any equivalency analysis of health coverage changes.").
[80] *Id.* at 891.
[81] *Id.*

VI. Due Process

RPEA argues that DRB deprived Plan members of their property—vested retirement benefits—without due process of law in contravention of Article I, Section 7 of the Alaska Constitution.[82] RPEA contends that DRB did not give Plan members notice and an opportunity to be heard before the Amendment went into effect.[83] DRB, however, states that Plan members were consistently put on notice of their requirement to fulfill both Medicare and Plan deductibles because it issued "multiple brochures indicating that the AlaskaCare deductible applied after Medicare applied."[84] DRB argues it satisfied the notice requirement when it published the Amendment on the AlaskaCare website, which is one of the avenues for members to receive Plan information.[85] Finally, a due process analysis[86] is not warranted because the Amendment does not diminish Plan members' benefits.

DRB explained at oral argument that the Plan amendment procedures are found in the health care booklets it periodically sends retirees. "Neither the claims administrator nor any agent of the claims administrator is authorized to change the form or content of

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[82] Pl.'s Mot. for Partial Summ. Judgment at 11-12.
[83] *Id.* at 17-18.
[84] Opp. to Mot. for Partial Summ. Judgment and Cross-Mot. at 28.
[85] Pl.'s Mot. for Partial Summ. Judgment at 29.
[86] The Alaska Supreme Court adopted the *Mathews v. Eldridge* test for procedural due process claims. *Hilbers v. Municipality of Anchorage*, 611 P.2d 31, 36-37 (Alaska 1980). Under *Mathews*, courts identify the specific requirements of due process by considering three distinct factors: 1) the private interest that will be affected by the official action; 2) the risk of an erroneous deprivation of such interest through the procedures used, and the probably value, if any, of additional or substitute procedural safeguards; and 3) the government's interest, including the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

this Plan in any way except by an amendment that becomes part of the plan over the signature of the Plan Administrator."[87]

RPEA attacks the procedures DRB follows when making amendments to the Plan.[88] However, DRB's procedures do not affect the outcome or the effect Amendment 2016-2 has on retirees. The effect of the Amendment is the same as before its implementation. The Amendment clarifies DRB's longstanding practice of requiring both deductibles. On the outside, it may appear that DRB procedurally took the wrong course of action when it did not appeal *ITMO C.P.*; however, this Court finds that Amendment 2016-2 was validly implemented. Therefore, this Court finds that DRB did not violate retirees' procedural due process rights because retirees were already on notice of their deductible obligations prior to the Amendment.

VII. Takings Clause

Article I, Section 18 of the Alaska Constitution provides: "Private property shall not be taken or damaged for public use without just compensation." In analyzing whether a taking has occurred, this Court address two questions. First, are the retirees' claims protected by the takings clause? Second, if the claims are protected property interests, does Amendment 2016-2 affect a taking of that property?

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[87] Opp. to Mot. for Partial Summ. Judgment and Cross-Mot., Ex. A "Retiree Insurance Information Booklet, May 2003" (section labeled "Changes to Plan").

[88] At oral argument, RPEA cited to two cases, *Carter v. Hoblett*, 755 P.2d 1084 (Alaska 1988) and *Adams v. Adams*, 89 P.3d 743 (Alaska 2004), for the proposition that DRB did not notify retirees of Amendment 2016-2 and therefore it breached its fiduciary duties to retirees. But again, this Court finds that retirees were on notice of their deductible obligations prior to Amendment 2016-2. Therefore, DRB did not breach its fiduciary duties to retirees when it issued Amendment 2016-2.

Both parties agree that vested retirement benefits are property rights.[89] These vested property rights are protected by the takings clause. This Court must determine then if the Amendment affected a taking of that property.

RPEA's takings claim is focused on the money Plan members pay to satisfy both deductibles, rather than a taking or alteration of the underlying health benefits themselves. RPEA asserts that "[r]equiring a Plan member to pay medical costs that should have been paid by the Plan deprives the Plan member of the use of those funds."[90] But a Plan member only has a vested property interest in the *benefits themselves*.[91]

Prior to the Amendment, before a member turns 65 years of age, the member is responsible for the $150 Plan deductible. After a member turns 65 years of age, the member obtains Medicare and the Plan becomes supplemental to Medicare. Moving forward, if a Plan member wishes to receive the benefit of both health insurances, the member must pay both insurance deductibles. Amendment 2016-2 clarifies this obligation by stating more clearly that a member is responsible for both deductibles after turning 65 years of age. Therefore, the effect of the Amendment is the same before and after its adoption: in order to receive both health insurances, their requisite deductibles must be satisfied by the plan member.

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[89] Amended Compl. at 13; Answer to Amended Compl. at 9 (emphasis added).
[90] Pl.'s Mot. for Partial Summ. Judgment Re: Plan Amendment 2016-2 at 13-14 n.30.
[91] *See Duncan*, 71 P.3d at 888-89 ("The natural and ordinary meaning of 'benefits' in a health insurance context refers to the coverage provided, rather than the cost of insurance.") (emphasis added).

No change in the substance of retirees' benefits has occurred because of the Amendment, thus there has been no taking and RPEA's claim fails.[92]

Conclusion

This Court finds that: 1) Amendment 2016-2 was validly adopted; 2) the Amendment does not diminish retirees' protected health insurance benefits; 3) The Amendment does not violate the due process clause; and 4) the Amendment does not result in a takings of retirees' protected health insurance benefits. Therefore, this Court **DENIES** RPEA's Motion for Partial Summary Judgment and **GRANTS** DRB's Cross Motion for Partial Summary Judgment.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 23rd day of November, 2020.

ADOLF V. ZEMAN
Superior Court Judge

I certify that on 23rd of November, 2020, a copy was mailed to:
G. Callow, J Peckett + K. Daly
J. Montanez, Judicial Assistant

cc

[92] For example, if prior to the Amendment a Plan member needed heart surgery, he would be covered under both the Plan and Medicare, assuming he satisfied both deductibles. After the Amendment, that same Plan member would be covered for the same procedure under the Plan and Medicare, assuming he satisfied both deductibles. There has been no alteration to the underlying health benefits.