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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

STATE OF ALASKA'S REPLY TO PLAINTIFF'S OPPOSITION TO CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff Retired Public Employees of Alaska, Inc., ("RPEA")'s response to the Division of Retirement and Benefits' ("DRB" or "Division") cross-motion for summary judgment ignores decades of diminishment case law and misrepresents the Division's arguments. RPEA's fulminations notwithstanding, its combined opposition and reply does nothing to call into question the legality of the Division's long-standing interpretation of the AlaskaCare Retiree Health Plan's ("Plan") deductible provisions in the context of coordinating with Medicare. Rather than addressing this issue head on, RPEA attempts to obfuscate the issues by implying that AS 39.35.006 conflicts with—and therefore controls—the rest of the PERS statutes. RPEA offers no support, beyond

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conjecture and speculation, for this contention.[1] As the Division has made clear in its briefing, the legal analysis here is straight-forward. The Division's long-standing interpretation and implementation of the Plan's deductible provisions is legally sound.

II. RPEA'S MISREPRESNTATIONS OF THE DIVISION'S POSITIONS

RPEA devotes a significant number of pages in its opposition to offering an "explanation" of the Division's positions. RPEA's explanations miss the mark—badly. The court need look no farther than the Division's pleadings and briefing to understand its arguments.

RPEA states that the Division does not dispute that the *Duncan* decision requires the Division to seek court approval prior to amending the Plan.[2] That is patently untrue. The Division has directly disputed this in its prior pleadings.[3]

RPEA spends considerable time arguing that if the Division wanted to avoid being stuck with RPEA's newly-minted, not to mention self-serving, interpretation of the Plan's deductible provisions its only option was to appeal the erroneous OAH decision to the superior court. The Division's briefing clearly explained why it was not

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[1] In fact, as discussed later, no statute or regulation mandates the OAH is the final arbitrator of DRB decisions.

[2] RPEA Combined Reply and Opposition at p. 6.

[3] *See, e.g.*, Division's Opposition to Pl.'s Mot. for Partial S.J. at pp. 25-26 ("RPEA's notion that DRB can only amend the retiree health plan with court approval is a theme that runs throughout its briefing. RPEA cites no authority for this radical proposition—and for good reason. Such a requirement would turn courts into health plan administrators—a function that they are not well-equipped to perform.").

required to make that Hobson's choice.[4]

Most notably, RPEA misstates the Division's position on whether retirees had "notice" of *ITMO C.P.*[5] RPEA's allegation is baseless. AS 44.64.090(a) requires the OAH to make all decisions "available to the public, agencies, and the legislature" and the OAH "shall make final agency decisions reached after administrative hearings available online through an electronic data base." RPEA argues, in essence, that following the statute is insufficient to inform the public of OAH decisions. But it offers nothing other than speculation and rhetorical questions in support of this position. And RPEA's unnecessary-burden argument is flatly wrong: "As a general rule, people are presumed to know the law without being specifically informed of it."[6]

The court should ignore RPEA's attempts to reframe the Division's brief and misrepresent its arguments. Instead, the Division asks the court to focus on the substantive arguments contained in the Division's cross-motion briefing.

III. THE OAH DOES NOT EXERCISE CONTROL OVER THE PLAN

RPEA's reply re-iterates its position that decisions of the OAH take precedence over the actions of the Administrator. RPEA attempts to justify this proposition by reading AS 39.35.006 in a manner that directly conflicts with AS 39.35.003, .004 and 44.64 *et seq*. RPEA argues that OAH decisions bind the Division and the Plan to

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[4] Division's Opposition to Pl.'s Mot. for Partial S.J. at pp. 17-22; 28 (setting forth reasoning in adopting Plan Amendment 2016-2).

[5] RPEA Combined Reply and Opposition at p. 7 n. 8.

[6] *Calvert v. State, Dep't of Labor & Workforce Dev., Employment Sec. Div.*, 251 P.3d 990, 1008 (Alaska 2011).

particular outcomes. Notably, RPEA cites no legal authority for this proposition. And the Division clearly maintains the authority to manage, maintain, and change the Plan under statute,[7] regulation,[8] and case law.[9]

Statutory interpretation is a question of law.[10] The Court should "interpret [the] statute according to reason, practicality, and common sense, considering the meaning of the statute's language, its legislative history, and its purpose."[11] Moreover, when construing statutes, the Court should attempt to harmonize sections dealing with the same issue in order to avoid conflict.[12] RPEA's argument that AS 39.35.006 somehow makes an "OAH ruling [] the final decision on the matter within the executive branch" has no basis in law and runs roughshod over AS 39.35.003 and .004. RPEA can point to no statute or regulation that vests the OAH with final decision authority over the terms

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7 AS 39.35.004.

8 2 AAC 39.390.

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

10 *Kuretich v. Alaska Tr., LLC*, 287 P.3d 87, 88 (Alaska 2012).

11 *Id*. (internal citations omitted).

12 *See generally Matter of Hutchinson's Estate*, 577 P.2d 1074, 1075 (Alaska 1978).

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of the PERS.[13] The fact that the OAH has been designated as the venue for administrative disputes between the Plan and its members does not mean the Division forfeits its right to administer the Plan, especially in light of an OAH decision that misconstrues the Plan.[14]

IV. BOTH CASE LAW AND OAH DECISIONS SUPPORT THE DIVISION'S CROSS-MOTION

RPEA's attempt to distinguish *McMullen v. Bell*, 128 P.3d 186 (Alaska 2006) fails on its face. RPEA argues that the Division's long-standing precedent in terms of its policies and practices do not define the contours of the Plan. This position is refuted by the court's diminishment analysis.[15] In fact, the Supreme Court's decision in *Flisock v.*

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[13] Moreover, the legislative history surrounding AS 39.35.006 is relatively silent on the intent of the statute beyond testimony from the Chief ALJ that the OAH had the capacity to handle PERS appeals and that PERS appeals would be adjudicated under the procedures promulgated by the OAH. Senator Bert Steadman Testimony, *Senate Finance Committee hearing Minutes March 30, 2005, 24th Alaska State Legislature* at p. 4; Acting Chief Administrative Law Judge Terry Thurbon Testimony, *Senate Finance Committee hearing Minutes March 30, 2005, 24th Alaska State Legislature* at p. 8-9; Vice-Chair, Teachers' Retirement System Board Ricard J. Solie, Sr., *Senate Finance Committee hearing Minutes March 30, 2005, 24th Alaska State Legislature* at p. 10-11; Member, Public Employees' Retirement System Board Bronk Jorgensen, *Senate Finance Committee hearing Minutes March 30, 2005, 24th Alaska State Legislature* at p. 19; Acting Chief Administrative Law Judge Terry Thurbon Testimony, *Senate Finance Committee hearing Minutes March 31, 2005, 24th Alaska State Legislature* at p. 2-3.

[14] RPEA will likely argue that *ITMO T.N.S.*, OAH No. 09-0025-PER, provides authority for this proposition. However, the OAH simply cites to AS 39.35.006 for this authority. Nothing in AS 39.35.006 provides the OAH with administrative control over the Plan.

[15] *See Sheffield v. Alaska Pub. Employees' Ass'n, Inc.*, 732 P.2d 1083, 1087 (Alaska 1987); *Flisock v. State, Div. of Ret. & Benefits*, 818 P.2d 640, 643 (Alaska 1991); *Metcalfe v. State*, 382 P.3d 1168, 1175 (Alaska 2016), *abrogated on other grounds by Hahn v. GEICO Choice Ins. Co.*, 420 P.3d 1160 (Alaska 2018).

