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

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

REPLY TO OPPOSITION
TO MOTION FOR PARTIAL DECLARATORY JUDGMENT AND TO ESTABLISH LAW OF THE CASE RE:
THE SCOPE OF FIDUCIARY DUTIES OWED TO THE BENEFICIARIES OF THE ALASKACARE RETIREE HEALTH CARE PLAN BY THE ALASKA DIVISION OF RETIREMENT AND BENEFITS

DRB's opposition seems intended to distract from what are the basic, straightforward issues this motion presents, if not create confusion. Attempting to reply to such scattershot and confusing arguments risks creating more confusion.

Most of the DRB's arguments are answered in the RPEA's opening memorandum in support of this motion.

The DRB urges the Court to deny or delay deciding the motion, arguing "there has not yet been sufficient discovery ... to permit meaningful evaluation" of the claims about DRB's conduct in reducing medical benefits.[1]

The motion is not seeking partial summary judgment. It seeks a limited declaratory judgment that would make clear the nature and extent of the duties that the DRB owes to the retired public employees of Alaska who have earned vested retirement medical benefits as a result of their public service. The relevant facts are not in dispute. There is no reason to delay deciding the motion to allow additional discovery.[2]

The DRB argues that the motion should be denied because DRB admits it owes a fiduciary duty to retirees. The DRB has admitted only that it has a limited fiduciary duty to ensure that funds held in trust to pay Plan benefits are used exclusively for the benefit of Plan participants and that DRB's failure to do so could "under some circumstances" be a breach of DRB's duties to retirees and their beneficiaries.[3] If that qualifies as an admission of a limited fiduciary duty to retirees, then it does not provide the kind of protections that the duties outlined in this motion would provide to retirees.[4]

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[1] DRB Opposition, p. 10, ln 20 to p. 11, ln 4.

[2] The affidavits submitted by the DRB do not provide any facts based on personal knowledge to justify denying or postponing the decision on the motion. See gen. Rule 56(e)and (f), Alaska R. Civ. P.

[3] Defendant's Answer to Amended Complaint, pp. 9-10, ¶ 48.

[4] At page 10 of its opposition, (lines 13-14) the DRB seems to recognize that it owes fiduciary duties to retirees in the "adjudication of benefit claims." The statement at best is unclear and again does not provide the kind of protection to retirees sought by this motion.

The DRB argues that it should not be subject to the fiduciary duties listed in the motion because, it claims, the Alaska Constitution—Art. I, §7 (Due Process) and Art. XII, § 7 (prohibiting the diminishment and impairment of vested retirement benefits of public employees) provide retirees with "more protections than typical retirees."[5] The DRB fails to explain how the constitutional provisions prevent the DRB from succumbing to pressures to reduce medical benefits in order to lower the amount of money the legislature may need to appropriate in any given year to keep the state's health trust funds appropriately funded.

The DRB claims that if it were required to fulfill the fiduciary duties described in the motion, it would be "functionally impossible for the State to operate the Plan."[6]

The DRB does not explain why fulfilling a duty of good faith and fair dealing to retirees—the duty not to do anything that will injure the right of the other to receive the benefits of the agreement[7]—would make it "functionally impossible" for DRB to "operate" the Plan.

The RPEA urges that the DRB should be held to have a duty of loyalty and a disavowal of self-interest, considered "the hallmarks of the fiduciary's role."[8] These duties

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[5] DRB Opposition at p. 4, Ins 1-4.
[6] DRB Opposition at p. 18, In. 16.
[7] Guin v. Ha, 591 P.2d at 1291; see gen. Restatement (Second) of Contracts § 205 (1979).
[8] Munn v. Thornton, 956 P.2d 1213, 1220 (Alaska1998), citing Wagner v. Key Bank of Alaska, 846 P.2d 112, 116 (Alaska 1993); see Metropolitan Life Ins. Co. v. Glenn, 554 U.S. 105, 111, 128 S.Ct. 2343, 2347–48 (2008).

include, inter alia, the duty to act solely in the best interests of Plan beneficiaries[9] to ensure a) that their medical claims get a full and fair review;[10] b) that their legitimate, covered medical claims are timely paid; and c) that no claims are paid that are not legitimate or not covered by the Plan.[11] The DRB's blanket opposition rejects the contention that it should owe these duties to retirees but does not explain how being required to fulfill them would make it "functionally impossible" for the DRB to "operate" the Plan.

The RPEA urges that the DRB should be held to have a fiduciary duty to deal honestly, fairly and candidly with Plan beneficiaries in all aspects of Plan administration. DRB's blanket opposition effectively denies that it should have that duty. Again, DRB gives no reason why having such a duty would make it "functionally impossible ... to operate the Plan."

The DRB offers no reasons why having a fiduciary duty to advise retirees of all facts that materially affect their rights and interests concerning the Plan and might reasonably be expected to influence their actions concerning insurance would make it "functionally impossible" for the DRB to "operate" the Plan.

