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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.	)	Case No. 3AN-18-06722 CI

OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff Retired Public Employees of Alaska, Inc., ("RPEA") asks the court to rule as a matter of law that the Retiree Health Plan ("Plan") Amendment 2016-2 (the "2016-2 Amendment" or "Amendment") is null and void.[1] RPEA further asks the court to enjoin the Division of Retirement and Benefits ("DRB" or "Division") from implementing the Plan's requirement that retirees pay a non-Medicare deductible under circumstances defined in the Plan.[2] Finally, RPEA asks that the court order DRB to pay restitution.[3]

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1 *See* RPEA's memorandum in support of its motion for partial summary judgment ("RPEA Mem.") at p. 4 & 23. *See also* RPEA's proposed order at p. 6.

2 *Id.*

3 *Id.*

RPEA's requests arise from the single question of whether the 2016-2 Amendment is valid and enforceable. That Amendment resolved a perceived ambiguity in the Plan's treatment of deductibles. Since its inception in 1975, the Division had interpreted the plain language of the Plan to require retirees to pay both a Medicare deductible and a Plan deductible as a consequence of the Plan's "coordination of benefits" with Medicare. "Coordination of benefits," as defined in the Plan, means that the Plan operates as supplemental or secondary insurance in certain instances.[4] When the Plan coordinates with Medicare, Medicare pays for care first, up to the limits of its coverage, and Medicare-covered retirees are subject to the Medicare deductible.[5] The Plan then pays for any remaining, Plan-covered expenses, after retiree members pay the Plan's deductible.[6] It is an undisputed fact that this is how the Plan has worked since its inception in 1975.[7]

Nevertheless, in 2015 a Medicare-eligible Plan member challenged the Plan's deductible in an appeal to the Office of Administrative Hearings ("OAH").[8] The Administrative Law Judge ("ALJ") found an ambiguity in the Plan's treatment of its deductible provisions for Medicaid-eligible members and ruled that the Plan could not

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4 *See* Davis Aff. at Ex A p. 167.

5 Davis Aff. at Ex. A pp. 82, 167-171.

6 Davis Aff. at Ex. D p. 15 (indicating AlaskaCare payment assuming deductible is met).

7 Davis. Aff. at Ex. B p. 2.

8 Final Decision, *ITMO C.P.*, OAH No. 15-0283-PER (April 13, 2016).

impose its own deductible.[9] The Division adopted the 2016-2 Amendment to clarify this perceived ambiguity.[10]

In asking the court to rule that the Amendment is, as a matter of law, invalid, RPEA seeks to overturn the nearly half-century history of the Division in administering the Plan's clear requirement that retiree members pay both deductibles in the course of receiving covered care from Medicare and supplemental covered care through the Plan. Because the Amendment merely clarified what the Plan's language plainly provided for (notwithstanding the ALJ's finding of ambiguity), and because the 2016-2 Amendment resolved any doubt about the manner in which the deductible provisions in Medicare and the Plan interrelate in the context of statutorily required coordination of benefits between the two insurance programs, RPEA's contention that the Amendment diminishes the value of its members' benefits is simply incorrect. So too is its contention that the Division acted improperly in adopting the 2016-2 Amendment.

For these reasons, DRB asks the court to deny RPEA's motion and grant its cross motion for summary judgment that the Amendment is valid.

II. FACTUAL BACKGROUND

A. Administrative structure of the Retiree Health Plan.

The overall design and components of retiree benefits are determined by the Legislature. The Legislature has made the Commissioner of Administration, or her

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9 *Id*. at p. 5.

10 Davis Aff. at Ex. G.

designee, the administrator of the state's retirement systems.[11] By delegation, DRB administers the Public Employees Retirement System ("PERS"), Teachers' Retirement System ("TRS"), and Judicial Retirement System ("JRS"), on behalf of the Commissioner.[12] By statute, participants in these systems are entitled to receive major medical insurance coverage.[13] The scope and details of that coverage are set forth in the AlaskaCare Retiree Insurance Information Booklet, the Alaska Public Employees Retirement System Information Handbook, and various information publications issued by the Division.[14]

As the administrator, DRB is authorized to approve or disapprove benefit claims, make necessary payments, publish information handbooks, and perform other tasks that may be necessary to carry out the purposes of the Plan.[15] Notably, DRB is empowered to make changes to the Plan.[16] By longstanding regulation, DRB "may change the

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11 AS 39.35.003.

12 AS 39.35.003, 14.25.003, 22.25.025. For ease of reference, in this brief DRB refers to the PERS statutes for general citations because the structure and scope of the three systems are functionally identical. The Division also administers other retirement plans not at issue here, such as the Elected Public Official Retirement System.

13 AS 39.35.535.

14 *See* Davis Aff. at Ex. A, B, D, and E. *See also* https://doa.alaska.gov/drb/forms/index.html#.XrV54qhKjcu.

15 AS 39.35.004(a)(3), (4), (11), & (13).

16 *Duncan v. Retired Pub. Employees of Alaska, Inc.*, 71 P.3d 882, 891 (Alaska 2003). *See also RPEA v. Matiashowski*, 2006 WL 4634279 at *2 ¶ 9 ("The Commissioner makes decisions on any changes in the Plan") & *11 ¶¶ 119 ("Further, it is clear that the state reserved the right to make changes to the plan. The health plan

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premiums and the terms of major medical insurance coverage."[17]

DRB is required to periodically furnish informational material that describes its interpretation of the provisions of the retirement system and provides guidance to members in understanding the nature and of the benefits provided by PERS.[18] It does so by publishing informational guides known as Handbooks. The 2016 Handbook reiterated DRB's authority to make changes to the Plan.[19]

DRB's authority to amend and clarify the Plan is further supported by the terms of the Plan itself and the regulations promulgated by the Division.[20] Furthermore, DRB has been invested by the Legislature with the power to adapt and manage the Plan with some flexibility, including the power to make changes to it so long as those changes do not diminish the value of the Plan's benefits.[21]

B. The Plan supplements Medicare.

By statute, participants in the retirement systems are entitled to receive major

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booklets for some time have contained cancellation clauses, reservation of rights to make changes, deductibles and co-insurance provisions.").

17 2 AAC 39.390.

18 AS 39.35.003(b); 39.35.004(a)(11).

19 Davis Aff. at Ex. A at p. 75 ("These benefits may change from time to time.") & pp. 172 & 176 ("[T]his Plan does not confer rights beyond the date that coverage is terminated or the effective date of any change to the plan provisions, including benefits and eligibility provisions. For this reason, no rights from this Plan can be considered vested rights.").