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State turns completely on whether or not the Division had a historical practice of allowing unused sick leave to be included in benefit determinations under the Teachers' Retirement System.[16] Similarly, in this case the Division's long-standing practice has been to apply the Plan deductible in conjunction with the Medicare deductible. This practice stretches back to 1975.[17] The only version of the Plan any retiree could have ever vested in is one in which the Division, as the Plan administrator, interpreted to require two deductibles. The OAH's determination that the Plan language was ambiguous did nothing to refute or undermine DRB's long-standing interpretation of the Plan. The simple fact is that the OAH failed to read the Plan as a whole and ignored the Division's long-standing practice when coordinating with Medicare. The OAH's decision was made in error. Plan Amendment 2016-2 fixed the error.

RPEA's opposition appears to conflate the decisions of the OAH with those of the Alaska Supreme Court. Throughout its opposition, RPEA argues that the decisions of the OAH are somehow the final, irrefutable decision on any matter associated with the PERS. Even the OAH does not share that expansive view of its power.[18] And, of course, such an unprecedented view of OAH power finds no support in any legal precedent. The OAH itself has stated that the relief available through the OAH appeal process is narrow and limited to the satisfaction of the underlying claim, such as the

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16 *Flisock v. State, Div. of Ret. & Benefits*, 818 P.2d 640, 644 (Alaska 1991).

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

18 *See, e.g.*, Order Denying Motion to Dismiss, *ITMO T.N.S.*, OAH No. 09-0025-PER at p. 6 (June 9, 2009). Attached as Exhibit "A."

payment of benefits in an individual case.[19] The OAH has recognized it does not possess judicial powers.[20] Moreover, "[t]he Office of Administrative Hearings has been given no authority to render declaratory judgments in cases of this type [retiree health appeals], and thus there is no relief that could have been granted beyond a monetary award."[21] In the instant case, OAH's own interpretation of its authority should have limited its application of *ITMO C.P.* to resolving a monetary dispute.

Notably, RPEA cites no legal authority for the position that decisions of the OAH have general application beyond resolving individual disputes between retirees and the Division. The Alaska Supreme Court has stated that an agency may "flatly repudiate" a decision of a quasi-judicial board if the agency believes the reasoning is no longer applicable.[22] In rejecting the idea that administrative decisions form some kind of *stare decisis*, the *May* Court stated "[w]e agree with the superior court that consistent with Alaska law and decisions of the United States Supreme Court, agencies may overrule a prior decision if convinced it was wrongly decided."[23] RPEA's opposition argues the exact opposite of this proposition, calling it a "faulty" premise,[24] without

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19 *Id.*

20 Decision on Summary Adjudication, *ITMO SUSAN REED d/b/a CARE CORE*, OAH No. 13-0937-MDR at p. 4 (October 15, 2013). Attached as Exhibit "B."

21 Final Decision and Order of Dismissal, *ITMO X.E.N.*, OAH No. 16-0053-PER at p. 2 (October 21, 2016). Attached as Exhibit "C."

22 *May v. State, Commercial Fisheries Entry Comm'n*, 168 P.3d 873, 883 (Alaska 2007).

23 *Id.* at 884.

24 *See* RPEA Combined Reply and Opposition at pp. 9-10.

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providing a single reference to any statute, regulation, or case that states the Division is bound to the decisions of the OAH, erroneous or otherwise. As explained elsewhere in this brief, RPEA's argument that AS 39.35.006 somehow trumps the rest of the PERS statutes is in direct conflict with the PERS and has been rejected by this court recently in other contexts.[25]

RPEA's argument that it is only advocating for oversight by the OAH is undermined by its acknowledgment that such "oversight," in this case, would require the Division to completely deviate from its long-standing practice of interpreting the Plan to require satisfaction of two deductibles when coordinating benefits with Medicare. RPEA states that it is not arguing for modification, creation, or nullification of any portion of the Plan.[26] However, RPEA is asking this court to use the OAH's interpretation of the Plan to nullify the administrator's interpretation. No statute allows for this substitution. Nor does any statute confer on the OAH the power to issue a declaratory judgment defining the rights and privileges afforded to the parties before it. That power is vested in the superior court, not the executive branch.[27]

The OAH cannot substitute its judgment for the administrator. Its authority is limited to determining whether or not the administrator paid an individual claim

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[25] *Miller v. State, Department of Administration, Division of Retirement and Benefits*, 3AN-18-06925 CI at p. 13 (Alaska Super., February 10, 2020) ("Miller cannot force the Division to change [its] policy at any level of administrative appeal."). Attached as Exhibit "D."

[26] RPEA Opp. at p. 12.

[27] AS 22.10.020(g).

correctly.[28]

V. RPEA CANNOT REWRITE REGULATIONS

RPEA argues that 2 AAC 39.390 is incorrectly written. However, RPEA does not have the power to rewrite the terms of 2 AAC 39.390.[29] The law is clear that state agencies are empowered to interpret statutes applicable to them through the promulgation of regulations.[30] An agency's reasonable interpretation of the statute through the use of a regulation is given considerable deference.[31] The regulation "need not be the only or most effective means of carrying out" an agency's goals.[32]

Here, the Division's regulation fills in the gaps contained in the statutory directives, provided within the PERS Act, regarding medical benefits. Specifically, those regulations clearly indicate that the Plan is subject to change. Similar language is

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[28] Order Denying Motion to Dismiss, *ITMO T.N.S.*, OAH No. 09-0025-PER at p. 5-6 (June 9, 2009).

[29] The Division notes that RPEA did not address the language in the Plan itself that allows for amendment of the Plan. The Division raised this in its cross motion. *See* Division's Cross Mot. at p. 5. This is likely because RPEA realizes this issue was conclusively decided between the parties in the *RPEA v. Matiashowski* litigation. *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 booklets for some time have contained cancellation clauses, reservation of rights to make changes, deductibles and co-insurance provisions.").

[30] *See* AS 39.35.005.

[31] *Davis Wright Tremaine LLP v. State, Dep't of Admin.*, 324 P.3d 293, 302-03 (Alaska 2014).

[32] *State, Dep't of Revenue, Permanent Fund Dividend Div. v. Bradley*, 896 P.2d 237, 240 n.6 (Alaska 1995).

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found in the Plan itself. [33] And while RPEA argues that this court should ignore the case law interpreting the Diminishment Clause in favor of the common law of contracts,[34] it routinely ignores the fact that the unambiguous terms of the contract control under its own analysis.[35] More importantly, the Supreme Court has consistently recognized the State's right to change the provisions of the PERS.[36] In fact, the Court specifically stated in *Duncan*

> As already noted, in *Hammond v. Hoffbeck* we held that the prohibition on diminishment or impairment of retirement benefits does not mean that retirement benefits are unchangeable. Instead, benefits can be modified so long as the modifications are reasonable, and one condition of reasonableness is that disadvantageous changes must be offset by comparable new beneficial changes.[37]

Despite RPEA's argument to the contrary, the Supreme Court does not interpret Article XII section 7 of the Alaska Constitution to guarantee immutable, fixed rights that require court approval before changes occur. Rather, the Court recognizes the need

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33 *See* 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").

