Wm. Grant Callow
Law Office of William Grant Callow
425 G Street, Suite 610
Anchorage, Alaska 99501
Telephone: 907-276-1221
Fax: 907-258-7329
Email: grant.callow@gmail.com

Attorney for Plaintiff

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

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

RPEA COMBINED REPLY AND OPPOSITION TO DEFENDANT'S OPPOSITION TO MOTION AND CROSS MOTION RE: AMENDMENT 2016-2

Summary of Reply and Opposition

The DRB does not dispute the key facts and the legal principles that support the RPEA motion. It admits that it did not appeal the OAH ruling of April 13, 2016 as it had the statutory right to do. The it offers no explanation why it chose to waive its statutory right to appeal the OAH ruling. If offers no argument or legal authority why the OAH

ruling that the Plan did not require Medicare-eligible retirees to pay a second deductible was not the final ruling on the issue within the executive branch in accordance with AS 39.35.006. It offers no legal authority allowing the DRB to ignore an OAH ruling because it unilaterally decide the OAH ruling is wrong. It offers no legal authority to support its view that the DRB interpretation of the Plan should control over the interpretation of the Plan language by the OAH.

In this combined reply and opposition, the RPEA contends that the key facts and legal principles are undisputed and justify granting its motion for summary judgment invalidating Plan Amendment 2016-2. It submits that:

- the DRB's arguments are based on faulty premises;
- the OAH ruling in the C.P. case was not advisory but became final and binding when it was not appealed by the DRB;
- that the DRB waived its right to challenge the OAH ruling, raising arguments now that it would have had the right to make four years ago if it had chosen to exercise its statutory right to appeal that ruling;
- the OAH ruling did not "modify" the Plan as contended by the DRB but merely determined, in accordance with the Plan terms and applicable law, that the terms of the Plan did not require Medicare-eligible retirees to pay a second deductible;
- the three cases principally relied on by the DRB do not support its contentions;

- the affidavit the DRB submitted does not support the DRB arguments, lacks evidentiary foundation and offers inadmissible hearsay;
- the administrative regulation cited by the DRB only allows the DRB to add benefits to the Plan, does not trump the Alaska Constitution or the opinions of the Alaska Supreme Court in Duncan, Hoffbeck and related Alaska Supreme Court opinions and does not allow the DRB to unilaterally change the Plan terms to reduce, eliminate or impair existing benefits without complying with Due Process and the limitations and requirements specified in the Duncan opinion;
- the DRB's conduct in responding to the OAH ruling breached its duty of loyalty and the other fiduciary duties that Judge Aarseth ruled the DRB owes to retirees to ensure that they are provided the vested retirement medical benefits they earned and were promised in return for their public service; and
- the DRB conduct of ignoring the OAH ruling; failing to disclose that ruling to Plan members; enacting "Plan Amendment 2016-2" without telling retirees it was doing so and continuing to require retirees to pay the second deductible was, both by each act and by all acts collectively, a constructive fraud on all the persons vested in the AlaskaCare Plan.

The RPEA contended in its opening memorandum that "Amendment 2016-2" violated Art. XII, §7 of the Alaska Constitution; violated the limitations and restrictions established by the Duncan opinion; and violated other constitutional rights and common law doctrines because it diminished or impaired a benefit the OAH ruled was provided

by the Plan—that is, the right of Medicare-eligible Plan members to supplemental medical benefits without having to pay a second deductible.

Reading between the lines of the DRB opposition/cross-motion, the DRB is arguing that its amendment did not violate these legal principles on the grounds that for many years (it claims, without offering adequate proof[1]), the DRB failed to provide Medicare-eligible retirees with the Plan benefit that the OAH ruled it should have provided. According to the DRB, this means that regardless of the terms of the Plan as it existed from 2003 until May of 2016, and regardless of the OAH ruling on the meaning of the terms of the Plan in effect during that time, "Plan Amendment 2016-2" did not actually diminish or impair any Plan benefit that the DRB had been providing.

Put another way, the DRB is contending that regardless of the fiduciary duties it owes to Plan members to ensure that they receive the vested medical benefits they earned and were promised, the DRB should be allowed to reduce or eliminate benefits that the Plan by its terms provides if it wrongfully withholds those benefits for some period of time. In essence, the DRB is urging the Court to approve a method for the DRB to reduce or eliminate a Plan benefit by wrongly denying that benefit for a period of time without getting caught.

Whatever the Plan may have provided before 2003 is irrelevant. The OAH ruled on the meaning and effect of the Plan terms as they existed during the 13 years from 2003 to 2016 when the OAH issued its decision. That is what counts.

---

[1] See discussion, infra.

The RPEA contends that the DRB's method for reducing or eliminating Plan benefits—summarily and unilaterally issuing a plan amendment instead of appealing an OAH decision it disagrees with—violates Art. XII, § 7 of the Alaska Constitution, violates the strict limits and requirements for amending the Plan established by Duncan, and violates other constitutional rights and common law protections of vested Plan benefits. It is a method that is inconsistent with what Judge Aarseth termed "the high standard prohibiting diminishment of benefits and the retirees' reliance and trust in those who facilitate the Plan."[2] It is also a method that is also inconsistent with the other fiduciary duties that Judge Aarseth ruled the DRB owes to the retired public employees of Alaska.[3]

The Facts and Law that the DRB Does Not Dispute

1. **The DRB does not dispute** that the Alaska Constitution states that the vested retirement benefits of the retired public employees of Alaska "shall not be diminished or impaired."

2. **The DRB does not dispute** that the Alaska Supreme Court has stated that the AlaskaCare Plan may be amended only for the purpose of preventing the Plan from becoming obsolete as the science of medical diagnoses and treatment evolves.[4]

---

[2] See decision and order of April 13, 2020 at p. 9 (Discussion, Sec. 1)

[3] Id. at pp. 9-12.

[4] Id. at p. 6, lns 13-16 and p. 10, lns 1-3.

3. **The DRB does not dispute** that under Duncan, if the DRB wants to propose any Plan change that is likely to result to the reduction or impairment of any existing benefit, the DRB must a) adhere to the limitations and requirements established in the opinion; b) provide retirees with reasonable notice and opportunity to be heard as required by Due Process;[5] and c) obtain court approval before implementing that change.

4. **The DRB does not dispute** that AS 39.35.006 gives retirees the right to appeal decisions of the Plan administrator concerning Plan benefits to the OAH and that the ruling of the OAH in those appeals is the final decision on the matter within the executive branch.

5. **The DRB does not dispute** that under AS 39.35.006, an "aggrieved party" (meaning either the retiree or the DRB) has the right to appeal an OAH ruling concerning Plan benefits to the Alaska Superior Court.

6. **The DRB does not dispute** that on April 13, 2016, the OAH ruled that the Plan terms were ambiguous on the issue of whether retirees over the age of 65 who had satisfied their annual Medicare deducible had to pay a second deductible as a condition of receiving Plan benefits that are supplemental to Medicare. In fact, the DRB expressly admits this fact.[6]

---

[5] Id. at p. 11, lns 19-21 (giving retirees notice and opportunity to be heard on proposed changes to Plan benefits is required by due process and noting that the DRB has conceded owing that duty to Plan members)

[6] See DRB Opposition/Cross-Motion at pp. 2-3 and affidavit of DRB employee Larry Davis submitted with DRB's opposition as an unlettered exhibit, p. 3, ¶ 11.

7. **The DRB does not dispute** that because the Plan is an insurance policy,[7] the OAH correctly applied the rule that courts resolve ambiguities in insurance policies in favor of the insureds and ruled that the Plan did not require retirees to pay the second deductible.

8. **The DRB does not dispute** that in May of 2016 it chose to waive its right to appeal the OAH ruling to the Alaska Superior Court and, if dissatisfied with that decision, then to the Alaska Supreme Court.