20 *Id.*; 2 AAC 39.390.

21 AS 39.35.003(b) ("The commissioner of administration shall adopt regulations to govern the operation of the system"); AS 39.35.005.

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medical insurance coverage.[22] In granting these health benefits, the Legislature specifically stated "[t]he benefits payable to persons age 65 or older supplement any benefits provided under the federal old age, survivors and disability insurance program."[23] When the State promulgated the first version of the Plan in 1975, it unambiguously stated that the Plan deductible would be assessed *after* the application of any Medicare payment.[24] Specifically, the 1975 Plan stated:

> If you or your dependents incur Covered Medical Expenses during a Benefit Year, your benefits, after subtracting any Medicare benefits payable, will be calculated as follows:
>
> Deductible Amount ·····$50
>
> Co-insurance Percentage - 80% of the first $1,950 of Covered Medical Expenses which are in ex-cess of the Deductible Amount in each Benefit Year, then 90% of the next $3,000 then 100 % of Covered Expenses for the remainder of that benefit year up to the Lifetime Maximum.

The interpretation established in 1975 was subsequently carried forward through the years, both in the practices of the Division, but also in informational materials published through the years.[25]

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22 AS 39.35.535 (PERS), AS 14.25.168 (TRS), and AS 22.25.090 (JRS).

23 AS 39.35.535(b).

24 Davis Aff. at Ex. B p. 5.

25 Davis Aff. Ex B pp. 5, 20-21, 26, 34, 42, and 49. *See also* Davis Aff. at Ex. D pp. 3-5, 7, 11-12, 15 (noting payment of deductible); Ex. E p. 28 ("For services covered by both plans, the claims are paid first by Medicare and then by AlaskaCare–with AlaskaCare coordinating to pay up to 100% of covered expenses, less any deductible you have not yet met"); Ex. F p. 3 ("With both participating and nonparticipating

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In addition to the Division's long-standing practice in assessing the Plan's deductible separately from Medicare, it is a standard industry practice for a secondary insurer to assess its deductible and other plan provisions when coordinating benefits. Section 7 of the National Association of Insurance Commissioner's model regulation on Coordination of Benefits specifically states a "secondary plan *shall* credit to its plan deductible any amounts it would have credited to its deductible in the absence of other health care coverage" (emphasis added).[26]

Despite the Division's long-standing practice and contemporary references to the application of the Plan deductible to the coordination of benefits with Medicare, a retiree challenged the application of the deductible in 2015. Before the OAH, the retiree in *ITMO C.P.*[27] argued that the Plan only allowed for single deductible, and that to the extent the Plan authorized the Plan to assess its deductible independently from Medicare, the Plan was ambiguous.[28] In April 2016, the OAH issued a decision that found the Plan was ambiguous in relation to the coordination with Medicare.[29] Nowhere in the decision does the OAH address the Division's long-standing history of apply the Plan deductible when coordinating benefits with Medicare. Nor does the OAH decision

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providers, your claim is usually paid in full, unless you have not yet met your Medicare and/or AlaskaCare deductible"); and Ex. H.

26 Davis Aff. at Ex. C p. 10.

27 *In the Matter of C.P.,* OAH No. 15-0283-PER (April 16, 2016) ("*ITMO C.P.*").

28 *ITMO C.P.* at pp. 3-4.

29 *Id*. at 5.

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recognize the overwhelming extrinsic evidence support the Division's interpretation of the Plan deductible. Finally, the OAH decision does not indicate that it is generally applicable, or purports to function as an injunction or declaratory judgment of some form.[30]

Following the issuance of *ITMO C.P.*, the Division reviewed decision with the office of the Commissioner of Administration.[31] Noting that the OAH decision stated only that the Plan was ambiguous, the Commissioner's Office issued Plan Amendment 2016-2 to clarify the perceived ambiguity and align the terms of the Plan with the rest of the contemporaneous information published by the Division that indicated that the Plan deductible applied when coordinating benefits with Medicare.[32]

C. The 2015 challenge to the administration of the plan's deductible provisions.[33]

1. Arguments of the parties.

In 2015, a beneficiary of the Plan and member of the Medicare, Part B program challenged DRB's longstanding application of the Plan's deductible after Medicare

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30 The OAH has no authority to issue injunctions or declaratory judgments. *See* 22.10.020(g).

31 Davis Aff. Ex. G.

32 *Id*.

33 RPEA states that it is not asking the court to revisit the OAH decision and that DRB should not be permitted to do so, either, because DRB did not appeal the decision. DRB is not asking the court to overturn the OAH decision. It is setting forth the history of the OAH case in some detail, however, because it provides the context for DRB's adoption of the 2016-2 Amendment.

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coverage had been exhausted and the Plan's supplemental coverage became operative.[34] On appeal to the OAH, the beneficiary argued that the plain language of the Plan provided that the Plan is "supplemental" to Medicare coverage.[35] In addition, the beneficiary argued that the Plan's coordination of benefits provision failed to expressly state that Medicare recipients must pay both deductibles.[36] The beneficiary further argued that even if the Plan's language was ambiguous, any ambiguity must be resolved in favor of the insured.[37] Thus, the beneficiary concluded that interpreting the Plan to require paying the Plan's separate deductible, in addition to the Medicare deductible, was unreasonable.

In opposition, DRB argued the Plan "supplements" Medicare according to the Plan's coordination of benefits provision, which expressly states that "neither plan pays more than it would without coordination of benefits."[38] The Plan's plain language required the payment of the deductible and did not provide an exception for Medicare recipients.[39] In addition, DRB noted that the Plan and the Medicare Program operated as independent health plans pursuant to their own terms. DRB further argued that, even if the Plan's provisions were ambiguous, DRB's assessment of a separate deductible under

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34 *See ITMO C.P.* at p. 1.

35 *Id*. at pp. 3-4.

36 *Id*. at p. 4.

37 *Id*.

38 Davis Aff. at Ex. A p. 168.

39 *Id.*

the Plan was objectively reasonable because a member receives the benefit of coverage from both Medicare and the Plan.[40]

2. The ALJ's decision.

The ALJ hearing the matter granted the beneficiary's Motion for Summary Adjudication at the end of 2015. The ALJ found that the Plan was ambiguous because it failed to explicitly mention the assessment of the Plan deductible in the coordination of benefits provision.[41] Therefore, he concluded, the Plan, as construed in favor of the insured's reasonable expectations, could not assess a separate deductible from the Medicare, Part B annual deductible and issued a proposed decision to that effect.[42]

In April of 2016, the ALJ issued a final decision, largely echoing his former proposed decision, finding the Plan was ambiguous because it failed to explicitly mention the assessment of the Plan deductible in the coordination of benefits provision. The ALJ held DRB could not assess a separate deductible from the Medicare annual deductible.