34 RPEA Combined Reply and Opposition at pp. 20-21.

35 *Allstate Ins. Co.*, 996 P.2d at 1222-23 ("[w]here an insurance company by plain language limits the coverage of its policy, we recognize that restriction") (internal citation omitted); *accord State Farm Fire & Cas. Co. v. Bongen*, 925 P.2d 1042, 1045 (Alaska 1996).

36 *Hammond v. Hoffbeck*, 627 P.2d 1052, 1057 (Alaska 1981) ("We agree with this analysis and hold that the fact that rights in PERS vest on employment does not preclude modifications of the system.").

37 *Duncan v. Retired Pub. Employees of Alaska, Inc.*, 71 P.3d 882, 889 (Alaska 2003).

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for flexibility, especially in the field of health benefits.[38] Consequently, 2 AAC 39.390 is entirely consistent with *Duncan* and the constitution. RPEA's attempt to rewrite the regulation, quite simply, fails.

VI. *Duncan* Does not function as a one-way ratchet

RPEA's reliance on *Duncan* is misplaced for two reasons. First, *Duncan* does not apply a one-way ratchet that only allows for ever expanding benefits, as RPEA argues in its motion and reply.[39] Rather, *Duncan* recognizes that medical benefits can be modified—as all diminishment decisions issued by the Supreme Court have recognized[40]—provided the changes are actuarially neutral as analyzed at the group level. Second, *Duncan* reaffirms that the only rights protected under the constitution are those flowing from statutes, regulations, and State practices. As the Division noted in its cross motion, *ITMO CP* is not grounded on any previously identified benefit, making RPEA's arguments regarding *Duncan* irrelevant.

The driving principal behind RPEA's argument—that the only changes allowed

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38 *Id.* at 891.

39 In fact, under RPEA's logic, the State would be better off simply allowing the Plan to diminish of its own accord over time by not attempting to realign the mix of benefits. Medical science has allowed retirees to live longer, fuller lives. But, following the logic of RPEA's arguments, the State should, for example, permit retirees to be denied advanced lifesaving medical treatments due to the $2 million lifetime benefit cap.

40 *Hammond v. Hoffbeck*, 627 P.2d 1052, 1057 (Alaska 1981) ("We agree with this analysis and hold that the fact that rights in PERS vest on employment does not preclude modifications of the system; that fact does, however, require that any changes in the system that operate to a given employee's disadvantage must be offset by comparable new advantages to that employee.").

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under *Duncan* are those that prevent obsolescence—is not supported by the text of the opinion. In *Duncan*, the Court recognized that "health insurance benefits must be allowed to change as health care evolves."[41] In justifying this position, the Court quoted favorably from a Michigan court of appeals opinion that stated:

> [T]he rights which have vested in Plaintiffs are not rights to receive exactly the same package of health benefits which were offered [at vesting] but rather a right to a reasonable health benefit package, one which is in keeping with the mainstream of such packages, as they are negotiated and implemented for similarly situated active employees over time. This—not a "frozen" package of benefits and cost containment measures—is the meaning of [the benefits] mandated by the Legislature.[42]

This statement is antithetical to RPEA's one-way ratchet argument. Both the Michigan court and the Alaska Supreme Court recognized that the rigid and inflexible health benefit system desired by RPEA is illusory, and the Plan must have the ability to enact new cost containment measures along with beneficial changes so long as in doing so the value of the Plan is not diminished.[43] RPEA's effort to limit *Duncan* does not accord with the clear holding in that decision.

In addition, nowhere in the text of *Duncan* does the Supreme Court state that the Division must affirmatively petition the superior court to make modifications to the Plan. RPEA's attempt to graft this requirement into the PERS is, frankly, ridiculous. Based on RPEA's logic, if the Legislature were to modify any of the PERS statutes, it

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41 *Duncan v. Retired Pub. Employees of Alaska, Inc.*, 71 P.3d 882, 891 (Alaska 2003).

42 *Id.* (internal quotations omitted).

43 *Id.*

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would need to seek the court's affirmative approval before enacting the change. Not only would this violate the separation of powers doctrine, it has been rejected by the Supreme Court.[44]

RPEA has completely failed to identify an actual, existing benefit that has been impaired or diminished. It is clear that at no time has there existed a statue, regulation, or Plan practice that allowed the waiver of the Plan deductible when coordinating benefits with Medicare. And while *Duncan* contains a vague description of the source of vested benefits under the PERS (a description that was clarified in later cases—*e.g. McMullen v. Bell*), RPEA's arguments continue to conflate the *administration* of the Plan with the benefits provided by the Plan. Retirees have no vested right under Article XII, section 7 to any particular administration of the Plan.[45] *Duncan* mandates that the Plan be operated in a manner consistent with mainstream health plans.[46] The NAIC mandates 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

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[44] *See Rice v. Rice*, 757 P.2d 60, 62 (Alaska 1988) (retroactive application of QDRO statutes not a diminishment of benefit).

[45] Order Re:, *The Retired Public Employees of Alaska, Inc. v. State*, 3AN-18-006722CI at p. 9 (Alaska Super., April 13, 2020) ("At the heart of this case is a Duncan diminishment analysis to decide whether the Defendant diminished Plan benefits through amendments. In such an analysis, the Court will consider the high standard prohibiting diminishment of benefits and the retirees' reliance and trust in those who facilitate the Plan. This analysis is only relevant to the sixth proposed duty, and this standard does not otherwise apply to the motions at hand. **These motions primarily address administration of the Plan.**") (emphasis added). *See also Rice* 757 P.2d at 62 (retroactive application of QDRO statutes not a diminishment of benefit).

[46] *Duncan*, 71 P.3d at 891.

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added).[47] Consequently, the Plan's long-standing practice in regard to coordinating benefits with Medicare is in compliance with *Duncan*'s admonishment that the Plan be operated "in keeping with the mainstream of such packages, as they are negotiated and implemented for similarly situated active employees over time."[48]

Finally, it is imperative that the court recognize that the true question in *Duncan* was whether health benefits were subject to the Diminishment Clause at all.[49] The Supreme Court found the benefits offered under AS 39.35.535 were indeed subject to the Diminishment Clause and remanded the case to the trial court.[50] Upon remand, the Anchorage superior court found the changes made to the health plan passed constitutional muster.[51] Critically, the court held "[n]either AS 14.25.168(b) nor AS 39.35.535(b) precludes the Defendants from coordinating benefits with federal (Medicare) benefits. The coordination of benefits for those retirees who have Medicare benefits to coordinate is neither discriminatory nor unfair."[52] Therefore, this court has previously ruled that the Plan's coordination of benefits with Medicare is not a diminishment of benefits. The adoption of Plan Amendment 2016-2 to clarify the

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47 Davis Aff. at Ex. C p. 10. RPEA's argument that this language supports its argument fails to recognize the fact both deductibles are assessed regardless of the ability of coterminous satisfaction of the deductibles.

48 *Duncan*, 71 P.3d at 891.

49 *Id.* at 886.

50 *Id.* at 892.

51 *Retired Pub. Employees of Alaska, Inc. v Matiashowski*, No. 3AN-00-7540CI, 2006 WL 4634279 at *14 ¶ 25 (Alaska Super. Apr. 27, 2006).

52 *Retired Pub. Employees of Alaska, Inc. v Matiashowski*, No. 3AN-00-7540CI, 2006 WL 4634279 at *14 ¶ 21 (Alaska Super. Apr. 27, 2006).