9. **The DRB does not dispute** the RPEA contention that it did not appeal the OAH ruling because it considered that ruling to be well-founded and unlikely to be reversed on appeal. Likewise, it does not offer any alternative explanation why it chose not to appeal the ruling.

10. **The DRB does not dispute** that it never notified retirees of the OAH ruling.[8]

---

[7] In re C.P., OAH No. 15-0283-PER, p. 3 (Exhibit 3 of RPEA's opening memorandum.)

[8] The RPEA stated in its opening memorandum that the DRB failed to notify retirees that the OAH had ruled that the Plan did not require retirees to pay a second deductible and supported the allegation with the statement of RPEA President Sharon Hoffbeck in ¶ 4 of her affidavit. See p. 2 of Exhibit 3 submitted in support of RPEA's motion and opening memorandum.

The DRB does not deny that fact in its opposition. However, the DRB did deny the RPEA's Request for Admission that asked it to admit that it did not notify the retirees of the OAH ruling. The DRB stated that it denied the request because the OAH ruling was "available to all members of the public." See attached Exhibit 1. Because the DRB did not post the OAH ruling on its website, it apparently contends it should be credited with notifying retirees of the OAH ruling because at some point in time after the ruling (A week? A month? Six months? A year?—the time is unspecified by the DRB), the OAH itself posted the decision on the OAH website.

11. The DRB does not dispute the fact that despite the OAH ruling, to this day the DRB has continued to require retirees to pay a second deductible as a condition of receiving Plan benefits that are supplemental to Medicare.

12. The DRB does not dispute that in response to the OAH ruling, it summarily deleted the language of two sections the AlaskaCare Plan handbook that the OAH relied on it its ruling and substituted new language stating that retirees must pay a second deductible in order to receive Plan benefits that are supplemental to Medicare.

13. The DRB does not dispute that the actual terms of the 2003 Plan document did not include any express or specific provision requiring the payment of a second deductible by Medicare-eligible retirees, despite any previous terms of the Plan or any prior past practice.

14. The DRB does not dispute that in the C.P. case, it had a full and fair opportunity to submit to the OAH any evidence of its alleged past practice or evidence of the terms of any plan in place prior to adoption of the 2003 Plan document. Similarly, it does not contend that the OAH ignored any such evidence in reaching its decision.

This shows that the DRB believes retirees (at least, those with access to and knowledge needed to use computer and how to navigate the Internet), should bear the multiple burdens of keeping abreast of OAH rulings concerning Plan benefits by learning about the OAH website and then finding, reading and understanding every OAH ruling concerning retirement benefits and how those ruling may affect them. The RPEA opposes that view. The RPEA contends that fiduciary duties the DRB owes to retirees include the duty to notify them in a timely and reasonably understandable way of any OAH or court rulings that affect their rights and retirement benefits.

Reply to the DRB Arguments

The DRB's opposition/cross-motion consists basically of two arguments. It argues: 1) that the OAH ruling concerning the second deductible was wrong, and 2) that because the DRB historically required retirees to pay the second deductible, it was justified in summarily amending the Plan to make it conform to the DRB's practice, regardless of the OAH ruling that the Plan did not require retirees to pay the second deductible.

The Faulty, Unstated Premises Underlying the DRB Arguments

Both of DRB's arguments are built on premises that the DRB does not mention and that are unsupported by law. The DRB seems to believe that the RPEA and the Court will overlook those faulty premises.

There are at least five faulty premises underlying the DRB's arguments. It does not mention them in its memorandum, much less even attempt to support them with any legal authority. Those five faulty premises are:

1. That the OAH ruling on the second deductible did not become the final ruling on the matter within the executive branch; that it was merely an "advisory" ruling that did not become binding on the DRB when the DRB chose to waive its right to appeal the ruling;

2. That if the DRB erroneously charges a deductible or other fees to retirees, or erroneously denies certain Plan benefits over a long period, then the DRB's wrongful conduct changes the terms of the Plan;

3. That if the DRB disagrees with an OAH ruling concerning the terms of the Plan and the medical benefits it provides to retirees, then instead of appealing that ruling the DRB can unilaterally and summarily amend the Plan to change it to what the DRB thinks the Plan should be;

4. That when the OAH rules that the Plan provides a benefit that the DRB has not been providing and the DRB then reacts by summarily changing the terms of the Plan to take away that benefit, that the DRB is not technically diminishing or impairing a Plan benefit because the DRB had not been providing that benefit, even though the OAH has ruled that it should have been providing that benefit;

5. That the DRB is not bound by the same appeal requirements and rules that apply to retirees under the provisions of AS 29.25.006 and the Alaska Rules of Appellate Procedure.

The OAH Ruling Became Final and Binding When the DRB Waived Its Right to Appeal

AS 39.35.006[9] gives the retired public employees of Alaska the right to appeal decisions made by the AlaskaCare Plan administrator to the OAH. The statute also provides an "aggrieved party" with the right to appeal the OAH decision to the superior

[9] **AS 339.35.006 Appeals.** An employer, member, annuitant, or beneficiary may appeal a decision made by the administrator to the office of administrative hearings established under AS 44.64. An aggrieved party may appeal a final decision to the superior court.

court. Alaska Appellate Rule 602(a)(2) provides that the appeal must be filed within 30 days of the date the OAH decision is mailed or otherwise distributed to the appellant.[10]

If the OAH decision is not appealed, it becomes final and binding.[11]

The DRB seems to believe that under AS 39.35.006, the OAH only has authority to issue an advisory opinion that the DRB is free to ignore if it determines the OAH opinion is wrong. That view is not supported by the OAH itself. Former Chief Judge Thurbon of the OAH, in a carefully reasoned opinion, made clear that by virtue of AS 39.35. 006, the OAH has original jurisdiction to hear and decide appeals of a decision of the Plan administrator concerning Plan benefits. In retirement benefit cases, the OAH decision is the final decision on the matter within the executive branch.

A copy of that decision by Chief Judge Thurbon is attached as Exhibit 2 and is incorporated here by reference.

Response to DRB Argument that the OAH Lacks Power to Modify the Plan

The DRB argues that it issued "Plan Amendment 2016-2" because it "recognized" that the OAH has "no power to modify, create, or nullify any provision of the Plan, or PERS in general."[12]

---

[10] This is consistent with both the OAH hearing procedures and was included in the final decision issued by OAH in C.P.

[11] See AkPIRG v. State, 167 P.3d 27, 41 (Alaska 2007)

[12] DRB argument at p. 15.

To support that argument, it asserts 1) that the RPEA cited no authority for the proposition that DRB lacked the ability to do so; 2) that an OAH ruling in a different case stated that "[t]he Office of Administrative Hearings cannot revise the plan;" and 3) the Alaska Supreme Court opinion in May v. State, Commercial Fisheries Entry Comm'n, 168 P.3d 873, 884 (Alaska 2007).

The DRB argument is a classic red herring. The RPEA is not arguing that the OAH has the power to "modify, create, or nullify" any provision of the Plan. It is arguing that the OAH has the statutory authority under AS 39.35.006 to independently review decisions of the Plan administrator that concern retirement benefits and then determine, as a final decision within the executive branch, whether those decisions are correct based on the terms of the Plan and applicable law. If the OAH finds the administrator's benefits decision is contrary to the terms of the Plan or applicable law, it has the statutory authority to reverse or amend that decision. The OAH ruling is the final decision on the matter within the executive branch and then may be appealed to the Superior Court by either the retiree or the DRB.[13]

The point is, contrary to the DRB's argument, an OAH ruling that overturns or amends a benefits decision of the Plan administrator does not "modify, create, or nullify any provision of the Plan." It simply makes an independent legal determination whether

---

[13] The part of the May opinion cited by DRB in support of its argument that the OAH lacks power to modify the terms of the Plan concerns whether an administrative agency is bound by stare decisis or can overrule its prior opinions. That is inapplicable to the issue of the authority of the OAH to review decisions of the Plan administrator concerning retirement benefits and reverse or amend any decision that the OAH determines is incorrect.

the decision of the Plan administrator is correct according to the terms of the Plan and the applicable law.