3. Reasons why the ALJ's decision was wrong.

The ALJ failed to correctly apply the law regarding contracts of adhesion when interpreting the Plan. OAH decisions contend that, as an insurance policy, the Plan is a

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40 *ITMO C.P.* at p. 6.

41 *ITMO C.P.* at p. 5.

42 *Id*. at p. 7.

contract of adhesion.[43] Courts construe contracts of adhesion according to the "'principle of reasonable expectations.'"[44] In other words, courts construe insurance policies to honor the reasonable expectations of an insured.[45] To determine whether a party's expectations are reasonable, courts consider the language of policy provisions, relevant extrinsic evidence, and any case law interpreting similar provisions.[46] A determination of ambiguity is not a prerequisite to interpretation of policy provisions. However, if ambiguity exists, "the court accepts the interpretation that most favors the insured."[47] This does not mean, however, that any interpretation set forth by an insured requires this deference. If an insured's expectations lead to absurd results or a "strained and tenuous" interpretation, policy language may be interpreted against the insured, even if the policy language is "somewhat confusing" or "sloppy and careless."[48]

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43 *In re D.T.*, OAH No. 10-577 PER (2011), page 2; *In re D.M.*, OAH No. 08-0153-PER (2008), page 2.

44 *Bering Strait School Dist. v. RLI Ins. Co.*, 873 P.2d 1292 (Alaska 1994).

45 *Id.*; *see also Whispering Creek Condominium Owner Ass'n v. Alaska Nat'l Ins. Co.*, 774 P.2d 176 (Alaska 1979)("'lay person's expectation of insurance coverage … [is] formed by many factors besides the language of the policies themselves.'"); *Starry v. Horace Mann Ins. Co.*, 649 P.2d 937 (Alaska 1982), *Stordahl v. Gov't Employees Ins. Co.*, 564 P.2d 63 (Alaska 1977).

46 *Bering Strait*, 873 P.2d at 1296.

47 *U.S. Fire Ins. Co. v. Clover*, 600 P.2d 1, 3 (Alaska 1979). Ambiguity only exists if the contract, when "taken as a whole," results in "two or more reasonable interpretations of particular policy language." *Allstate Ins. Co. v. Falgoust*, 160 P.3d 134, 138-39 (Alaska 2007); *Dugan v. Atlanta Cas. Co.*, 113 P.3d 652, 655 (Alaska 2005). Ambiguity does not exist merely because two parties simply disagree over the interpretation of its provisions. *U.S. Fire Ins. Co.*, 600 P.2d at 3.

48 *Dugan*, 113 P.3d at 656; *U.S. Fire Ins. Co.*, 600 P.2d at 4.

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The ALJ's decision first erred by finding that the Plan was ambiguous regarding the application of the Plan's deductible when the Plan provides benefits secondary to Medicare. The decision held that the Plan was ambiguous because the coordination of benefits provision did not specifically address the application of either deductible. However, this reading failed to analyze the Plan as a whole, as required when determining whether an insurance policy is ambiguous.

Taken as a whole, the Plan provided that each member must meet the annual deductible.[49] The deductible provision outlines only two exceptions – maximum of three deductibles per family and common accidents.[50] It did not provide an exception or waiver of the deductible for Medicare recipients. The coordination of benefits provision provided that, when a member is covered by two health plans, "neither plan pays more than it would without coordination of benefits."[51] The Plan also provided an example, which outlines two health plans, each with separate deductibles applied before benefits are paid.[52] In addition, DRB's statutes governing medical benefits, AS 39.35.535(b), states:

> [t]he coverage for persons age 65 or older is the same coverage available for a person under 65 years of age. The benefits payable to persons age 65 or older supplement any benefits provided under the federal old age, survivors and disability insurance program.

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49 Davis Aff. at Ex. A p. 67, 77 (stating "You must first meet the annual deductible of $150 per person, before the medical plan starts to pay benefits"), and 169.

50 *Id*. at 67.

51 *Id*. at 168.

52 *Id*. at 169.

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Despite DRB's presentation of these arguments in its briefing, the ALJ found that DRB's argument "is presented as a conclusion without any persuasive analysis, and without tying it to the actual Plan provisions set forth in the Booklet."[53] This is an incorrect statement based on the plain reading of the Plan.

Second, the ALJ's decision erred by failing to consider relevant extrinsic evidence when determining whether the beneficiary's interpretation of the Plan was reasonable. As outlined above, case law provides that courts should consider extrinsic evidence when determining whether or not an insured's interpretation of a plan is reasonable. In its briefing, DRB provided numerous AlaskaCare newsletters, a DRB pamphlet addressing Medicare, and the National Association of Insurance Commissioners guidelines on this topic, paired with an affidavit from DRB Chief Health Official Michele Michaud stating that DRB follows these guidelines – all of these documents supported DRB's position that a retiree member who is a recipient of Medicare must also pay the Plan's annual deductible.[54] The ALJ summarily dismissed this evidence, stating DRB's argument "is supported only by an affidavit of DRB manager and by reference to documents that are extrinsic to the Booklet and thus are not part of the Plan itself."[55] Inexplicably, the decision provided no further analysis of this evidence.

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53 *ITMO C.P.* at p. 5.

54 *See generally* Davis Aff. at Ex. C, D, F, and H.

55 *ITMO C.P.* at p. 5.

The ALJ further erred in adopting the beneficiary's interpretation of the Plan because that interpretation resulted in an absurd and strained reading of the Plan. First, the ALJ conflated the Medicare Program and the Plan. However, Medicare is a separate health care program, governed by federal statutes and regulations.[56] DRB had (and has) no control over the application or assessment of the Medicare deductible.

Second, the beneficiary's assertion that the assessment of two deductibles penalizes retirees over sixty-five years-old ignored the fact that these members, despite having to meet two deductibles, also were receiving the benefits of two health care plans. In other words, despite having to pay two deductibles, retiree members who were also recipients of Medicare received more coverage of medical costs overall. Accordingly, the Plan "supplements" Medicare. As outlined in the coordination of benefits provision, the Plan then, as now, pays "the difference between the amount the other plan paid and 100% of the expenses the retiree plan would cover."[57] Thus, the Plan "supplements" Medicare while still requiring Medicare recipients to meet the Plan's deductible. The ALJ's conclusion that the Plan's language waived or exempted Medicare recipients from the Plan's deductible, despite the absence of an express waiver or exemption, clearly required a strained reading of the Plan.