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erroneous decision reached by the OAH *ITMO CP* cannot, as a matter of law, be void and the court should enter an order denying RPEA's motion for partial summary judgment and grant the State's motion.

VII. Affidavit of Larry Davis

RPEA attacks the Affidavit of Larry Davis on two grounds. First, it asserts that the affidavit is based on inadmissible "hearsay."[53] Second, it asserts the affidavit is infirm because it contains Mr. Davis's opinions.[54] These criticisms lack both merit and relevance.

To be admissible for the purposes of summary judgment, affidavits must be "made on personal knowledge, … set forth such facts as would be admissible in evidence, and … show affirmatively that the affiant is competent to testify to the matters stated therein."[55] Mr. Davis's affidavit satisfies these criteria.

Mr. Davis' statements are not hearsay. Hearsay is a statement by a third party "offered in evidence to prove the truth of the matter asserted."[56] The Alaska Supreme Court has held that it is entirely reasonable for public servants to testify to their own beliefs regarding policies and practices, and that they do not have to personally witness every factual element underlying their impressions in order to convey them.[57]

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53 RPEA Combined Reply and Opposition at pp. 16 – 17

54 *Id.*

55 Alaska R. Civ. P. 56(e).

56 Alaska R. Evid. 801(c).

57 *Alaska State Employees Ass'n/AFSCME Local 52, AFL-CIO v. State*, 74 P.3d 881, 884 n.15 (Alaska 2003).

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Mr. Davis's beliefs and impressions about longstanding departmental procedures are either grounded in his personal experience or relevant to the state of mind of those implementing these procedures.[58]

RPEA also challenges the admissibility of what it characterizes as Mr. Davis's opinions, which it claims are "mistaken"[59] and "not relevant."[60] Even if these assertions were true, and they are not, they would not affect the admissibility of Mr. Davis's opinions. Lay witness opinions are permissible so long as they are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue."[61] The Alaska Supreme Court applied this rule in *Cameron v. Chang-Craft*,[62] where it allowed an employee's union representative to offer opinion testimony on an incident underlying an employee's

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58 *See* Alaska R. Evid. 803(3), (23); *Int'l Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp*., 189 F.2d 177, 192 (9th Cir. 1951), aff'd sub nom. *Int'l Longshoremen's & Warehousemens's Union v. Juneau Spruce Corp.*, 342 U.S. 237, 72 (1952) ("The results of the investigation were admissible, not as proof of the truth that the ports in question were in fact closed to appellee, but only to show that appellee, relying on such reports, acted in a reasonable manner in closing its mill."); *Van Huff v. Sohio Alaska Petroleum Co.*, 835 P.2d 1181, 1186 (Alaska 1992) ("The contested statements were not hearsay because they were introduced as proof of the state of mind of the supervisors that selected Van Huff for termination, and not as proof of the truth of the matter asserted in those statements.").

59 RPEA Combined Reply and Opposition at p. 16.

60 *Id*. at 17.

61 Alaska R. Evid. 701

62 *See Cameron v. Chang-Craft*, 251 P.3d 1008, 1021 (Alaska 2011), disavowed in part on other grounds by *Christensen v. Alaska Sales & Serv., Inc*., 335 P.3d 514 (Alaska 2014). *See also Olivera v. Rude-Olivera*, 411 P.3d 587, 592–93 (Alaska 2018) (construing ARE 701 as allowing landowners to testify to the value of their property, despite lacking familiarity with property valuation).

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grievance – despite the fact that the representative had not witnessed the incident themselves.[63] The Court admitted the opinions because they a) had a rational basis in the union worker's representation of the employee throughout the grievance process, and b) were helpful in assessing the reasonableness of the union's actions, due to the representative's personal familiarity with the organization.[64] Similarly, Mr. Davis's opinions and beliefs about the DRB's practices are "rationally based"[65] on his extensive personal experience with the "statutes, policies, procedures, and regulations regarding the AlaskaCare Retiree Health Plan,"[66] as well as from his involvement in the Division's "review, response, and defense" of administrative appeals.[67]

Mr. Davis's testimony regarding DRB policies and practices are helpful and relevant to the Division's assertion that those policies and practices are long-standing and rationally related to the Division's statutory and regulatory mandates. They also provide the reasons and context for Amendment 2016-2. Mr. Davis's testimony is neither based on hearsay nor inadmissible under ARE 701. The court should rely on the Davis affidavit in finding that Amendment 2016-2 was appropriately adopted and remains a valid component of the Plan.

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63 *Id.* at 1021 n.48.

64 *Id.*

65 Alaska R. Evid. 701

66 Davis affidavit at p. 1, ¶3.

67 Davis affidavit at p. 1, ¶4.

VIII. CONCLUSION

For the above stated reasons, the court should DENY RPEA's motion for partial summary judgment, GRANT the Division's partial motion for summary judgment, and hold that the adoption of Plan Amendment 2016-2 was a valid act of the Plan administrator and not a diminishment of benefits.

DATED June 5, 2020.

KEVIN G. CLARKSON
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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.

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[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

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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

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[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

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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,

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[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:

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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

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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

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[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

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[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.

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[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.]

BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES

In the Matter of the	)	
	)	
SUSAN REED	)	OAH No. 13-0937-MDR
d/b/a CARE CORE	)	
	)	

DECISION ON SUMMARY ADJUDICATION

I. Introduction

Susan Reed, who does business under the name Care Core, provides Medicaid care coordination services. She is paid for those services by the Medicaid program. On May 10, 2013, the Office of Rate Review (ORR) notified her that her payment rate would decrease by 20 percent. Ms. Reed requested a hearing.

Prior to the hearing, ORR moved for summary adjudication. Ms. Reed did not oppose ORR's motion for summary adjudication.[1] The undisputed facts show that Ms. Reed was notified of the requirement that she file an annual provider report, as required by 7 AAC 145.531(e), and of the financial consequences if she did not file that report. Ms. Reed, however, did not file any part of her report. Alaska regulation 7 AAC 145.520(*l*)(1) mandates that a provider who does not file any part of the required report "will" have the Medicaid payment rate reduced by a total of 20 percent. Because Ms. Reed did not file any part of her report, and because she does not have any legal defenses to the filing requirement, ORR's motion for summary adjudication is granted; its decision reducing her payment rate by 20 percent is upheld.

II. Facts

Ms. Reed is a Medicaid care coordinator who received $58,682 in Medicaid payments in calendar year 2011.[2] On February 1, 2013, ORR send her a letter, by certified mail, that she would be required to provide ORR with an annual report, to include an audited financial statement, a working trial balance, and cost survey. The letter also told her that if she did not indicate otherwise, her fiscal year would be considered to be the calendar year, and that she

[1] ORR filed its motion for summary adjudication on July 19, 2013. Ms. Reed's opposition was due by August 14, 2013. On August 16, 2013, she requested an extension of time to file her opposition. She was granted an extension, until August 27, 2013, to file that opposition. She did not request a further extension and did not file an opposition.