The Gallion, Flisock and McMullen Opinions Do Not Support the DRB's Arguments

The DRB cites a footnote in Flisock[14] and the language in Gallion[15] stating the employees have "no vested right in the Retirement Division's mistaken application of the statutory provisions." But that language supports RPEA's argument. The OAH ruling was that the Plan administrator—that is, the DRB—was mistaken in requiring retirees to pay the second deductible. The DRB does not have right to continue making the mistake.

In prior arguments made to the Court in this case, the DRB has argued that McMullen v. Bell, 128 P.3d 186 (Alaska 2006) supports its contention that its "practices" should establish what benefits are, and are not, provided by the Plan. McMullen is distinguishable because 1) it was a pension benefits case rather than a medical insurance benefits case; and 2) it involved interpretation of statutory provisions rather than the terms of an insurance contract, meaning different legal principles applied.

[14] Flisock v. State, 818 P.2d 640, 644 n. 5 (Alaska 1991)

[15] Municipality of Anchorage v. Gallion, 944 P.2d 436 (Alaska 1997)

The RPEA has also previously explained why the sentence the DRB relied on in McMullen[16] does not mean that a DRB "practice" of wrongfully or erroneously denying a benefit eventually eliminates that benefit from the Plan.

The DRB has not argued McMullen in its motion, perhaps because it is now convinced that the statement in McMullen undermines its argument. However, in case DRB has plans to raise McMullen in its reply and because, if it does, the RPEA will not be able to respond in writing, the RPEA reasserts the arguments it made in its prior memoranda to this Court why McMullen does not support DRB's position.

The main point is that McMullen states that benefits can "arise" by the DRB practices. It does not state that the DRB can diminish, eliminate or impair Plan benefits by its practices. The rule that ambiguities in insurance policies are construed in favor of coverage would be worthless if insurers could overcome it simply by arguing that for years they denied claims based on their own interpretation of ambiguous language in their policies. On the other hand, if an insurer always paid claims based on the ambiguous language of the policy, then that insurer's "practice" would be consistent with the law and would avoid litigation. Those established concepts are implicit in McMullen.

---

[16] "An employee's vested benefits arise by statute, from the regulations implementing those statutes, and from the division's practices." McMullen, 128 P.3d at 190–91.

The Larry Davis Affidavit Does Not Support the DRB's Conduct or Its Argument

The DRB offers the affidavit of Larry Davis in support of its motion. Mr. Davis's affidavit states that he has been employed at the DRB's "Appeals and Risk Mitigation Manager" since July 27, 1997.

It seems likely that Mr. Davis is not a lawyer since there is no mention of that in his affidavit. As DRB's manager of appeals, however, it also seems likely that Mr. Davis is primarily responsible for the decision not to appeal the OAH ruling and instead simply issue "Plan Amendment 2016-2" and continue doing what the OAH ruled it was not permitted do to under the terms of the Plan.

Mr. Davis, who was the DRB's manager of appeals when the OAH decided the C.P. case, does not explain why the DRB decided not to appeal the OAH ruling.

His affidavit should be rejected for a variety of reasons.

First, it does not explain how his job duties managing "risk" and "appeals" have given him personal, first-hand knowledge of the DRB's practices, before or after started working for the DRB, concerning the DRB's practice of requiring retirees to pay a second deductible. The payment of the second deductible has no obvious direct connection to either risk mitigation or appeals.

His statement that when he started working for the DRB, "it was the long standing practice of the Plan [sic] to charge its deductible in addition to any deductible

change by Medicare or any other primary insurer"[17] is clearly hearsay and therefore not admissible.[18]

He states that "[t]o the best of [his] knowledge, since 2003 only one member has ever appealed" the DRB's requirement that retirees pay a second deductible.[19] If true, that simply supports the RPEA's contention that most retirees trust the DRB or simply accept that what the DRB tells them is at least legally correct. That trust and the associated vulnerability of retirees to potential wrongful denials of retirement benefits were among the main reasons Judge Aarseth ruled that the DRB owes fiduciaries duties to the retired public employees of Alaska the DRB was created to serve.

Mr. Davis's affidavit states that he is "familiar" with the case where the OAH ruled that Plan does not require retirees to pay a second deductible as a condition of receiving Plan benefits that are supplemental to Medicare. He criticizes the OAH ruling on the grounds that he believes the DRB briefing "refuted" the appellant's argument that the Plan was ambiguous. But Mr. Davis is mistaken. An argument is "refuted" if is it proven to be wrong, and of course the OAH ruling shows that the DRB did not refute the appellant's argument in the C.P. case.

Mr. Davis offers his opinion that the OAH ruling was "inconsistent with [his] understanding of the long-standing practice of the Division in assessing the Plan's

---

[17] Davis affidavit at p. 3, ¶ 11.

[18] The RPEA makes an offer of proof, and the Court can take judicial notice of the fact that Larry Davis did not submit any affidavit or other evidence the C.P. appeal to the OAH.

[19] Davis affidavit at p. 2, ¶ 7.

deductible when coordinating with Medicare."[20] His opinion concerning whether the OAH opinion was "consistent" with "his understanding" of the DRB's past practices (an understanding based on hearsay) is not relevant, much less admissible evidence.

For these reasons, Mr. Davis's affidavit does not support upholding the DRB amendment.

The DRB Reliance on 2 AAC 39.390 Is Misplaced

Citing 2 AAC 39.390, the DRB states: "By longstanding regulation, DRB 'may change the premiums and the terms of major medical insurance coverage,'" in support of its argument that it has the power to issue amendments that alter the terms of the Plan. That regulation in its entirety states:

> If necessary, the administrator may change the premiums and the terms of major medical insurance coverage.

The regulation was adopted 37 years after the Alaska Constitution was ratified and 18 years after the Alaska retirement medical plan went into effect.

In essence, the DRB is arguing that regardless of constitutional provisions; regardless of Alaska Supreme Court opinions; and regardless of common law rules, it has the power to make whatever changes it wants to the Plan because of that regulation.

The faults in the DRB's rationale are obvious. Regulations do not trump constitutional provisions. Art. XII, §7 of the Alaska Constitution and Duncan, Hoffbeck

---

[20] Davis affidavit at p. 2, ¶ 9.

and related opinions of the Alaska Supreme Court make clear that the DRB cannot unilaterally amend the Plan in a way that diminishes or impairs Plan benefits.

As noted earlier in this memorandum, on April 13, 2020 Judge Aarseth ruled that retirees have a constitutional due process right to notice and an opportunity to be heard before any Plan changes are approved by the court and implemented by the DRB. He also correctly observed in that ruling that Duncan made clear the only reason the DRB might be permitted to amend the Plan in a way that would reduce, eliminate or impair any existing benefit would be if the DRB were able to prove first that doing so would be necessary to prevent the Plan from becoming obsolete.[21]

The DRB has offered no evidence that "Plan Amendment 2016-2" was issued to prevent the Plan from becoming obsolete or that it complied with the other Duncan limitations or requirements such as, inter alia, providing new benefits that it proved by means Duncan's required "equivalency analysis" fairly and fully offset the benefit DRB sought to eliminate with "Plan Amendment 2016-2." The amendment was summarily imposed without court approval. It was done without giving retirees any prior notice and opportunity to be heard.