In the face of the ALJ's finding of an ambiguity, DRB simply promulgated an amendment that clarified that the language of the Plan, supported by a nearly 50-year

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56 *See* 42 CFR § 410.160.

57 Davis Aff. at Ex. A p. 168. *See also* Davis Aff. at Ex B at pp. 29, 36, 42, and 48.

history of interpreting that language to include a deductible associated with the Plan's supplemental insurance, was a feature of the Plan in the context of coordinated benefits with Medicare.

4. DRB issued the 2016-2 amendment to clarify the perceived ambiguity.

The ALJ based his decision in *ITMO C.P.* solely on his determination that the Plan's deductible provisions were ambiguous. But a finding of ambiguity does not establish new rights. More to the point, the ALJ—by ignoring the Division's historical practices and failing to properly interpret the Plan as a whole—erroneously interpreted the Plan. Members do not have a vested right in a mistaken application of the retirement system.[58] Recognizing that the OAH possess no power to modify, create, or nullify any provision of the Plan, or PERS in general, DRB issued a clarifying amendment.[59] RPEA has cited no authority for the proposition that DRB lacked the ability to do so. DRB acted completely within its authority to correct the ambiguity that the ALJ had found to exist. In fact, it would be a perverse result if an agency were *prohibited* from taking

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[58] *Flisock v. State of Alaska*, 818 P.2d 640, 644 n. 5 (Alaska 1991). *See also Municipality of Anchorage v. Gallion*, 944 P.2d 436, 441 (Alaska 1997)("We held in *Flisock* that although an employee had the right to the benefits provided by statute when he enrolled in his retirement system, the employee had no vested right in the Retirement Division's mistaken application of the statutory provisions.").

[59] To the extent that the OAH issues a decision that is at odds with the provisions and practices of the PERS, the Commissioner of Administration possesses the authority to "overrule a . . . decision if convinced it was wrongly decided." *May v. State, Commercial Fisheries Entry Comm'n*, 168 P.3d 873, 884 (Alaska 2007). The OAH agrees "[t]he Office of Administrative Hearings cannot revise the plan." Decision, *ITMO R.P.G.*, OAH No. 10-0626-PER at p. 3.

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corrective action to address a perceived deficiency in its administration of its area of responsibility simply because OAH was the source that identified that deficiency.[60] So long as DRB's action did not violate a constitutional or statutory mandate, it acted well within its scope of authority when it issued the 2016-2 Amendment.

III. STANDARD OF REVIEW

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[61] In ruling on a motion for summary judgment, the court must draw all reasonable inferences in favor of the non-moving party to determine whether the record presents any genuine issue of material fact, and whether "the moving party is entitled to judgment on the law as applied to the established facts."[62] "The existence of a dispute regarding any material fact precludes summary judgment."[63] "The party opposing summary judgment need not produce all of its evidence but instead must only show the existence of a genuine factual dispute."[64] A party is not entitled to stand on only "naked assertions" or "meager

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60 The State is not required to further promulgate its own errors. *See generally Whaley v. State*, 438 P.2d 718, 720 (Alaska 1968).

61 *Mahan v. Arctic Catering, Inc.,* 133 P.3d 655, 658 (Alaska 2006).

62 *Miller v. Safeway, Inc.,* 102 P.3d 282, 288 (Alaska 2004).

63 *Meyer v. State, Dep't of Revenue, Child Support Enf't Div. ex rel. N.G.T.*, 994 P.2d 365, 367 (Alaska 1999).

64 *Id*.

statements unsupported by other evidence."[65]

IV. ARGUMENT

All of RPEA's arguments follow from its assertion that the 2016-2 Amendment is illegitimate. Because DRB's adoption of the Amendment was procedurally proper and because the Amendment does not diminish retirees' health benefits or effect an impermissible "takings," the court should deny RPEA's motion and grant DRB's cross motion.

RPEA attacks the legitimacy of the Amendment, arguing that DRB's adoption of it was procedurally flawed insofar as, RPEA contends, it violated RPEA's members' due process rights. RPEA further argues that the Amendment was substantively flawed, insofar as it, RPEA contends, diminished retiree's health benefits in violation of Article XII, Section 7 of the Alaska constitution and constituted an unconstitutional takings. RPEA also suggests, briefly, that the Amendment breaches the contract between the State and retirees. RPEA is wrong on all counts.

A. The OAH has no authority to modify the terms of the Plan.

As noted above, the Commissioner of Administration, or her designee, is the administrator of the PERS.[66] The PERS administrator is empowered to adopt rules and

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[65] *Meyer v. State*, 994 P.2d 365, 370 (Alaska 1999) (Fabe, J., dissenting); *see also, Martech Construction Co. v. Ogden Environmental Services, Inc.*, 852 P.2d 1146, 1149-50 (Alaska 1993).

[66] AS 39.35.003(a). The Commissioner has delegated day-to-day administration of the PERS to the Division.

regulations that govern the operation of the system.[67] The PERS administrator is required approve or disapprove claims for benefits and to periodically publish information that describes the nature and scope of benefit available under the PERS.[68] "The Commissioner makes decisions on any changes in the Plan."[69] Specifically, the administrator is empowered to procure and set the terms for medical benefits available under AS 39.35.535.[70]

The OAH is a quasi-judicial agency housed in the Department of Administration that has the power to hear cases on behalf of executive branch decision makers.[71] The OAH has described its jurisdiction as:

> Not [that of] a policy maker with respect to the underlying subject matter—retirement benefits or taxes, for instance. Instead, the OAH judge applies laws made by others and policy drawn from law. OAH judges are generalists who may have developed expertise in some areas of law but whose decisions are not meant to make new law.[72]

In the realm of PERS health plan appeals, the OAH has recognized "[t]he Office of

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67 AS 39.35.003(b), .005. The PERS is not subjected to the Administrative Procedure Act. AS 39.35.005(a).

68 AS 39.35.004(a)(3), (11).

69 *RPEA v MATIASHOWSKI*, No. 3AN-00-7540CI, 2006 WL 4634279 at ¶ 9 (Alaska Super. Apr. 27, 2006).

70 *See* AS 39.30.090(a), 091. *See also RPEA v MATIASHOWSKI*, No. 3AN-00-7540CI, 2006 WL 4634279 at ¶ 46 (Alaska Super. Apr. 27, 2006).

71 *See* AS 44.64.010-.030.