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[9] See Devlin v. Blue Cross and Blue Shield, 274 F.3d 76, 88 (2d Cir.2001), quoting Donovan v. Bierwirth, 680 F.2d 263, 271 (2d Cir.1982) (Friendly, J.).

[10] Abatie v. Alta Health & Life Ins. Co., 458 F.3d 955, 974 (9th Cir. 2006), citing 29 U.S.C. § 1133(2).

[11] See Gaither v. Aetna Life Ins. Co., 394 F.3d 792, 807–08 (10th Cir. 2004) (Under ERISA, the plan administrator as "a fiduciary has a duty to protect the plan's assets against spurious claims ....").

The RPEA urges that DRB should have a fiduciary duty to timely advise retirees of the reasons why a medical claim is denied, including references to specific Plan language relied upon to deny the claim, and that the explanation should be understandable to a layperson of average intelligence and education.

DRB opposes being required to fulfill that duty but again provides no explanation why that duty would make it "functionally impossible" for the DRB to "operate" the Plan.

The RPEA urges that the DRB has a fiduciary duty to give Plan beneficiaries appropriate notice and opportunity to be heard concerning any proposed changes in Plan benefits or administration that the DRB has reason to believe are reasonably likely to diminish or impair any Plan medical benefit. The duty at issue is more than just a fiduciary duty; it is a due process requirement of both the Alaska and the U.S. constitution.

The DRB has admitted that the vested retirement benefits of retired public employees of Alaska are valuable property.[12] Yet implicit in DRB's blanket opposition to the motion is that it opposes having to provide retirees with a complete and candid disclosure of proposed changes to the Plan and the reasons for those changes, followed by a reasonable opportunity to be heard. Again, the DRB fails to provide any reason why fulfilling this duty would make it "functionally impossible ... to operate the Plan."

RPEA also contends that DRB's fiduciary duties should include providing reasonable assistance to retirees who might need help submitting their claims. DRB's website assures retirees that the DRB "team" has "comprehensive knowledge of the

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[12] See Defendant's Answer to the Amended Complaint at p. 9, ¶ 44.

systems' administrative procedure to assist member participants with professional services and expertise."[13] In spite of this assurance, DRB also opposes the part of the motion that would make clear that DRB has a duty to provide that reasonable assistance retirees, but fails to explain why that duty would make it "functionally impossible" for to DRB to operate the Plan.

DRB also makes a confusing argument to the effect that the "standard" in RPEA's motion "is applicable to legal issues involving the administration of benefits, not ... the amendment of the plan."[14] Whatever that means, RPEA submits that whether the DRB is handling claims (i.e., "administering benefits") or proposing Plan amendments that are reasonably expected to result in some diminishment or impairment of medical benefits, the DRB should maintain and fulfill its fiduciary duties to the retirees.

This motion presents issues of law concerning the nature and scope of the fiduciary duties DRB owes to retirees. Issues of law are decided based on precedent, policy and reason.[15] RPEA's opening memorandum argued all three elements.

DRB's response to the ample state and federal precedent cited by the RPEA was to claim that the Alaska Constitution provides retired Alaska public employees with more protections than "typical retirees."[16] Although the DRB admitted in its answer to the amended complaint that the Plan is self-insured by the State,[17] it claims here that the

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[13] RPEA Opening memorandum at p. 5, fn 13.
[14] DRB Opposition at p. 3, lns 12-13.
[15] See e.g., Summers v. Hagen, 852 P.2d 1165, 1169 (Alaska 1993), citing Guin v. Ha, 591 P.2d 1281, 1284 n. 6 (Alaska 1979)
[16] DRB Opposition at p. 4, ln 2.
[17] Defendant's Amended Answer at p. 4, ¶ 17.

cases cited by RPEA are not applicable. It argues that "the State of Alaska is not an insurer"[18] because it "does not transact the business of insurance in the state" and "does not sell insurance to its retirees."[19] The argument puts form over substance. A few pages later in its opposition, DRB states that "insurance is the topic in dispute" in this case.[20]

RPEA's opening memorandum explained the policy reasons provided by the Alaska Supreme Court and other courts for holding a party to fiduciary standards in transactions and relationships where the other party is especially vulnerable and must rely on the expertise and good faith of the fiduciary to perform as promised. RPEA explained the vulnerabilities and reliance present here, where aging retirees needing medical care are often on limited, fixed incomes and lack the knowledge, the stamina, the financial means and sometimes the mental acuity to understand insurance coverage, much less challenge medical claims that may be wrongfully denied. It is also reasonable to expect that many retirees are inclined to accept a denial of a medical claim in good faith, trusting that the government they served for years is acting in good faith and would not wrongly deny them any medical benefit they earned as a result of their public service.