When read in the context of the Alaska Constitution, the Hoffbeck and the Duncan opinions, and other constitutional and common law principles cited by the RPEA in its opening memorandum in support of the motion, the following underlined language should be read into the regulation cited by the DRB:

---

[21] Decision of April 13, 2020 at p. 6, lns 13-14; p. 10, lns 1-6

> If necessary **to prevent the Plan from becoming obsolete as medical science evolves**, the administrator may change the premiums and the terms of major medical insurance coverage **if the administrator first obtains court approval by proving that changes comply with the limitations and requirements established by the Duncan opinion and that Plan members have been given reasonable notice and opportunity to be heard in court concerning the proposed changes.**

The DRB actually admits this in its memorandum, stating that it has "the power to make changes to [the Plan] so long as those changes do not diminish the value of the Plan's benefits."[22]

The regulation does give the DRB authority to change the terms of the Plan unilaterally as long as it is only adding medical benefits, which includes changing the Plan to lower or eliminate a deductible charge or comply with a final decision of the OAH or the Alaska courts. If Plan benefits are added that way, then they are protected by the Alaska Constitution. But the regulation provides the DRB with only a one-way street for unilaterally adding Plan benefits; if the DRB wants to change the Plan in any way that reduces, eliminates or impairs access to any benefit, it can only do so if it complies with state and federal constitutional law, the limitations and requirements of Duncan, and applicable common law principles.

---

[22] DRB Opp/Cross-Motion at p. 5 (emphasis added).

The DRB's Cross-Motion Should Be Denied Because the DRB's Conduct of Failing to Inform Retirees of the OAH Ruling, of Summarily Issuing Plan Amendment 2016-2 Without Notifying Plan Members and of Continuing to Require Medicare-Eligible Plan Members to Pay a Second Deductible Is A Form of Constructive Fraud

In his decision of April 13, 2020, Judge Aarseth ruled that the DRB owes fiduciary duties to the retired public employees of Alaska who earned vested retirement benefits to ensure that they receive those benefits, including the medical benefits provided by the AlaskaCare Plan.

It is undisputed that the DRB itself did not notify Plan members of the OAH ruling in the C.P. case, though DRB argues that Plan members received notice of it when the OAH posted the decision on its website.[23] It is also undisputed that when the DRB summarily issued Plan Amendment 2016-2, it did not notify retirees of the amendment.

Such a unilateral, undisclosed change in a contract is a type of constructive fraud.

> Fraud may be actual or constructive. 'Constructive fraud exists in cases in which conduct, although not actually fraudulent, ought to be so treated,—that is, in which such conduct is a constructive ... fraud, having all the actual consequences and all the legal effects of actual fraud.' Stated otherwise, constructive fraud is a breach of a duty, which while not

---

[23] See Exhibit 1, attached. The DRB does not provide any evidence of when the C.P. decision was posted on the OAH website. It also takes for granted that that all retirees have access to and are able to find, read and understand the meaning and effect of OAH decisions, and that despite the fiduciary duties the DRB owes to retirees, that retirees should bear the burden of having to find and monitoring the OAH website to determine if it issues any opinions that might affect Plan benefits. The RPEA contends that retirees should not bear any of those burdens, and that the DRB has the duty to disclose to them OAH or judicial opinions that concern affect Plan benefits in general.

> intentionally deceptive or actually dishonest, 'the law declares fraudulent because of its tendency to deceive others.'

Adams v. Adams, 89 P.3d 743, 750 (Alaska 2004)(footnotes omitted)

In Adams, one of the parties to a contract whose material terms had been agreed to by the other party unilaterally changed a material term of the written contract before it was signed without disclosing that fact to the other party. The other party then, signed the contract, unaware of the change. The Court held that the change made by the party that prepared the contract amounted to a constructive fraud, ruling that the party what made the change

> had the obligation to bring the ... change to the attention of" the [other party]. Its breach of this duty was a constructive fraud because of the powerful tendency to deceive that such conduct carries with it.

Adams, at 750

This is a reason for rejecting the DRB's cross-motion.

Miscellaneous DRB Arguments or Statements that the RPEA Disputes

The DRB states: "It is an undisputed fact that [charging Medicare-eligible retirees a second deductible] is how the Plan has worked since its inception in 1975,"[24] arguing that it has a "nearly half-century history of ... administering the plan's *clear requirement* [25] that retiree members pay" the second deductible.[26] It supports its contention with

---

[24] DRB Opp/Cross-Motion at p. 2

[25] Id. at p. 3. Of course, the OAH ruling belies the DRB's claim that the Plan contained a "clear requirement" that Medicare-eligible retirees pay a second deductible as a condition of receiving Plan medical benefits that are supplemental to Medicare

the affidavit of Larry Davis, a person who was not hired until 22 years later (1997) by the DRB to be its "appeals and risk manager." His affidavit provides no explanation how his work in that position gave him any direct, personal knowledge of what the DRB or its third-party administrator required Medicare-eligible retirees to pay as a condition of receiving supplemental medical benefits. Although he states that "to the best of his knowledge," since 2003 only one retiree appealed the issue of the second deductible to the OAH, we are told nothing about how many retirees over the years might have questioned the grounds for being charged the second deductible and either trusted what the DRB told them or appealed the issue but chose to give up at one of the earlier appeal levels before reaching the OAH.

The DRB argues that "it is a standard industry practice for a secondary insurer to assess its deductible and other plan provisions when coordinating benefits."[27] It provides no support for that statement other than to quote a section of a "model regulation" of NAIC dealing with coordination of benefits. The DRB provides no evidence that the model regulation has become "standard industry practice," and in any case, whatever that "standard industry practice" might be, is not relevant here. The terms of the Plan and applicable Alaska law control.

Were it applicable, the NAIC model regulation would actually support the conclusion that DRB should not be charging the second deductible. As quoted by the DRB:

---

[26] Id.
[27] DRB Opp/Cross-Motion at p. 7.

> '[The] 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."

The plain meaning and intent of the model regulation is that amounts paid to satisfy a deductible charged by a primary plan (in this case, Medicare) must be credited to the deductible of secondary plan (the AlaskaCare Plan) as if the other primary plan did not exist.

Conclusion

The DRB is asking the Court to approve not only its "Plan Amendment 2016-2" but also the DRB's conduct of ignoring the OAH ruling and continuing to do what the OAH ruled it did not have the right to do—that is, charging Medicare-eligible retirees a second deductible. Its main ploy is to justify its issuance of the amendment by attacking the OAH ruling the amendment was meant to circumvent with baseless arguments that it waived over four years ago when it chose not to appeal that ruling.

One hundred years ago Justice Holmes, writing for a unanimous Court, stated: "Men must turn square corners when they deal with the Government."[28] The RPEA submits that equity and basic fairness likewise require the Government to turn square corners when it deals with its citizens, especially when it has the fiduciary duty to ensure that the people who devoted a substantial part or all their working lives to serving in Government receive the vested retirement medical benefits they earned, were promised and that are guaranteed to the by the Alaska Constitution.

---

[28] Rock Island, A. & L.R. Co. v. United States, 254 U.S. 141, 143 (1920), quoted in Heckler v. Cmty. Health Services of Crawford County, Inc., 467 U.S. 51, 63 (1984)

DATED this 26th day of May 2020.

LAW OFFICES OF WM. GRANT CALLOW

WM. GRANT CALLOW
ABA No.: 7807062
Counsel to the RPEA

Certificate of Service

By my signature below, I certify that on this 26th day of May 2020, I caused a true and complete copy of the foregoing Reply and Opposition to Cross-Motion, with the attached exhibits, to be served upon Assistant Attorneys General of the State of Alaska Kevin McKenzie Dilg and Jeff Pickett by email at their email addresses of record.