72 Order Denying Motion to Dismiss, *ITMO T.N.S.*, OAH No. 09-0025-PER at p. 4-5.

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Administrative Hearings cannot revise the plan."[73] As a quasi-judicial administrative agency, the OAH possesses no judicial power and its decisions lack the finality conveyed to the courts and the executive branch.[74] More importantly, administrative agencies do not have the jurisdiction to determine constitutional rights.[75] Ergo, the OAH cannot create a new vested benefit that does not already exist in statute, regulation, or practice.

Moreover, the OAH is limited in its resolution of cases.[76] The OAH can only resolve the factual matter presented to it, it does not have the power to issue injunctions, declaratory actions, or issue decisions binding on an entire class of individuals.[77] The OAH's role is to provide guidance and support to the executive branch, not function as a final arbiter of the nature and scope of vested benefits. Importantly, the OAH does not possess any power to enforce its orders in relation to its review of Plan provisions.[78] This lack of power indicates that the OAH is not the administrator of the Plan and has no authority to declare new benefits. Consequently, the OAH is not vested with the

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73 Decision, *ITMO R.P.G.*, OAH No. 10-0626-PER at p. 3.

74 *Alaska Pub. Interest Research Grp. v. State*, 167 P.3d 27, 36 (Alaska 2007).

75 *Alaska Pub. Interest Research Grp. v. State*, 167 P.3d 27, 36 (Alaska 2007).

76 *Alaska Pub. Interest Research Grp. v. State*, 167 P.3d 27, 36-37 (Alaska 2007).

77 The power to issue declaratory and injunctive relief rests with the Superior Court. AS 22.10.020(c), (g). *See also* Decision and Order of Dismissal, *ITMO L.H.*, OAH No. 18-0917-PER (January 10, 2019) at p. 4.

78 *See generally Alaska Pub. Interest Research Grp. v. State*, 167 P.3d 27, 37–38 (Alaska 2007).

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authority to create a new vested benefit as advocated by RPEA in its brief. Rather, the OAH must apply the statutes, regulations, and practices developed by the Division. The fact the OAH ignored the Plan's long-standing coordination with Medicare practices is further reason for this court to reject RPEA's offer to invent a new benefit and it shows the OAH's decision was not rationally based.

Finally, the Supreme Court has clearly stated that state agencies such as the Division are empowered to interpret the laws and documents that govern their actions.[79] This includes the agency following its own precedents and correcting flawed interpretations.[80] OAH decision are not binding outside the realm of OAH proceedings. The OAH does not possess the authority to create new rights or privileges where none previously existed. Consequently, the OAH decision *ITMO C.P.* cannot be enforced against the State as creating a new vested benefit, especially since the alleged benefit is at direct odds with the actual long-standing Division practice of independently assessing the AlaskaCare deductible when coordinating with Medicare.

B. The Plan Administrator can overrule the decisions of the OAH.

To the extent the court determines that the OAH had some authority to issue a decision that substantively changes the Plan, the Division had the right—and the

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79 *See e.g. Whaley v. State*, 438 P.2d 718, 722 (Alaska 1968); *Amerada Hess Pipeline Corp. v. Alaska Pub. Utilities Comm'n*, 711 P.2d 1170, 1178 (Alaska 1986); *Sisters of Providence in Washington, Inc. v. Dep't of Health & Soc. Servs.*, 648 P.2d 970, 977–78 (Alaska 1982).

80 *May v. State, Commercial Fisheries Entry Comm'n*, 168 P.3d 873, 884 (Alaska 2007).

responsibility—to overrule that decision with Plan Amendment 2016-2. As previously stated, the Plan has a long established practice of requiring the exhaustion of the Plan's deductible when coordinating benefits with Medicare. *ITMO C.P.* contains no discussion as to the Plan's history and the decision does not explain why that history is being ignored. *ITMO C.P.*'s failure to provide a reasoned analysis for ignoring the Plan's precedents threatened to make broad enforcement of the decision arbitrary.[81] The Division cannot casually ignore its prior practices.[82] Consequently, the Division was required to correct the OAH's flawed interpretation of the Plan.

Moreover, even if the OAH possessed some administrative power over the Plan, the issuance of *ITMO C.P.* was insufficient to modify the terms of the Plan. Pursuant to the terms of the Plan itself, no changes to the Plan can occur without the written approval of the Plan Administrator.[83] The OAH is not the Plan Administrator, the Commissioner of Administration is the Plan Administrator.[84] Therefore, *ITMO C.P.* was insufficient as a plan amendment.

Finally, the Division retains inherent authority to overturn OAH decisions. State

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81 *May v. State, Commercial Fisheries Entry Comm'n*, 168 P.3d 873, 884 (Alaska 2007).

82 *May v. State, Commercial Fisheries Entry Comm'n*, 168 P.3d 873, 884 (Alaska 2007).

83 Ex. A at p. 106.

84 AS 39.35.003.

agencies "may overrule a prior decision if convinced it was wrongly decided."[85] Moreover, the Division is authorized by regulation to "change the premiums and the terms of major medical insurance coverage" as necessary.[86] "The retiree major medical program has from the beginning been subject to deductibles, co-payments, and maximum limits."[87] Plan Amendment 2016-2 was enacted to "ensure that members are aware they continue to pay a Plan deductible once they enter Medicare" consistent with the Plan's long-standing practice.[88] *ITMO C.P.* was wrongly decided in light of the clear long-standing practices of the Plan in relation to application of the Plan's deductible. Thus, the Division was well within its inherent authority to overturn the OAH's decision.[89]

C. DRB did not diminish retirees' health benefits in violation of Article VII, Section 7 of the Alaska Constitution.

The question of whether DRB's issuance of the 2016-2 Amendment diminished retirees' health benefits in violation of Article VII, Section 7 of the Alaska Constitution

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85 *May v. State, Commercial Fisheries Entry Comm'n*, 168 P.3d 873, 884 (Alaska 2007).

86 2 AAC 39.390.

87 *RPEA v MATIASHOWSKI*, No. 3AN-00-7540CI, 2006 WL 4634279 at ¶ 58 (Alaska Super. Apr. 27, 2006).

88 Davis Aff. at Ex. G. *See also RPEA v MATIASHOWSKI*, No. 3AN-00-7540CI, 2006 WL 4634279 at ¶ 123 (Alaska Super. Apr. 27, 2006) ("This Court distinguishes between the *cost* of the coverage provided to the retirees (for which the State pays premiums) and the *coverage* itself. The latter has always been subject to deductibles, co-payments and maximum limits which result in out-of-pocket expenses to the retirees and these expenses have changed from time to time.").