[2] Kim Hyung Affidavit, para. 2; Agency Record, p. 1.

would be informed of the deadlines to submit that information.[3] The February 1 letter was delivered on February 5, 2013.[4] On April 1, 2013, ORR sent Ms. Reed a second certified letter, stating that her fiscal year was considered to be the calendar year and that she had 30 days from the date of the letter to provide the required audited financial statement, working trial balance, and cost survey for the 2011 calendar year.[5] Ms. Reed received the second letter on April 2.[6] After the reporting window expired, ORR sent Ms. Reed a third certified letter, mailed May 10 and delivered May 11, 2013, advising her that her payment rate would be decreased by a total of 20 percent because she had not submitted any part of her annual report.[7]

Ms. Reed then wrote ORR two letters. The first, dated May 22, 2013, acknowledged receipt of the April 1, 2013 letter. It stated that she had been quoted a fee of $4,000 for an audit, and stated that she would provide her records to a person of ORR's "choosing," or that if ORR would pay for the audit, she would provide her records to the accountant.[8] The second, dated June 10, 2013, again acknowledged receipt of the April 1 letter but denied having received any subsequent correspondence (*i.e.*, the May 10, 2013 letter), requested a hearing, and claimed that other care coordinators had not had their payment rates reduced.[9]

III. Discussion

ORR has moved for summary adjudication. Summary adjudication in an administrative proceeding is the equivalent of summary judgment in a court proceeding.[10] It is a means of resolving disputes without a hearing when the central underlying facts are not in contention, but only the legal implications of those facts. Under these circumstances, the evidentiary hearing is not required.[11] Summary adjudication, however, is not automatically granted when one party does not file an opposition to a motion for summary adjudication. In order to grant summary adjudication, even when an opposition is not filed, there must still be a determination that there is no genuine issue of material fact and that the moving party is legally entitled to judgment.[12]

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3 Kim Hyung Affidavit, para. 3; Ex. A.
4 Kim Hyung Affidavit, para. 5; Ex. C.
5 Kim Hyung Affidavit, para. 6; Ex. D.
6 Kim Hyung Affidavit, para. 7; Ex. E.
7 Kim Hyung Affidavit, para. 8-9; Exs. F, G, H.
8 Agency Record, p. 10.
9 Agency Record, p. 3.
10 *See, e.g., Schikora v. State, Dept. of Revenue,* 7 P.3d 938, 940-41, 946 (Alaska 2000).
11 *See Smith v. State of Alaska,* 790 P.2d 1352, 1353 (Alaska 1990); 2 Pierce, *Administrative Law Treatise* § 9.5 at 813 (5th ed. 2010).
12 *See, e.g., Martinez v. Ha*, 12 P.3d 1159, 1162 (Alaska 2000).

A Medicaid home and community-based waiver services provider is required to submit an annual report, no later than nine months after the close of its fiscal year. That annual report must include a cover letter signed by the provider's chief executive officer certifying the completeness and accuracy of the report, an audited financial statement, a post-audit working trial balance tied to the audited financial statement, a completed statistic worksheet, and a complete cost survey (when requested by the department).[13] If a small service provider, *i.e.*, one who receives $200,000 or less in yearly Medicaid payments, does not provide the audited financial statement, the service provider's payment rate is reduced by 10 percent.[14] If that service provider also does not submit the other required documents, the payment rate is reduced by an additional 10 percent.[15] The payment reductions remain in effect until a complete annual report is submitted.[16]

There are no genuine issues of material fact in this case. ORR has furnished copies of the letters it sent to Ms. Reed, and proof that they were delivered. Ms. Reed was therefore on notice that ORR required her to file an annual report for 2011 and the deadline for filing it.[17] Indeed, Ms. Reed acknowledges that she received ORR's April 1, 2013 letter that provided her with a deadline for filing her report, and she did not file it. Ms. Reed is therefore subject to a 20 percent combined reduction in her Medicaid payment rate because she did not file any part of her annual report: a 10 percent reduction for not filing the audited financial statement and an additional 10 percent reduction for not filing the remainder of the report.

While Ms. Reed did not file an opposition to ORR's motion for summary adjudication, she alluded to two legal defenses in her May 22, 2013 letter and her June 10, 2013 hearing request letter. Those defenses are (1) that the reduction in her payment was an unconstitutional taking of property without due process, (2) that she has been singled out for a reduction, *i.e.*, the regulation is being selectively enforced.

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13 7 AAC 145.531(e).

14 7 AAC 145.520(*l*)(1)(B).

15 7 AAC 145.520(*l*)(1)(C).

16 7 AAC 145.520(l)(B) and (C).

17 It should be noted that under a strict application of the underlying regulation, 7 AAC 145.531(e), Ms. Reed's annual report was already overdue at the time the Division sent out its February 1, 2013 letter notifying Ms. Reed about the obligation to file an annual report. This is because her 2011 annual report was technically due 9 months after close of her fiscal year; since her fiscal year ended on December 31, the 2011 annual report would have been due by October 1, 2012.

A. Unconstitutional Taking

If Ms. Reed is making the argument that the underlying regulations are invalid, be it either on constitutional or other grounds, that issue is reserved for the courts, not the administrative hearing process for two reasons. First, an administrative agency is "bound by [its] regulations unless and until it repeals or amends the regulation using the proper procedure. Administrative agencies are bound by their regulations just as the public is bound by them."[18] Second, invalidation of a regulation is a judicial function. The Alaska Administrative Procedure Act specifically provides that "[a]n interested person may get a judicial declaration on the validity of a regulation by bringing an action for declaratory relief in the superior court."[19] An administrative agency, even acting in a quasi-judicial status, does not have judicial powers.[20] This decision will therefore not address the issue further.

If Ms. Reed is arguing that her payment is being reduced without being supplied proper procedural due process, that argument fails. ORR has provided her with the same procedural due process through the administrative hearing process as public benefit recipients, which she availed herself of through her request for an administrative hearing to challenge her payment rate reduction.[21]

B. Selective Enforcement

Ms. Reed asks, in her June 10, 2013 hearing request: "I have been in contact with other Care Coordinator who have not provided any part of an annual report and have not have their rated reduced. Is there a reason I have been singled out for this heavy handed treatment?"[22] This suggests a claim that the Medicaid provider rate reduction penalty has been selectively applied. If so, this part of Ms. Reed's argument is not a contention that the regulation is invalid, but rather a contention that staff within the Department Health and Social Services applied the regulation in an unconstitutional manner by singling out Ms. Reed for disproportionate, selective enforcement.

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18 *Burke v. Houston NANA, L.L.C.*, 222 P.3d 851, 868 - 869 (Alaska 2010).

19 AS 44.62.300.

20 *Alaska Public Interest Research Group v. State*, 167 P.3d 27, 35 - 37 (Alaska 2007).

21 "Procedural due process 'requires that benefit recipients be given timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend before their benefits are reduced or terminated, in order to afford them protection from agency error and arbitrariness.'" *Pfeifer v. State, Dept. of Health & Social Services*, 260 P.3d 1072, 1084 (Alaska 2011) (citations omitted).

22 Agency Record, p. 3.

Such "as applied" equal protection defenses can be evaluated in a proceeding such as this one.[23] However, in order to prevail on such a defense, Ms. Reed has "the burden of demonstrating that [ORR's] 'selective enforcement' of the [rate reduction] 'is part of a deliberate and intentional plan to discriminate based on an arbitrary or unjustifiable classification."[24] Ms. Reed, however, did not state a factual basis for her claim. "An agency need not – indeed, often cannot – apply a statute simultaneously to all similarly situated parties to avoid violating the equal protection clause so long as it is not intentionally discriminating against any party."[25] Given the complete lack of any evidence regarding a selective enforcement defense, and the lack of any articulated claim based on an arbitrary or unjustifiable classification, Ms. Reed has not presented a factual or legal issue that would preclude granting summary adjudication in ORR's favor.[26]

IV. Conclusion

There are no genuine issues of material fact and ORR is entitled to summary adjudication in its favor as a matter of law. Ms. Reed was given notice of the regulatory requirement for submitting an annual report, and of the financial penalties that would ensue if she did not file that report. She has not filed her report. Consequently, ORR's reduction of her Medicaid provider payment rate by 20 percent is upheld.