Wm. Grant Callow

Retired Public Employees of Alaska, Inc. v. State

Case No. 3AN-18-06722 CI

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

RE THE LEGALITY OF REQUIRING RETIREES TO PAY A SECOND DEDUCTIBLE AS A CONDITION OF RECEIVING MEDICAL BENEFITS THAT ARE SUPPLEMENTAL TO MEDICARE

EXHIBIT 1

Defendant's Answer to RPEA Request for Admission No. 9
(3 pages)

jnu.law.ecf@alaska.gov

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

THE RETIRED PUBLIC EMPLOYEES OF ALASKA, INC., Plaintiffs, v. STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION, DIVISION OF RETIREMENT AND BENEFITS, Defendant.	**Case No. 3AN-18-06722CI**

DEFENDANT'S RESPONSES TO REQUESTS FOR ADMISSION

Defendant State of Alaska, Department of Administration, Division of Retirement and benefits (the "Division"), objects and responds to Plaintiff Retired Public Employees of Alaska, Inc.'s ("RPEA") First Set of Requests for Admission as follows:

PRELIMINARY STATEMENT

1. The Division's investigation and development of all facts and circumstances relating to this action is ongoing. These responses and objections are made without prejudice to, and are not a waiver of, the Division's right to rely on other facts or documents at trial.

2. By making the accompanying responses and these objections to RPEA's first requests for discovery, the Division does not waive, and hereby expressly reserves,

ATTORNEY GENERAL, STATE OF ALASKA
Dimond Courthouse
PO Box 110300, JUNEAU, ALASKA 99811
PHONE (907) 465-3600

RESPONSE:

Object that this request is not reasonably calculated to lead to the discovery of admissible evidence.

Notwithstanding this objection, the Division **ADMITS** that on or about April 13, 2016, the Office of Administrative Hearings adopted a final decision in OAH Case No. 15-0283-PER. That decision speaks for itself, and any characterization thereof that is inconsistent with the decision itself is **DENIED.**

The Division specifically denies the request to the extent the reasoning of the OAH decision was based on the administrative law judge's conclusion that the AlaskaCare Retiree Health Plan contained an ambiguous paragraph that was analyzed outside the context of the surrounding language of the Plan.

REQUEST FOR ADMISSION NO. 8

Please admit that you elected not to appeal the final decision of the Alaska administrative law judge in OAH No. 15-0283-PER.

RESPONSE:

Object that this request is not reasonably calculated to lead to the discovery of admissible evidence. Notwithstanding that objection, the Division **ADMITS** this request.

REQUEST FOR ADMISSION NO. 9

Please admit that you did not notify Plan members of the decision of the Alaska administrative law judge in OAH No. 15-0283-PER.

RESPONSE:

Object that this request is not reasonably calculated to lead to the discovery of admissible evidence.

Without waiving said objection, the Division **DENIES** the request. OAH Case No. 15-0283-PER was available to all members of the public.

ATTORNEY GENERAL, STATE OF ALASKA
Dimond Courthouse
PO Box 110300, JUNEAU, ALASKA 99811
PHONE (907) 465-3600

REQUEST FOR ADMISSION NO. 24

Please admit that in 2018, OptumRX mailed a letter to Plan members who have been taking certain name-brand prescription medications specifically prescribed for them by their health care providers that encouraged Plan members to take a medication represented to be and marketed as a generic alternative to the name-brand medication and advising them that they will be paying more for brand-name drugs once Optum RX becomes the pharmacy benefits manager of the Plan.

RESPONSE:

Object that this request is not reasonably calculated to lead to the discovery of admissible evidence. Object that this request is vague and ambiguous.

Notwithstanding these objections, the Division **ADMITS** in or about December 2018, OptumRX erroneously mailed letters to some AlaskaCare Retiree Health Plan participants stating that their medication is moving to a higher tier (resulting in increased cost), that quantity limits would soon apply to their medication, and/or that their medication would require a prior authorization to determine if it will be covered under the plan.

On or about December 18, 2018, the Division of Retirement and Benefits updated its online OptumRx Transition Frequently Asked Questions to inform Defined Benefit retirees that the letter was sent in error and there was no change to their benefits. On or about December 19, 2018 OptumRX mailed a letter to Plan Participants explaining that Defined Benefit retirees received the letter in error and there was no change to their benefits.

DATED: February 15, 2018.

KEVIN G. CLARKSON
ATTORNEY GENERAL

By: Kemrj

Katherine Demarest
Assistant Attorney General
Alaska Bar No. 1011074

Kevin Dilg
Assistant Attorney General
Alaska Bar No. 1406053

ATTORNEY GENERAL, STATE OF ALASKA
Dimond Courthouse
PO Box 110300, JUNEAU, ALASKA 99811
PHONE (907) 465-3600

Retired Public Employees of Alaska, Inc. v. State

Case No. 3AN-18-06722 CI

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

RE THE LEGALITY OF REQUIRING RETIREES TO PAY A SECOND DEDUCTIBLE AS A CONDITION OF RECEIVING MEDICAL BENEFITS THAT ARE SUPPLEMENTAL TO MEDICARE

EXHIBIT 2

Decision of Chief Judge Thurbon
In the Matter of T.N.S, OAH No. 09-0025-PER
(11 pages)

BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of	)	
T. N. S.	)	OAH No. 09-0025-PER
	)	Agency No. PRH2006-1204

ORDER DENYING MOTION TO DISMISS

I. Introduction

T. S.'s appeal of the Public Employees' Retirement Systems (PERS) administrator's denial of a claim for certain prescription medication coverage under the retiree health care plan is on remand from the superior court. Mr. S. requests that the administrative law judge rule that the office of administrative hearings (OAH) lacks jurisdiction, and that the appeal be dismissed at the executive branch level and returned to the superior court.

OAH has broad jurisdiction to hear PERS appeals, broader even than that of its PERS appeals predecessor, the former PERS board. PERS members cannot bypass OAH's jurisdiction simply by raising constitutional and other legal questions over which judicial branch courts exercise independent judgment. The PERS administrator cannot waive OAH's exercise of its jurisdiction. The administrator's arguable waiver of the requirement to exhaust administrative remedies does not preclude the superior court from remanding the matter to OAH.

Mr. S.'s motion, therefore, is denied. This matter will be scheduled for an appropriate proceeding before OAH.

II. Facts

The PERS administrator upheld a lower-level determination that the retiree health plan excludes coverage for erectile dysfunction medication prescribed to Mr. S. by his physician following surgery for prostate cancer.[1] The administrator's decision informed Mr. S. that he could appeal to superior court (bypassing OAH) if he was dissatisfied with the decision.[2] Mr. S.

---

[1] The lower-level determination was made twice by the health care plan third-party administrator, then Aetna. August 31, 2006 Letter from Aetna to Rubin (Rec. 33-34) (describing results of Level I review); October 30, 2006 Letter from Aetna to Rubin (Rec. 31-32) (describing results of Level II review). That determination was then reviewed by MAXIMUS Center for Health Dispute Resolution and ultimately upheld by the PERS administrator. March 13, 2007 Letter from Millhorn to S. at 1 (Rec. 6); February 21, 2007 Letter from MAXIMUS to Brown (Rec. 8-10).