89 *May v. State, Commercial Fisheries Entry Comm'n*, 168 P.3d 873, 884 (Alaska 2007).

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is determinative of RPEA's other claims. After all, if there was no diminishment, then there could be no deprivation of a property right without due process and there could be no takings of property. Likewise, without a showing that the Amendment diminished the value of the benefit of the bargain retirees struck with the state when they accepted employment, there can be no breach of contract. Because the Amendment did not diminish retirees' health benefits, all of RPEA's claims fail.

As a threshold matter, a constitutional diminishment claim must identify a protected benefit. RPEA fails this fundamental predicate and the court should deny RPEA's motion on that basis alone.

Article XII section 7 of the Alaska Constitution protects "vested benefits" from diminishment or impairment.[90] Members of PERS vest into the system that exists at the time they initiate their employment and enroll in PERS.[91] "An employee's vested benefits arise by statute, from the regulations implementing those statutes, and from the Division's practices."[92] PERS members have no vested right to "phantom" benefits that arise from the mistaken applications of the retirement system.[93] Moreover, administrative changes that do not reduce the value of—or outright extinguish—benefits do not violate the diminishment clause.[94] RPEA's motion fails to identify any statute,

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90 Art. XII § 7, Alaska Const.

91 *Hammond v. Hoffbeck*, 627 P.2d 1052, 1055–56 (Alaska 1981).

92 *McMullen v. Bell*, 128 P.3d 186, 190–91 (Alaska 2006).

93 *Municipality of Anchorage v. Gallion*, 944 P.2d 436, 441 (Alaska 1997).

94 *Rice v. Rice*, 757 P.2d 60, 62 (Alaska 1988).

regulation, or practice that existed at the time of any member's employment and enrollment in the system that conferred a benefit which the 2016-2 Amendment diminished.

The salient issue is whether retirees had the right to waive the Plan's deductible before the decision in *ITMO C.P*. The answer is a clear no. Retirees have had to satisfy both the Medicare and AlaskaCare annual deductibles throughout the history of the Plan.[95] In the initial Plan booklet issued in 1975, the Plan clearly coordinated benefits with Medicare by applying the AlaskaCare deductible *after* any payment by Medicare.[96] This practice was reinforced in subsequent Plan booklets. For example, the 1989 Plan booklet specifically highlighted the application of the Plan deductible in its "Effect of Medicare" section.[97] Even after the adoption of the 2003 Handbook that the OAH found ambiguous, the Division was still clearly communicating the Plan's practice. Brochures issued by the Division in 2006, 2007, and 2010 all state that AlaskaCare pays after Medicare "assuming the service is covered by both plans and deductibles are met."[98]

The ALJ either misunderstood or ignored the Plan's past method of treating deductibles in coordination with Medicare, and the issuance of *ITMO C.P.* did not change that history. As discussed at length above, OAH declared that the Plan's

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95 It's notable that no retiree had previously appealed the Plan's application of both deductibles and no retiree has appealed the issue since the passage of the Amendment.

96 Davis Aff. at Ex. B. p. 2.

97 *Id*. at p. 21.

98 Davis Aff. at Ex. D, E p. 28, and F p. 3.

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coordination with Medicare provision was ambiguous, not that it was illegal or void.[99] The OAH is not the administrator of the Plan and has no authority, of course, to change PERS benefits.[100] In other words, the Plan did not *change* as a result of the issuance of *ITMO C.P.* It was merely declared to be ambiguous. DRB, the Plan administrator, issued the 2016-2 Amendment to clarify a perceived administrative ambiguity. In doing so it aligned the putatively ambiguous language of the Plan with the long-standing practices of the Division. No retiree lost a vested benefit because no such benefit ever existed.

In addition, RPEA has failed to show that the Amendment deviates from the structure of the plan that existed at the time that any retiree *began his or her PERS eligible employment*. Article XII Section 7 protects the right to benefits as they existed when a member first enrolled.[101] RPEA has offered no evidence that anyone ever enrolled in a system that waived the AlaskaCare deductible. In fact, the only evidence introduced regarding the actual past practices under the Plan unequivocally shows that the Plan required satisfaction of *both* deductibles.[102] Notably, this practice was reiterated in 2010, four years *after* enrollment in the health plan offered under AS

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99 As noted above, the OAH apparently reached this conclusion without consulting ample extrinsic evidence shedding light on the Plan's intended treatment of deductibles in coordination with Medicare. That failure was highly unusual. *See generally State v. Arbuckle*, 941 P.2d 181, 184 (Alaska 1997).

100 AS 39.35.003.

101 *Hammond v. Hoffbeck*, 627 P.2d 1052, 1055–56 (Alaska 1981).

102 *See* Davis Aff. at Ex. B, D, E, and F.

39.35.535 was closed to all new potential PERS members.[103] And RPEA certainly cannot now demand a benefit that never existed before *ITMO C.P.* and which gained, at most, a chimerical existence through a mistaken application of the retirement system.[104]

The Supreme Court has consistently held that members' retirement benefits are defined by the system as it was when the employee enrolled in PERS and not as the system is when he or she retires.[105] Prior to the issuance of the 2016-2 Amendment, retirees did not have a right to the waiver of the AlaskaCare deductible through either law or practice. The adoption of the Amendment could not have, therefore, diminished any benefit available to retirees.[106]

D. DRB did not violate retirees' due process rights when it adopted the Amendment.

RPEA asserts that DRB violated retirees' procedural due process rights. It argues, in essence, that DRB (i) attempted an end-run around the OAH decision; and (ii) it failed to provide adequate notice to retirees of the adoption of the Amendment—going so far as to assert that DRB is not permitted to amend the plan without first

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103 Beginning on July 1, 2006, the Alaska State Legislature closed the defined benefit PERS system to new enrollees and stood up a defined contribution retirement system. *Compare* AS 39.35.095 *with* AS 39.35.700.

104 *Flisock*, 818 P.2d at 644 n. 5. *See also Municipality of Anchorage v. Gallion*, 944 P.2d 436, 441 (Alaska 1997).

105 *McMullen v. Bell*, 128 P.3d 186, 191 (Alaska 2006).

106 For these same reasons, the adoption of the Amendment could not have resulted in a "takings" because no valuable property right has been removed or taken from a Plan member. *See Alaska Pub. Employees Ass'n v. State,* 776 P.2d 1030, 1033–34 (Alaska 1989).

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"obtain[ing] court approval before or after implementing its Plan amendment."[107] RPEA's notion that DRB can only amend the retiree health plan with court approval is a theme that runs throughout its briefing.[108] RPEA cites no authority for this radical proposition—and for good reason.[109] Such a requirement would turn courts into health plan administrators—a function that they are not well-equipped to perform.[110] RPEA's assertion that DRB violated retirees' due process rights because it issued the Amendment without first obtaining court permission is easily dismissed.