DATED this 11th day of September, 2013.

By: *Signed*
Lawrence A. Pederson
Administrative Law Judge

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23 *See, e.g., In re Holiday Alaska, Inc.,* OAH No. 08-0245-TOB (Comm'r of Commerce, Community & Econ. Dev. 2008) (http://aws.state.ak.us/officeofadminhearings/Documents/TOB/TOB080245.pdf), at 7-13.

24 *State, Dept. of Natural Resources v. Alaska Riverways, Inc*., 232 P.3d 1203, 1220 (Alaska 2010).

25 *Id.*

26 To properly oppose a summary adjudication motion on the basis that the rate payment reduction had been selectively and improperly enforced against her, Ms. Reed would need to have filed an affidavit explaining how the regulation had been selectively enforced against her "based on an arbitrary or unjustifiable classification." 2 AAC 64.250(b). However, Ms. Reed is representing herself. "Adequate knowledge of both the right to file and the necessity of filing counter-affidavits to oppose summary judgment is critical to the pro se litigant's access to a just disposition of the merits of his claim," *Maydun, supra*, 657 F.2d at 877. The requirements of 2 AAC 64.250(b) must be administered in that spirit. Regardless, even given the latitude afforded pro se litigants, Ms. Reed did not file an opposition and did not make any averments in her correspondence that can be interpreted to create a colorable claim of selective enforcement.

Adoption

The undersigned adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 15th day of October, 2013.

By: *Signed*_____
William Streur, Commissioner
Department of Health and Social Services

BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of	)	
	)	
X E. N	)	OAH No. 16-0053-PER
	)	Agency No. 2015-0615

FINAL[1] DECISION AND ORDER OF DISMISSAL

In this retiree health coverage appeal, Mr. N challenged the partial denial of his health insurance claims for two services rendered by Alaska Heart and Vascular Institute (AHVI)[2] in September of 2014. The two partial denials disallowed a total of $899 of Mr. N's billings from AHVI. Mr. N and his wife had dual coverage, such that any amounts not disallowed were reimbursed at 100 percent.[3]

The central issue in the appeal was the Retiree Health Plan's use of "Recognized Charge" provision in a plan booklet that purportedly[4] became effective on January 1, 2014. AHVI was an out-of-network provider, and for such providers the Plan applied the supposed "Recognized Charge" provision by using numbers somehow generated by an entity called FAIR Health, Inc. Mr. N believes the way this was done violates the Recognized Charge provision in the 2014 plan booklet. Alternatively, if the use of the FAIR Health numbers was in compliance with the Recognized Charge provision in the 2014 plan booklet, Mr. N believes the Recognized Charge provision unconstitutionally reduces his retirement benefits.[5]

The main issue in the appeal was briefed in connection with a Motion to Establish Law of the Case from Mr. N. Mr. N filed his reply brief June 6, 2016. The same day, the Administrator of the Retiree Health Plan agreed to pay Mr. N the full $899 in dispute, and moved to dismiss this case as moot.

Mr. N agrees that he has been made financially whole on the two claims at issue, but nonetheless opposes dismissal. First, he contends that since the underlying legal issues will not

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1 This decision has been modified from an earlier proposed decision, in response to proposals for action submitted by the parties pursuant to AS 44.64.060(e).

2 The provider was then known as Alaska Heart Institute.

3 The 100% reimbursement of allowed charges can be seen at R. 58 and R. 62.

4 The term "purportedly" has been used because another Office of Administrative Hearings decision held that the booklet did not become effective. *In re T.O.T.*, OAH No. 15-1204-PER (August 23, 2016) (published on the OAH website); *see also* note 8, *infra*. It is not clear whether any appeal has been filed in *T.O.T.* This decision should not be construed as an endorsement or rejection of the holding in *T.O.T.*

5 Mr. N has suggested that there is an additional issue relating to the dual coverage of Mr. N and his wife. However, this issue appears to be purely derivative, not an independent basis on which payment has been denied. If the AHVI billings are not reduced by application of the Recognized Charge provision, there appears to be no dispute that dual coverage applies and 100% of the AHVI charges must be covered in full.

have been decided, the case is not moot. Second, he contends that even if the case is moot, it falls within the public interest exception to the mootness doctrine for matters that are capable of repetition but evading review.

There is no question that the case is moot. A case is moot if "the party bringing the action would not be entitled to any relief even if they prevail."[6] The only relief to which Mr. N would have been entitled had he prevailed is the $899 he has now received. The Office of Administrative Hearings has been given no authority to render declaratory judgments in cases of this type, and thus there is no relief that could have been granted beyond a monetary award.

The case also does not fit within the public interest exception to the mootness doctrine. Three factors are considered in deciding whether this exception applies:

> (1) whether the disputed issues are capable of repetition, (2) whether application of the mootness doctrine will repeatedly circumvent review of the issues, and (3) whether the issues are of important public interest.[7]

Here, the issue is indeed capable of repetition, to be sure. It could arguably evade review as well, if the Administrator were to pay off claimants just as their appeals became ripe, effectively avoiding an adverse ruling while continuing to deny a correct application of the Plan to all members who lack the resources, savvy, or patience to navigate the appeals process. But that is not the situation here. On August 23, 2016, a final decision was entered in a case brought by another Plan member whose 2014 procedure at AHVI was denied full reimbursement on the same basis Mr. N was denied.[8] The Plan member prevailed, establishing that the 2014 Recognized Charge provision should not have been applied at all and that the AHVI charge was fully allowable. There is no basis to disregard the mootness doctrine in order to revisit the directly parallel issue in this case. Accordingly, the Administrator's motion to dismiss is granted.

DATED: October 21, 2016.

By: *Signed*
Christopher Kennedy
Administrative Law Judge

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

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6 *O'Callaghan v. State*, 920 P.2d 1387, 1388 (Alaska 1996).

7 *Clark v. State*, 156 P.3d 384, 387 (Alaska 2007), quoting *Taylor v. Gill St. Invs.*, 743 P.2d 345,347 (Alaska 1987).

8 *In re T.O.T., supra*. The Administrator submitted no Proposal for Action objecting to the *T.O.T.* decision, and has not sought to revisit the reasoning of that decision in this case.

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

FREDA MILLER, APPELLANT, vs. STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION, DIVISION OF RETIREMENT AND BENEFITS, APPELLEE.	CASE NO. 3AN-18-06925CI

ORDER

Introduction.