[2] March 13, 2007 Letter from Millhorn to S. at 2 (Rec. 7) (stating "[t]his decision on your appeal is a final administrative decision [and y]ou may appeal this final administrative decision to the Alaska superior court pursuant to Rule 602(a)(2) of the Alaska Rules Appellate Procedure" and going on to quote Alaska R. App. P. 602).

appealed to the superior court, stating in his appeal points that his challenge is based, in part, on statutory and constitutional antidiscrimination provisions.[3]

After briefing and oral argument, the court remanded the appeal for further proceedings consistent with the court's written decision, assuming that the OAH hearing process would be "sufficient to address the existing questions of fact and law."[4] The court's remand decision noted the lack of factual findings from the administrative process below on two subjects:

1. "whether the loss of a breast results in the same sexual dysfunction as erectile dysfunction[;]" and
2. "whether other cancers, such as cervical cancer, may lead to sexual dysfunction[.[5]]"

Finally, the court directed that if the OAH "process cannot address the issues raised in [the court's] decision, the [administrative law judge] shall so rule, and this appeal will return to the Court to consider the questions of law and fact under a trial *de novo*."[6]

Mr. S. requested reconsideration or clarification of the court's decision.[7] The Division of Retirement and Benefits (acting for the PERS administrator) petitioned for rehearing.[8] Reconsideration and rehearing were denied but oral argument was scheduled on what the court treated as cross motions for clarification.[9] During that argument, the judge indicated that the definition of "sexual dysfunction" would have to be determined first because it appears to be a non-legal term of art which poses a question of expertise and fact, not law, and because the parties do not appear to agree on the definition.[10] He indicated that consideration of whether the health care plan's exclusion causes disparate impacts would depend on this definition, suggesting

---

3 *See generally* April 9, 2007 Notice of Appeal and Statement of Points on Appeal in *S. v. State*, 3AN-00-0000 CI (Rec. 1-5).

4 *See* August 1, 2008 Decision on Appeal in *S. v. State*, 3AN-00-0000 CI at 7 (Tan, J.) (Rec. 1693).

5 *Id.* at 6 & 7 (Rec. 1692 & 1693).

6 *Id.* at 7-8 (Rec. 1693-1694).

7 August 8, 2008 Motion for Reconsideration or Clarification in *S. v. State*, 3AN-00-0000 CI (Rec. 984-988) (urging the court to decide the appeal by comparing covered treatment for breast cancer and prostate cancer patients without further factual development).

8 August 14, 2008 Appellee's Petition for Rehearing in *S. v. State*, 3AN-00-0000 CI (Rec. 991-996) (urging the court to focus the remand on fact finding and a review of the claim under the contract, and away from discrimination claims that might require a proceeding outside OAH's jurisdiction).

9 October 22, 2008 Order in *S. v. State*, 3AN-00-0000 CI (Tan, J.) (Rec. 1007) (denying S.'s reconsideration request but providing for oppositions to cross motions for clarification and scheduling oral argument); December 5, 2008 Order Denying Petition for Rehearing in *S. v. State*, 3AN-00-0000 CI (Tan, J.) (Rec. 1023-1024) (denying division's petition but "with clarification on the scope of the remand").

10 December 2, 2008 Oral Proceedings in *S. v. State*, 3AN-07-0000 CI (audio recording); *see also* S.'s Memorandum, Exh. 3 at 4-5 (uncertified transcript of December 2, 2008 oral proceedings).

that only after the term is defined can the inquiry turn to comparing coverage provided to men and women for conditions fitting within the definition.[11]

After the remanded appeal was referred to OAH, during the initial case planning conference, Mr. S. questioned whether OAH has jurisdiction to hear his appeal.[12] The parties agreed to, and the administrative law judge approved, a schedule for briefing on the jurisdictional issue and agreed to defer for a future status conference planning for the balance of the appeal once a jurisdictional ruling has been made.[13]

Mr. S. "move[d] to dismiss this hearing process before the [OAH] and for an order remanding this proceeding back to the Superior Court for trial *de novo*."[14] He argued that OAH lacks jurisdiction to decide retiree health plan coverage issues such as his because, he concludes, the plan precluded the former PERS board from doing so, especially when the appeal focuses on the alleged discriminatory effect of the plan.[15] He also argued that OAH lacks jurisdiction because OAH has no "authority to address [equal protection and] such matters of constitutional law."[16] Lastly, he argued that OAH lacks jurisdiction because issues arising under the employment and insurance laws on which some of his discrimination-related arguments rest are not adjudicated by OAH outside the context of hearings performed for the Human Rights Commission and the Department of Commerce, Community and Economic Development's Division of Insurance.[17]

The PERS administrator opposed Mr. S.'s motion, arguing that OAH has jurisdiction to hear appeals of the administrator's decisions and has primary jurisdiction over plan interpretation and application issues.[18] The administrator also took the position that OAH is the proper forum in which

> to develop the factual record, not only to interpret the Plan and to determine the definition of "sexual dysfunction," but also to allow both

---

11 December 2, 2008 Oral Proceedings in *S. v. State*, 3AN-00-0000 CI (audio recording); *see also* S.'s Memorandum, Exh. 3 at 5-7.

12 January 28, 2009 Case Planning Conference (audio recording).

13 January 28, 2009 Case Planning Order at 1.

14 February 9, 2009 Motion to Dismiss for Lack of Jurisdiction (S.'s Motion) at 1.

15 February 9, 2009 Memorandum in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction (S.'s Memorandum) at 6-9.

16 *Id.* at 9; *also* March 3, 2009 Appellant's Reply to State's Opposition to Motion to Dismiss for Lack of Subject Matter Jurisdiction (S.'s Reply) at 1.

17 S.'s Memorandum at 9-10; S.'s Reply at 1-2.

18 February 25, 2009 Administrator's Opposition and Memorandum in Support of Opposition to Motion to Dismiss for Lack of Jurisdiction (Administrator's Opposition) at 11-15.

sides to present evidence on Mr. S.'s extra-contractual claims, including his statutory and constitutional claims.[19]

The administrator's opposition to the dismissal motion emphasized OAH's role in making an evidentiary record but also acknowledged that "ruling on factual issues could moot the legal issues."[20]

III. Discussion

A. NATURE OF THE OFFICE OF ADMINISTRATIVE HEARINGS

OAH is an independent adjudicatory agency.[21] Many protections were built into OAH's organic statutes to ensure that the agency and its judges can remain decisionally independent from the executive branch employees and entities whose decisions generate cases OAH hears.[22] An appeal to OAH is far from the "second shot" in the division's "own house" Mr. S. fears.[23] Nowhere is this truer than in OAH's original jurisdiction cases.

OAH hears many of its cases on behalf of other executive branch decisionmakers.[24] In those cases, unless final decisionmaking authority is delegated on a case-specific basis, OAH issues proposed decisions for consideration and final action by someone else in the executive branch—usually a department head, board or commission.[25] In a few categories, however, including PERS appeals, OAH has original jurisdiction.[26]

In the original jurisdiction cases, parties aggrieved by an agency action have the right to appeal to OAH, not to some other executive branch entity. The OAH judge assigned to hear the appeal is the final executive branch decisionmaker. The judge is not a policy maker with respect to the underlying subject matter—retirement benefits or taxes, for instance. Instead, the OAH

---

19 *Id.* at 16.

20 *Id.* at 17.

21 AS 44.64.010(a).

22 The chief judge is appointed for a term of years, can be terminated only for good cause, and reports to the finance committees of both bodies of the legislature on budgetary matters. AS 44.64.010(c); AS 44.64.020(a)(10). This allows the chief to protect the agency and its employees against inappropriate attempts to influence decisionmaking. OAH judges receive protection under certain personnel rules that do not normally apply to employees in the executive branch partially exempt service. AS 44.64.040(a). The legislation creating OAH amended the legislative and executive branch ethics acts to enhance decisional independence by prohibiting improper *ex parte* communications from legislators and executive branch employees. AS 24.60.030(i); AS 39.52.120(e). One of the chief judge's statutory duties is to "protect, support, and enhance the decisional independence of the administrative law judges" assigned to the cases OAH hears. AS 44.64.020(a)(4).

23 *See* S.'s Memorandum, Exh. 1 at 47-48 (uncertified transcript of February 6, 2008 oral proceedings), (stating that "from Mr. S.'s perspective, he didn't get a fair ... shot before in front of [the division] because they refused to address the issues, and there's no reason to give them a second shot in their own – in their own house").