RPEA argues that DRB improperly adopted the Amendment in response to an

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107 RPEA Mot. at 17.

108 *Id*. (asserting that Plan members should be given the "opportunity to be heard **in court and in advance**" of implementing a change to the Plan and arguing that Plan members are entitled to have courts vet and approve changes prior to their implementation) (emphasis in original).

109 RPEA suggests that *Duncan v. Retired Pub. Employees of Alaska, Inc.,* 71 P.3d 882 (Alaska 2003) requires prior court approval of any amendment to the Plan. *See, e.g.,* RPEA Mot. at 17. Nowhere in that opinion does the Court say that Plan amendments must be preapproved by a trial court.

110 This principle is often expressed in terms of deferring to an agency's expertise in interpreting its own regulations. The same concerns apply to an agency exercising its expertise to manage highly complex subjects. *Cf., e.g., Handley v. State, Dep't of Revenue*, 838 P.2d 1231, 1233 (Alaska 1992) (when agency interprets its own regulation, court should apply the "the reasonable and not arbitrary test. This standard is not demanding"); *Rose v. Commercial Fisheries Entry Comm'n*, 647 P.2d 154, 161 (Alaska 1982) ("'[W]here an agency interprets its own regulation . . . a deferential standard of review properly recognizes that the agency is best able to discern its intent in promulgating the regulation at issue.'"); *United States v. RCA Alaska Communications, Inc*., 597 P.2d 489, 498 (Alaska 1978) (interpretation entitled to great weight); *State, Dep't of Highways v. Green*, 586 P.2d 595, 602 n.21 (Alaska 1978) (interpretation given effect unless plainly erroneous).

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adverse OAH decision.[111] It asserts that DRB had two options: appeal the decision or accept the results flowing from it.[112] But DRB is expressly given another option, under the specific findings of the OAH decision. Because the ALJ found that the Plan contained an ambiguity related to its deductible, and therefore interpreted the ambiguity in the insured's favor, DRB was empowered to amend the Plan to resolve the ambiguity.[113] That is precisely what it did when it adopted the 2016-2 Amendment. RPEA has pointed to nothing in the process DRB followed in exercising that right—and obligation—that violated the due process clauses of the Alaska and United States constitutions.

Nor is there any genuine issue of material fact regarding the notice provided by DRB to Plan members that they would be required to satisfy both Medicare and AlaskaCare deductibles. The Division issued multiple brochures indicating that the AlaskaCare deductible applied after Medicare paid.[114] In addition, in the July 2007 Health Matters newsletter, the Division stated Medicare claims are "usually paid in full, unless you have not yet met your Medicare and/or AlaskaCare deductible."[115] Finally,

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111 *See, e.g.,* RPEA Mot. at 17.

112 *Id.*

113 *See, e.g., Matiashowski*, 2006 WL 4634279 at *2 ¶ 9 ("The Commissioner makes decisions on any changes in the Plan.") & *11 ¶¶ 119 ("Further, it is clear that the state reserved the right to make changes to the plan. The health plan booklets for some time have contained cancellation clauses, reservation of rights to make changes, deductibles and co-insurance provisions.").

114 Davis Aff. at Ex. D.

115 Davis Aff. at Ex. F.

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the PERS Information Handbook originally published in 2011 states "[f]or services covered by both plans, the claims are paid first by Medicare and then by AlaskaCare–with AlaskaCare coordinating to pay up to 100% of covered expenses, less any deductible you have not yet met."[116] Nowhere in its briefing or supporting materials does RPEA introduce cognizable evidence that Plan members were kept in the dark about the 2016-2 Amendment. To the contrary, DRB published the Amendment and made it available on the AlaskaCare website.[117] At most, RPEA offers Ms. Hoffbeck's averment that, to the best of her knowledge and belief, DRB has "made no effort to notify [members of the Plan] of the fact, substance or import" of OAH's *ITMO C.P.* decision.[118] But the due process violation that RPEA alleges relates to communications surrounding the issuance of the 2016-2 Amendment, not the OAH decision. And DRB has no duty to publish OAH decision.[119] RPEA simply has failed to introduce any evidence that its members' due process rights have been infringed by virtue of the issuance of the Amendment.

Finally, the Alaska Supreme Court has adopted the federal *Matthews v. Eldridge* test for analysis due process violations.[120] Under the *Mathews* test, a litigant claiming a

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116 Davis Aff. at Ex. e p. 28.

117 *See* http://doa.alaska.gov/drb/alaskaCare/retiree/publications/booklets.html.

118 Affidavit of Sharon Hoffbeck at ¶ 4.

119 AS 44.64.090(a) mandates the OAH "make final agency decisions reached after administrative hearings available online through an electronic data base."

120 *Griswold v. City of Homer*, 252 P.3d 1020, 1029–30 (Alaska 2011).

due process violation must have been deprived of a cognizable liberty or property interest.[121] The Alaska Supreme Court has specifically stated that retirees do not have a vested right in a mistaken application of the retirement system.[122] Moreover, the *Matthews* test does not demand a pre-deprivation hearing prior to the removal a right absent the showing of a substantial hardship. In *Matthews*, the United States Supreme Court held that a post-deprivation hearing process was sufficient in cases where social security disability benefits were ended. The Division's application of a Plan deductible presents less of a hardship than the removal of disability benefits, therefore post-deprivation relief in the form of appeals of benefit decisions is more than sufficient to satisfy any due process owed to any impacted retiree.

There are no issues of genuine material fact regarding the process DRB followed in adopting the Amendment. There has been no allegation that DRB did not follow proper procedures, and RPEA's notice arguments either are not well-taken, in the case of asking for pre-approval from the court, or without any factual support, in the case of information provided about the Amendment to Plan members. Finally, because there has been no diminishment, under *Matthews* there can have been no violation of due process. For all of these reasons the court should deny RPEA's request that the court grant summary judgment on its due process allegations.

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121 *Id*.

122 *Flisock v. State, Div. of Ret. & Benefits*, 818 P.2d 640, 644 (Alaska 1991); *Municipality of Anchorage v. Gallion*, 944 P.2d 436, 441 (Alaska 1997).