It is unlikely there is any group of medical insureds who are any more vulnerable and dependent on the good faith of Plan administrators than our retired public employees. Yet the DRB summarily argues that the Alaska Constitution provides them with more protections than "typical" retirees. This case, like Duncan and others like it that have

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[18] DRB Opposition at p. 14, ln 15.
[19] DRB Opposition at p. 14, footnote 22.
[20] DRB Opposition, p. 16, ln 14.

revealed evidence of concerted efforts by DRB to reduce or eliminate medical benefits, prove that DRB's contention about the efficacy of constitutional protections is unfounded.

Finally, the results sought here are not only consistent with closely-related state and federal case precedent and sound public policy. They are also supported by reason and common sense. Clearly establishing that the DRB owes retirees the fiduciary duties described in this motion will help ensure that future efforts by the DRB to make changes to the Plan are done transparently and with full, fair and candid disclosures to all affected retirees concerning the precise nature of the changes DRB proposes to make. It will help ensure that retirees are fully apprised all the reasons for the proposed changes and informed of the expected effects of the changes if they are approved and go into effect.

Duncan makes clear that the Court intends to uphold the plain meaning and intent of Art. XII § 7 of the Alaska Constitution that accrued retirement benefits "shall not be diminished or impaired." The Court ruled that alleged concerns about rising medical costs having "the potential to put severe strains on the [retirement] systems" were not sufficient grounds for reducing vested retirement medical benefits.[21] However, the Court recognized that because of "the ever changing nature of medical care,"[22] the Plan should be allowed to change "as health care evolves"[23] in order to keep the Plan from becoming "more obsolescent with each passing year."[24] Yet the opening is a narrow one.

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[21] Duncan, 71 P.3d 880, 888 (Alaska 2003)
[22] Duncan, 71 P.3d at 891
[23] Id.
[24] Id., quoting Studier v. Michigan Pub. Sch. Employees Ret. Bd., File 00–92435–AZ, Circuit Court for Ingham County, Michigan, pp. 17–18 (Order of 2/21/01), aff'd in part, rev'd in part, 698 N.W.2d 350 (Mich. 2005).

The allowable changes under Duncan may be made only for limited reasons, and some changes are prohibited. Treatment of a particular disease or condition may not be deleted if doing so can reasonably be expected to result in a serious hardship to individuals who suffer from that disease of condition.[25] Duncan also establishes other important conditions and limitations on Plan changes that can be made.[26] If the State proposes to reduce or eliminate any medical benefits, it must propose comparable new benefits and meet its burden of proving, by means of certain types of evidence the Court considers reliable, that the new benefits offset or compensate for the benefits that would be reduced or eliminated.[27] Furthermore, retirees who believe they will suffer a serious hardship from the proposed changes must be given the chance to prove that fact. If they do so, then normally they must be given the option of retaining their existing package of benefits.[28] Plan changes proposed by the State that "substantially reconfigure the mix of benefits ... [will] be approved only on a strong showing of justification."[29]

Duncan makes clear that the burden is on the DRB to satisfy these requirements before it makes Plan changes that result in any diminishments or impairments of benefits. The DRB has not been doing so. Instead, the evidence shows that without complying with Duncan, the DRB has been summarily implementing Plan changes that have resulted in diminishments and impairments of benefits. The process effectively forces the

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[25] Duncan, 71 P.3d at 892.
[26] Duncan, 71 P.3d at 891-92
[27] Duncan, 71 P.3d at 892.
[28] Duncan, 71 P.3d at 892.
[29] Id.

RPEA to file a lawsuit and shoulder the burden of trying to determine and prove all the different types of diminishments and impairments that have resulted from the Plan changes summarily imposed in defiance of Duncan. The task is made particularly difficult by HIPAA and other laws governing the confidentiality of medical records, which complicates discovery. Meanwhile, while the case is pending, the changes remain in effect and continue to affect the lives of potentially thousands of retirees.

RPEA submits that common sense and a careful reading of Duncan lead to the conclusion that the DRB should not be permitted to make changes to the Plan that reasonably can be expected, on a group basis, to result in diminishments or impairments of medical benefits unless DRB first obtains court approval.

Granting this motion would be an important step toward ensuring that any future changes proposed by DRB will be based on fiduciary duties to retirees and in furtherance of ensuring that they receive the vested retirement medical benefits that they have earned.

For the foregoing reasons, the RPEA respectfully requests that this motion be granted.

DATED this 26th day of April 2019.

LAW OFFICES OF WM. GRANT CALLOW

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Certificate of Service

By my signature below, I certify that on this 26th day of April 2019, I caused a true and complete copy of the foregoing reply memorandum to be served upon Kate Demarest Assistant Attorney General of the State of Alaska, counsel to Defendant, by email and hand-delivery and on Kevin McKenzie Dilg, Assistant Attorney General of the State of Alaska, counsel to Defendant, by email and U.S mail, first class postage pre-paid and addressed to their respective addresses of record.

Wm. Grant Callow