24 *See* AS 44.64.030(a)(1)-(12), (15)-(23) & (28)-(39).

25 AS 44.64.060(c)-(e).

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.[27]

This is not to say that an OAH judge hearing a case, whether by original jurisdiction or as an adjunct to another decisionmaker, is merely a fact finder and need not address legal questions. Quite to the contrary, OAH judges frequently are called upon to address purely legal issues, including some raising constitutional questions and many requiring interpretation of statutes or regulations.[28] If the case is one heard for another executive branch decisionmaker, the judge's proposed decision may serve in part to inform that decisionmaker's thinking on how a court would view the constitutional or statutory question when exercising the court's independent review of such legal questions.

Similarly, if the OAH judge is the final executive branch decisionmaker, addressing legal questions that might be subject to an independent-judgment review by a judicial branch judge may have the salutary effect of informing the agency and private parties' thinking about whether to appeal to superior court. This could lead the parties to resolve the dispute without incurring the emotional and monetary costs of court proceedings.[29] Thus, even though, for instance,

---

[26] AS 39.35.006 (giving OAH original jurisdiction to hear PERS appeals). OAH also has original jurisdiction in Teachers' Retirement System appeals and most tax appeals. *See* AS 14.25.006; AS 43.05.405.

[27] In contrast to cases OAH hears for executive branch decisionmakers who do make substantive law or establish public policy, for instance, through regulations they adopt, OAH's "lawmaking" authority does not extend to creating substantive rules except regarding ethical conduct of state hearing officers. AS 44.64.020(a)(11) (requiring the chief administrative law judge to adopt regulations to carry out the duties of the office and implement" AS 44.64); AS 44.64.050(b) (requiring the chief administrative law judge to adopt regulations establishing a code of hearing officer conduct); *also compare* AS 43.05.435 (prescribing standards for OAH's review of tax appeals and requiring deference to the Department of Revenue on matters within that department's discretion).

[28] *E.g.*, *In re Baker*, OAH No. 08-0025-AEL at 11-12 (Sept. 19, 2008) (adopted, as mod., by AELS Board Nov. 6, 2008) (addressing separation of powers argument); *In re Cezar*, OAH No. 06-0255-PHA at 14, n. 17 (Oct. 22, 2007) (adopted, as mod., by Pharmacy Board Feb. 14, 2008) (addressing full faith & credit and privileges & immunities clause arguments); *In re J.L.*, OAH No. 05-0735-PER at 5-13 (Apr. 26, 2006) (Whitney, ALJ) (construing PERS statute bearing on calculation of credited service); *In the Consolidated Matters of Imaging Associates of Providence*, OAH Nos. 06-0743-DHS & 06-0764-DHS at 9-11 (Oct. 29, 2007) (adopted by Commissioner of Health & Social Services Nov. 29, 2007) (interpreting statutory exclusion from certificate of need requirement for "offices of physicians"); *In re D.W.*, OAH No. 06-0178-PER at 5-9 (Mar. 9, 2007) (Hemenway, ALJ) (construing PERS statute on benefit calculation); *In re G.W. & M.E.*, OAH No. 07-0605-PFD at 11-13 (Oct. 9, 2008) (adopted for Commissioner of Revenue Nov. 14, 2008) (ruling on statutory-regulatory abrogation of common-law mailbox rule).

[29] In appeals before the executive branch, the parties usually must bear their own costs, whereas in judicial branch appeals, the non-prevailing party may be required to pay some or all of the prevailing party's attorneys fees and costs. *Compare* Alaska R. App. P. 508 and cases applying same (allowing award of attorneys fees in appeals and of actual fees when appeal is frivolous or for the purpose of delay) *with* AS 44.64.040(b)(2) (allowing an award of reasonable expenses, including attorneys fees, only as a sanction for bad faith, frivolous or delay-causing tactics).

"[a]dministrative agencies do not have jurisdiction to decide issues of constitutional law[,]"[30] it may be appropriate to consider such questions while the case is still with the executive branch. This is especially so when constitutional or other legal arguments are collateral to the main issue of how to interpret and enforce a contract.

Just as the superior court is not constrained by the prospect of higher court independent review of legal questions from considering Mr. S.'s antidiscrimination statutory and constitutional arguments, an OAH judge is not constrained from considering such arguments simply because the judicial branch will have the final word on the questions if a further appeal occurs. Mr. S.'s appeal is not a civil action alleging discrimination; it is an administrative appeal of the PERS administrator's decision. The relief available through such an appeal is narrow: payment for the prescription. In this context, his arguments are not claims or complaints, which might trigger a different process with different potential remedies. They are simply arguments meant to persuade the PERS administrator, and those who exercise legal review over the administrator's decisions (whether that be a judicial branch court, OAH or the administrator's legal advisors) that the retiree health care plan should not be enforced as excluding coverage for Mr. S.'s prescription.

Accordingly, OAH can and will, to the extent appropriate in this case, consider legal questions raised by Mr. S.'s appeal, together with any factual issues that need to be resolved, if OAH's jurisdiction to hear PERS appeals extends to decisions by the PERS administrator to deny coverage under the health care plan.

B. OAH'S PERS JURISDICTION INCLUDES COVERAGE APPEALS.

Mr. S. asserts that OAH does not have jurisdiction over his appeal because this type of claim denial could not have been appealed to the former PERS board.[31] He is correct that OAH "only has that jurisdiction conferred upon it by the legislature" and "has jurisdiction that the agencies for which it is conducting hearings have jurisdiction."[32]

With regard to PERS, however, the legislature conferred upon OAH original jurisdiction to hear appeals challenging any of the administrator's decisions. Specifically, AS 39.35.006 provides as follows:

---

30 *Alaska Public Interest Research Group v. State*, 167 P.3d 27, 36 (Alaska 2007).

31 S.'s Memorandum at 6-9 (quoting the health care plan document and arguing that OAH has no jurisdiction because the "[c]laim denials cannot be appealed to the Board if [a] claim is denied because it is not covered by the plan").

32 S.'s Memorandum at 6.

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

Thus, OAH hears PERS appeals, not for another agency, but for itself, as an independent adjudicatory agency.

OAH's jurisdiction is not derivative of the former PERS board's jurisdiction. That board no longer exists. Its powers and duties were repealed in the same legislation that gave OAH jurisdiction over appeals from decisions of the PERS administrator.[33] When that board was still in existence, it had the power and duty

> to act as an appeals board, hold hearings at the request of an employer, employee, surviving spouse, or a beneficiary on decisions made by the administrator, and submit its findings to the administrator[.[34]]

It also had policy-making and other non-adjudicatory functions that were not transferred to OAH.[35]

For PERS appeals, OAH's jurisdiction stems not so much from its mandate under AS 44.64.030(a) to hear executive branch appeals in specified categories as from AS 39.35.006 directly. Since 2005, AS 39.35.006 has afforded PERS members such as Mr. S. the right to appeal to OAH if dissatisfied with a decision by the PERS administrator. Unlike the situation with the former PERS board, OAH's statutory authority to hear such appeals is not couched in terms of acting "as an appeals board" that must "submit its findings to the administrator" for some unidentified action and OAH is not affected by potentially competing duties to prescribe operating or other policies for PERS.

Instead, OAH judges act as professional neutrals to adjudicate PERS appeals in much the same way a judicial branch judge would, except that the executive branch hearing process

---

33 2005 Sess. Laws of Alaska, ch. 9, § 132 (repealing AS 39.35.040); *compare id.* at §§ 81 & 131 (adding AS 39.35.006 and including it on the AS 44.64.030(a) list of OAH's mandatory jurisdiction cases).