As a retired state employee Freda Miller is entitled to medical benefits. For many years the plan administrator paid for her prescribed massage therapy. In November 2016, Aetna, the plan administrator, denied coverage for the massages during a certain period.[1] Miller appealed that decision and it was affirmed at two levels.[2] Miller then gave notice of her intent to appeal to the Office of Administrative Hearings (OAH).[3] After nearly three months the Deputy Director of Retirement and Benefits announced that she was overruling the denial

1 R. 85-89.

2 R. 72-76 (Level I decision), 63-649-70 (Level II decision).

3 R. 8.

of coverage.[4] The Division thus denied the request to forward the notice of appeal to OAH.[5]

Miller responded by filing a notice of appeal directly with OAH.[6] Chief Administrative Judge Chris Kennedy concluded that Miller did not have the right to appeal the decision to afford her coverage.[7] Miller appealed this decision to the superior court.

Miller's underlying concern is that she believes Aetna has adopted a policy regarding coverage of certain procedures, including those she expects to need for the foreseeable future, that limits or eliminates coverage in violation of the underlying plan. While she appreciates the reversal of the decision not to cover her recent massages, she wants to challenge the validity of Aetna's new policy. She contends that she has an absolute right to appeal to the OAH the original denial, originally justified by reference to the Aetna policy, despite the fact that the Deputy Director reversed the adverse payment decision. The Division argues that Miller does not have that right. It contends that a beneficiary may only appeal

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4 R. 310.

5 R. 315.

6 R. 372-73.

7 R. 367-70.

adverse coverage decisions and that after the Deputy Director agreed to pay for her procedures, there was no longer an adverse decision to be appealed.

Jurisdiction of the Superior Court.

Miller first argues that the superior court does not have jurisdiction to hear this appeal concerning the initial denial of benefits due her as a beneficiary of the Public Employees' Retirement System (PERS). At first blush it is a strange argument for the person who initiated an appeal to claim that the entity to which she appealed has no jurisdiction to hear her appeal. This is particularly so when she is not asking this Court to dismiss her appeal, but rather asks it to exercise its jurisdiction and force an administrative agency (OAH) to act in its capacity as an appellate body. But Miller's beef is not with the superior court, but rather with the ability of the Division to short circuit her challenge to the reason for the initial denial of benefits by belatedly granting her the benefits.

For Miller it is not enough to have the benefits provided to her, that is, for PERS to pay for specific medical services that she has already received. She wants two additional victories. First, she wants to block the ability of the Division to derail her substantive challenge to the Aetna policy by simply paying her benefits and thereby cutting off what she believes is her right to appeal the reasoning of the initial denial and not merely the fact of the denial. Second, she wants to challenge the validity of Aetna's reasoning for the initial denial of her benefits.

The Division responds that a beneficiary may only appeal adverse decisions, not victories.[8] Miller wanted the benefit paid. The Deputy Director ordered them paid. The division argues Miller does not have the right to insist on a particular reason for the payment. Furthermore, Miller may appeal any future denial of benefits, thus is not entitled to a prospective declaration of eligibility.

Miller's challenge to the jurisdiction of the superior court is another way of her expressing her argument that she is entitled to appeal the initial reasoning of the initial denial, even if she has won her claim to the financial benefit itself.

She begins with AS 22.10.020, which defines the jurisdiction of the superior court in general. More particularly, subsection .020(d) gives the superior court jurisdiction over appeals from an administrative agency. It provides, in part: "The superior court has jurisdiction in all matters appealed to it from a subordinate court, or administrative agency *when appeal is provided by law* [.]"[9] She argues that the italicized language places a limit on the jurisdiction of the superior court.

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[8] More precisely, the Division simply ignores Miller's challenge to the jurisdiction of the superior court. The division does not address that argument in its brief. Instead it focuses on whether Miller could appeal to the OAH after the Deputy Director overrode the denial of Miller's benefits. While the Court does not think the Division should have so completely ignored Miller's jurisdictional argument, it does agree that the real issue is whether Miller can appeal to the OAH in these circumstances.

[9] Italics supplied.

That limit is defined by any restriction contained in any particular authorization for an appeal to the superior court. Miller contends that the specific statute that authorizes her denial of benefits appeal contains such a restriction.

Beneficiaries of the PERS have the right to appeal decisions made by its administrator.[10] There are several levels of appeals available. Miller focuses on the appeal to the OAH. She contends that she is entitled to "appeal a decision made by the administrator to the [OAH]"[11] and furthermore, that the jurisdiction of the superior court is limited to appeals from the OAH.

The Court appreciates Miller's argument about whether she can get to the OAH without the permission of the Director or even if the Director overrides the initial denial and orders Miller's benefits paid. But the way to address that argument is head on, not through a back door challenge (however clever) to the jurisdiction of the superior court.

ALJ Kennedy noted that Miller had filed a timely notice of appeal and that the Division "never forwarded your Notice of OAH Appeal to OAH, nor informed OAH of its existence. You sent the form directly to OAH with your

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[10] AS 39.35.006 provides: "An employer, member, annuitant, or beneficiary may appeal a decision made by the administrator to the office of administrative hearings established under AS 44.64. An aggrieved party may appeal a final decision to the superior court."

[11] AS 39.35.006.

April 4 Letter."[12] However ALJ Kennedy reluctantly concluded that Miller's "request for a direct appeal ... cannot be granted by this tribunal."[13]

Miller appealed that adverse decision to the superior court. In her first point on appeal Miller identified her objection: Had the Division "violated [her] statutory right under AS 39.35.006 to appeal a decision by [the Division] to the Office of Administrative Hearings?"[14]

ALJ Kennedy had noted various irregularities in the way the Division handled Miller's lower level appeals. By statute the Division should have responded to Miller's appeal to the OAH within ten days of receiving the notice.[15] Instead, the Division waited 81 days before Deputy Director Michaud advised that she was reversing the denial of benefits.[16] Michaud entitled her decision as a

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12 R. 367.

13 *Id.*

14 R. 365.

15 AS 44.64.060(b) provides, in part:

> (b) When an agency receives a request for a hearing that is subject to AS 44.64.030, the agency shall, within 10 days and in writing, deny the request for reasons provided by law or grant the request and refer the case to the office. The agency shall immediately give notice of the denial or referral to the requesters and the office. If the request is denied, the denial may be appealed to the superior court as provided by other law.

16 R. 368 at II (Kennedy conclusion regarding untimeliness) and 374-78 (Michaud letter).

"Notice of Decision on Appeal."[17] ALJ Kennedy questioned Michaud's authority to make an appellate decision: "the Deputy Director does not have concurrent jurisdiction over appeals, and she does not have the authority to decide them."[18]

ALJ Kennedy acknowledged that AS 39.35.006 provided that a beneficiary "may appeal a decision made by the administrator to the office of administrative appeals."[19] Furthermore, OAH's jurisdictional statute authorized OAH to "conduct all adjudicative administrative hearings required under the following statutes or under regulations adopted to implement the statutes: ... (29) AS 39.35.006 (public employees' retirement system) [.]"[20] But an OAH regulation dictated how that appeal should be transmitted to OAH.

> An administrative hearing within the mandatory jurisdiction of the office is initiated as a statute or regulation of the referring agency may provide. A notice of appeal or request for hearing may not be filed directly with the office by the person contesting the agency decision, except as provided by statute.[21]

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17 R. 374.

18 R. 369 at III. Whether it was technically appropriate for Michaud to describe her decision as an appellate decision, there can be little doubt that she had the authority as any party does, to settle the case. Here she granted Miller all of the financial benefits she was seeking and had been initially denied.

19 R. 367 at I.

20 AS 44.64.030(a)(29).

21 2 AAC 64.110.