E. DRB did not breach the State's contract with retirees.

RPEA suggests that DRB's adoption of the Amendment breached retirees' contractual rights.[123] It does not develop the argument beyond making the assertion on page 5 of its brief that "the common law of contracts prohibits the State from unilaterally amending the contract to deprive the other parties—i.e. retirees—of their vested contractual rights."[124] For the reasons stated in Sections A-D no issue of genuine material fact exists showing that the State unilaterally amended the contract—or that the properly adopted 2016-2 Amendment deprived retirees of their vested contractual rights. More importantly, RPEA has failed to show any diminishment to a vested property interest, and thus it has failed to show that any Plan member has been deprived of the benefit of his or her contractual bargain. Thus, to the extent that RPEA is asking the court to rule, as a matter of law, that DRB has breached its contract with retirees, the court should reject the request.

F. Restitution is not an available remedy.

RPEA asks the court to order restitution. Restitution is a remedy based on the concept of quasi-contract.[125] However, the Alaska Supreme Court has foreclosed an award of contract damages in diminishment cases involving retirement benefits.[126] The

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123 *See* RPEA Mot. at 5.

124 *Id.*

125 *Haines v. Comfort Keepers, Inc.*, 393 P.3d 422, 428 (Alaska 2017).

126 *Metcalfe v. State*, 382 P.3d 1168, 1169–70 (Alaska 2016), *abrogated on other grounds by Hahn v. GEICO Choice Ins. Co.*, 420 P.3d 1160 (Alaska 2018)("The primary issue in this case is whether a breach of contract damages claim can arise when

proper remedy in a diminishment case is to permit the employee to elect to receive the benefits in the new system or opt to keep the benefits in effect at enrollment.[127]

In *Metcalfe v. State*, the Supreme Court clearly and explicitly laid out the fact contract damages are not an available remedy in cases alleging diminishment of benefits. In doing so, the Court reiterated the idea it announced in *Hammond* that "rigid adherence to labels like 'gratuity,' 'compensation,' 'contract,' and 'vested rights' has not allowed courts the flexibility necessary to deal properly with legitimate legislative response to changing economic and social conditions".[128] In finding that the Court had never recognized a claim for damages for a violation of Article XII, Section 7, it "recognized that retirement systems require some flexibility for successful operations."[129] Specifically, the Court held

> Although we have used contract-law principles to decide article XII, section 7 cases and have even affirmed a related breach of contract finding in a case, breach of contract damages are not an appropriate remedy for the alleged constitutional violation here: In *Lowell v. Hayes* we declined to allow "a constitutional claim for damages, 'except in cases of flagrant constitutional violations where little or no alternative remedies are available.'" We later stated that declaratory and injunctive relief are appropriate remedies with respect to potentially unconstitutional statutes if the circumstances of the case do not meet the exception described in *Lowell v. Hayes* and damages are unavailable. Our general reluctance to allow a constitutional claim for damages where other remedies exist, viewed in concert with our past article XII, section

existing retirement benefits are diminished. We hold there can be no such claim").

127 *Id.* at 1169-70, 1175; *Hammond v. Hoffbeck*, 627 P.2d 1052, 1059 (Alaska 1981).

128 *Hoffbeck*, 627 P.2d at 1057.

129 *Metcalfe*, 382 P.3d at 1174.

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> 7 decisions, convinces us that Metcalfe has no cognizable claim for breach of contract damages—Metcalfe's remedy here has been outlined in *Hammond* and *McMullen*.[130]

The concerns that existed in *Metcalfe* and *Hammond* also exist here. It is imperative that the State have the flexibility to operate the PERS in response to changing economic and social conditions. While that operation is clearly constrained by the Alaska Constitution and relevant case law, adopting the extreme position advocated by RPEA could push the PERS into obsolescence and financial ruin. Awarding restitution would have a currently unknown impact on the actuarial soundness of the retiree health trust, which in itself would threaten a diminishment of benefits.[131] While RPEA complains about administrative overreach and adverts to unsubstantiated rumors, it is clear that an order requiring payment of restitution would not only violate the clear edicts of *Hammond* and *Metcalfe*, but also would threaten the benefits rightfully owed to future retirees. This court should not allow RPEA to rob future retirees of their right to benefits simply so that some current retirees can enjoy a windfall not contemplated under the Plan. Regardless of the court's resolution of the other issues raised by RPEA, it clearly must deny RPEA's request for an order of restitution.

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130 *Metcalfe*, 382 P.3d at 1175.

131 Retirees have a vested benefit to the security and integrity of the retirement system to pay future benefits. *Municipality of Anchorage v. Gallion*, 944 P.2d 436, 444 (Alaska 1997).

G. In resolving this motion for summary judgment, the court need not consider RPEA's statement of its preference for how changes to the Plan should be made.

RPEA devotes parts of two pages, and all of a third sandwiched in between, to setting forth its vision for how changes to the Plan should be proposed and adopted, all under the court's supervision.[132] The court need not consider these suggestions in resolving RPEA's motion for summary judgment. RPEA does not move for this type of mandatory injunctive relief anywhere its motion.[133]

V. DRB'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

For the reasons discussed above, the 2016-2 Amendment is valid and enforceable.[134] It does not effect a diminishment or a takings. It was not adopted in a manner that violated retirees' due process rights. It did not breach a contract with retirees. To the contrary, DRB exercised the authority given to it by the Legislature to administer the Plan by issuing the 2016-2 Amendment to clarify a perceived ambiguity. Because there are no genuine issues of material fact, DRB respectfully asks the court to rule, as a matter of law, that the 2016-2 Amendment is valid and enforceable.

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132 *See* RPEA Mot. at 21-23.

133 While RPEA did not file a motion separate from its memorandum in support of its motion, the determinations it asks the court to make and the relief it asks the court to grant are set forth in the memorandum's "Summary of Motion and Relief Requested." Nowhere in that two-page summary, nor in RPEA's proposed order, does it ask the court to order the mandatory injunctive relief that it muses upon on pages 21-23 of its brief.

134 In order to promote judicial efficiency and to conserve the parties' and court's resources and time, DRB incorporates and adopts those arguments by reference here. Rather than restate them here. DRB has filed a separate pleading stating the cross-motion itself.

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VI. CONCLUSION

There are no genuine issues of material fact that:

1. DRB had the authority to adopt the Amendment.

2. DRB followed proper procedures in doing so.

3. RPEA failed to identify a protected benefit, and the Amendment did not diminish or take or deprive a Plan member of a protected benefit without due process.

4. DRB did not breach the State's contract with retirees because it followed proper procedures in adopting the Amendment and because the Amendment did not diminish a protected benefit.

For these reasons, the court should deny RPEA's motion for partial summary judgment and grant DRB's cross motion for summary judgment.

DATED May 8, 2020.

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