34 AS 39.35.040(4) (2004).

35 *See, e.g.*, AS 39.35.040(6) (2004) (power to prescribe PERS operating policies); AS 39.35.040(2) (2004) (power to modify and adopt administrator-proposed regulations); AS 39.35.040(7) (2004) (duty to prescribe interest rate credited to PERS accounts); AS 39.35.040(5) (2004) (duty to have biennial actuarial valuations prepared). In one form or another, these non-adjudicatory powers and duties of the former PERS board were statutorily assigned to others, such as the commissioner of administration, the PERS administrator, and the Alaska Retirement Management Board (ARM Board). *E.g.*, AS 39.35.040 (2006) (powers and duties of the PERS administrator); AS 39.35.005 (2006) (regulation adopting power of the commissioner); AS 37.10.220(4),(6)&(8) (2006) (powers and duties of the ARM Board regarding PERS operating policies, interest rate setting, and actuarial valuation); AS 39.35.007 (2006) (fiduciary duty of the ARM Board).

generally is less formal, and thus can be more efficient and cost effective for the parties, and may permit supplementation of the record through evidentiary proceedings more freely than an administrative appeal to superior court. The rules of civil procedure and evidence developed for the courts typically do not apply in executive branch adjudications. Discovery usually is managed efficiently and cooperatively, without the formality of interrogatories, requests for production or depositions. Sometimes most of the fact gathering actually takes place during the hearing, without the need for prehearing discovery beyond an exchange of documents. When a case presents as a pure appeal—one that can be decided on the agency record, without supplementation through an evidentiary hearing—the parties might file written briefs or they might simply make their arguments on the oral record. Thus, the flexibility and relative informality make the executive branch hearing process less intimidating to self-represented parties and quite suitable for resolution of PERS appeals.

In sum, OAH has the functional ability and the statutory authority to hear appeals of decisions by the administrator to deny a claim for coverage under the health care plan.[36] That the yet-to-be-updated 2003 plan booklet provides for board appeals in only certain types of claim denials has no bearing on OAH's statutory jurisdiction to hear appeals from decisions by the PERS administrator. The board no longer exists. The legislation eliminating the board retained for PERS members an opportunity for an executive branch appeal at least equal to that available from the former board.[37] That opportunity extends to final health care plan coverage decisions by the PERS administrator, notwithstanding any plan-based limits there might have been on the

---

[36] Indeed, OAH has heard coverage appeals in other cases. *E.g.*, *In re P.A.*, OAH No. 06-0254-PER (Mar. 15, 2007) (Whitney, ALJ) (granting summary adjudication in appeal from denial of coverage for massage therapy); *In re R.S.*, OAH No. 06-0176-TRS at 3-5 (Apr. 3, 2007) (Handley, ALJ) (considering appeal from denial of coverage for surgical procedure excluded by health care plan under OAH's parallel jurisdiction for teachers' retirement system appeals found at AS 14.25.006).

[37] The opportunity for an executive branch adjudication arguably is better before OAH than before the former board in the following respects:

- OAH is an independent adjudicatory agency, not an appeals board that makes findings to be presented to the administrator;
- OAH can make alternative dispute resolution processes available to the parties;
- OAH hearings can take place anytime throughout the year, not just when a board of lay volunteers is available to meet;
- OAH proceedings can be easily tailored to fit the particular needs of the case;
- OAH's statutes and regulations afford the parties an opportunity to respond to the judge's proposed decision before a final decision is made; and
- As illustrated by this case, OAH can provide an executive branch adjudication of any of the administrator's coverage decisions, including denials predicated on the view that the claims are not covered by the plan.

former board. Accordingly, OAH has jurisdiction to hear Mr. S.'s appeal as long as exercise of that jurisdiction has not been waived.

C. OAH'S EXERCISE OF JURISDICTION HAS NOT BEEN WAIVED.

The PERS administrator's denial letter informed Mr. S. that he could appeal his coverage dispute to superior court if he disagreed with the decision. This raises the question of whether the PERS administrator waived the right to require Mr. S. to exhaust his administrative remedies and, if so, whether the administrator thereby waived OAH's right to exercise its jurisdiction to conduct an executive branch hearing before the matter goes to superior court.

By mistakes made concerning the notice of appeal rights, a governmental entity can waive the right to assert failure to exhaust administrative remedies as a defense.[38] The PERS administrator mistakenly directed Mr. S. to superior court. This may be enough to bar the administrator from demanding exhaustion by Mr. S. of the administrative remedy of appealing to OAH, but that is not determinative of the dispute here.

The PERS administrator's mistake does not negate OAH's jurisdiction. An agency appearing before OAH cannot waive OAH's exercise of jurisdiction, even if the agency omits to or elects not to invoke it. To conclude that an individual or entity in the executive branch other than OAH can knowingly or inadvertently circumvent the legislative intent that OAH hear PERS appeals before they leave the executive branch would undermine the independence of OAH as an adjudicatory agency. The question, therefore, comes down to whether the superior court can require exhaustion of administrative remedies when the government agency party (not adjudicator) arguably has waived the right to do so itself.

In Mr. S.'s case, the superior court has already answered that question by remanding the appeal. OAH has no authority or desire to countermand the superior court's order. It appears well founded. The remand is consistent with case law showing that the court has the discretion to excuse or require exhaustion of administrative remedies.[39] It also furthers the goal of allowing PERS administrative appeals to be heard by a central executive branch adjudicatory agency

---

[38] *See, e.g., Pruitt v. City of Seward*, 152 P.3d 1130, 1137-1138 (Alaska 2007) (illustrating that lack of notice of the right to an administrative appeal bars use of failure to exhaust administrative remedies as a defense).

[39] *E.g., State of Alaska, Dep't of Revenue v. Andrade*, 23 P.2d 58, 65-67 (Alaska 2001) (demonstrating that whether exhaustion of administrative remedies is required or will be excused is a matter for the superior court's discretion and affirming superior court's determination that exhaustion was excused because "refusal of the department to address the Andrade family's constitutional challenge rendered pursuit of administrative relief futile").

charged with increasing consistency in administrative decisions,[40] before the parties must resort to court appeals where consistency in decisions across a group of more than 30 superior court judges may be hard to achieve.

IV. Conclusion

OAH has jurisdiction to hear Mr. S.'s denial of coverage appeal. The fact that he was misdirected to file his appeal in superior court does not change that. The court has remanded the appeal. OAH will hear it and will consider any legal arguments the parties offer on interpretation and enforcement of the retiree health care plan's exclusion for sexual dysfunction treatment.

A status conference is scheduled for **11:00 a.m., Wednesday, June 17, 2009**. The parties should be prepared to discuss the following subjects:

1. Suitability of this matter for alternative dispute resolution;
2. Discovery, including whether the division has access to records maintained by the health care plan's third-party administrator should such records be needed;
3. Supplementation of the record, including any objections to supplements filed since the record was first transmitted;
4. Stipulations of fact, including whether material facts concerning Mr. S.'s medical condition, the medical necessity for the treatment and the appropriateness of the treatment can be established by stipulation;
5. The nature of the proceeding appropriate for this appeal—i.e., hearing on written record and briefs versus evidentiary hearing to supplement the record—and whether "sexual dysfunction" within the meaning of the plan can be interpreted without further record development;
6. The schedule for the appropriate proceeding and pre-proceeding events such as exchange of documents, witness lists and prefiling of exhibits;
7. The location for any in-person proceeding; and
8. The new deadline for the proposed decision.

If either party has a conflict for the June 17 conference, that party should contact the other and the two should identify alternative dates/times when both parties are available and then jointly contact OAH staff at 907-465-1886 to reschedule the conference on the judge's calendar.

[40] AS 44.64.020(b)(6).

The parties should endeavor to agree on alternative dates that would have the case planning conference occur by June 24.

DATED this 9th day of June, 2009.

By: *Signed*
Terry L. Thurbon
Chief Administrative Law Judge

[This document has been modified to conform to technical standards for publication.]