Based upon this regulation ALJ Kennedy concluded that OAH could not hear an appeal that was sent to it directly, as here, from the person seeking to appeal, and not from the applicable agency.[22] ALJ Kennedy acknowledged the problem that might result if an agency repeatedly refused to comply with requirements that it expeditiously transmit notices of appeal to OAH from a dissatisfied beneficiary. He observed: "Indeed, if refusal to refer becomes a recurrent problem, the regulation may have to be amended."[23]

ALJ Kennedy noted the Division's argument that Miller's appeal was mooted by Michaud's decision to pay the benefits, but declined to rule on it, observing only that had the appeal been referred to OAH by the Division, the assigned judge would have addressed that assertion of mootness.[24]

The superior court has jurisdiction over Miller's appeal. That is because she appealed a decision that OAH made--its refusal to hear her appeal of the initial decision not to pay for the medical services he had received. The adverse decision is ALJ Kennedy's conclusion that OAH could not address Miller's substantive complaints because OAH was only authorized to hear a beneficiary's appeal if the Division transmitted the notice of appeal. OAH's

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22 R. 368 at I.

23 *Id.*

24 R. 369 at IV.

regulation, 2 AAC 64.110, precluded OAH from addressing an appeal sent to it directly by the aggrieved beneficiary. The superior court has appellate jurisdiction to review that denial.[25]

The OAH Decision.

The legislature established the OAH.[26] It established some procedures for hearings.[27] Among those is a specification of how cases are to be given to OAH. Alaska Statute 44.64.060(b) provides, in part:

> (b) When an agency receives a request for a hearing that is subject to AS 44.64.030, the agency shall, within 10 days and in writing, deny the request for reasons provided by law or grant the request and refer the case to the office. The agency shall immediately give notice of the denial or referral to the requesters and the office. If the request is denied, the denial may be appealed to the superior court as provided by other law.

OAH promulgated 2 AAC 64.110 which specifies who may initiate an appeal.[28] It provides, in part: "A notice of appeal or request for hearing may not be filed directly with the office by the person contesting the agency decision, except as

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[25] AS 22.10.020(d); AS 39.35.006; Appellate Rule 601(b); *Bethel Utilities Corp. v. City of Bethel*, 780 P.2d 1018, 1021 (Alaska 1989) ("Unless the legislature provides otherwise, administrative decisions are presumed to be judicially reviewable. 5 K. Davis, *Administrative Law* §§ 28.1; 28.4 (2d ed. 1984)." (footnote omitted).

[26] AS 44.64.010.

[27] AS 44.64.060.

[28] The chief administrative judge of OAH is authorized to establish procedures by regulation. AS 44.64.060(a).

provided by statute."[29] Thus, an aggrieved PERS beneficiary, like Miller, may not initiate an appeal to OAH directly. Only the Division may initiate the OAH appeal on behalf of the beneficiary.

That regulation is subject to abuse. If the Division affirmed the denial of medical benefits to a beneficiary yet refused to transmit her appeal of that denial to OAH, then the beneficiary's statutory right to appeal might be circumvented. But that is not what happened here.

ALJ Kennedy declined to accept Miller's appeal in the context of the Deputy Director having exercised the Division's discretion (whether appellate or not) to override the plan administrator's denial of the benefits. That decision was in compliance with the OAH regulation. That regulation is not inconsistent, in this context, with any statute.[30] ALJ Kennedy did not err by denying the direct appeal and instead advising Miller of her right to appeal to the superior court.

The Deputy Director's Decision.

Did the Deputy Director commit legal error by not transmitting Miller's appeal to OAH after reversing the plan administrator's denial of Miller's benefits? The answer must be no for a variety of interrelated reasons.

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29 2 AAC 64.110.

30 *Davis Wright Tremaine LLP v. State, Dept. of Administration*, 324 P.3d 293, 302 (Alaska 2014) ("An agency's interpretation [of its own regulation] is consistent with statute unless the statute's text and purpose prohibit such an interpretation.").

A PERS beneficiary had a right to "a decision made by the administrator to the office of administrative hearings established under AS 44.64."[31] The Division's regulation further defines and limits that right. The beneficiary may appeal "a final decision by the administrator [that] is in whole or in part adverse to the person seeking the decision."[32] The Division implicitly concluded that its decision to pay Miller her benefits was not an adverse decision either in whole or in part. If the decision that Miller was appealing is defined as the decision to pay all of the benefits or not, then the decision to pay all of the benefits is not adverse to her in any way.

Miller argues that the Deputy Director's decision was at least partly adverse to her because the Division did not reject the Aetna policy that was the basis for the initial denial of the benefits. The Court cannot accept Miller's expanded construction of what constitutes a partially adverse decision. If the Alaska Supreme Court overturns a criminal defendant's conviction, reversing the Court of Appeal's affirmance, that is not an adverse decision to the criminal defendant. Nor is it partially adverse simply because the supreme court did not reverse on all or even any of the grounds asserted by the defendant. A win is a win.

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31 AS 39.35.006.

32 2 AAC 35.080(a).

It is not hard to describe a partially adverse decision that a PERS beneficiary could appeal to the OAH. If the Deputy Director had reversed the plan administrator's decision to pay none of the services, but instead paid for only some, but not all, of the services, then that decision to pay some benefits would be partially adverse and appealable.

Miller has suffered no present adverse consequences by the apparent decision of the Division to allow Aetna to keep its new policy in place. If, in the future, Aetna denies her payment for massages or other medical procedures, then Miller may appeal again.

Miller's broadest, i.e., constitutional objection to the Aetna policy (or more precisely, her desire to have it struck down) is not something that she can force the Division to resolve in her favor by an administrative appeal. To the extent that Miller is arguing that the Aetna policy is a diminishment of her vested retirement benefits and thus a violation of article XII, § 7[33] of the Constitution of Alaska, the Division does not have the authority to resolve that assertion.[34] While the Division may certainly consider Miller's complaint and evaluate whether to

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[33] Section 7 provides: "Membership in employee retirement systems of the State or its political subdivisions shall constitute in a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired."

[34] *Alaska Public Interest Research Group v. State*, 167 P.3d 27, 36 (Alaska 2007) ("Administrative agencies do not have jurisdiction to decide issues of constitutional law.").

permit Aetna to continue with that policy, Miller cannot force the Division to change that policy at any level of administrative appeal.

Conclusion.

The Court affirms the OAH decision not to accept Miller's direct appeal of the Deputy Director's decision to pay her benefits, but not modify or eliminate the Aetna policy. The Court affirms the Deputy Director's decisions to pay her benefits, but not modify or eliminate the Aetna policy and not to transfer Miller's notice of appeal of those decisions to the OAH.

DONE this 10th day of February 2020, at Anchorage, Alaska.

William F. Morse
Superior Court Judge

CERTIFICATE OF SERVICE

I certify that on 11 February 2020
a copy of the above was emailed/mailed to each of the following at their addresses of record:

W. G. Callow
K. Dilg

Ellen Bozzini
Judicial Assistant

3AN-18-06925CI
MILLER v. STATE
Administrative Appeal

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

CERTIFICATE OF SERVICE

I certify that on this date true and correct copies of the **STATE OF ALASKA'S REPLY TO PLAINTIFF'S OPPOSITION TO CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT, EXHIBITS A-D** and this **CERTIFICATE OF SERVICE** were served via electronic mail on the following:

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/s/ Angela Hobbs
Angela Hobbs Date
Law Office Assistant II

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