IN THE SUPREME COURT FOR THE STATE OF ALASKA

KELLY TSHIBAKA, COMMISSIONER OF THE DEPARTMENT OF ADMINISTRATION, Appellant, v. THE RETIRED PUBLIC EMPLOYEES OF ALASKA, INC., Appellee.	)	No. S-17577

Superior court: 3AN-16-04537 CI

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE ERIC A. AARSETH, PRESIDING

BRIEF OF APPELLEE

Filed in the Supreme Court
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Alaska Constitution, art. XII, § 7

Membership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired.

AS 09.60.010

(c) In a civil action or appeal concerning the establishment, protection, or enforcement of a right under the United States Constitution or the Constitution of the State of Alaska, the court

(1) shall award, subject to (d) and (e) of this section, full reasonable attorney fees and costs to a claimant, who, as plaintiff, counterclaimant, cross claimant, or third-party plaintiff in the action or on appeal, has prevailed in asserting the right[.]

INTRODUCTION

The Alaska Constitution provides:

> Membership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired.[1]

Effective January 1, 2014, the State made unilateral changes to retiree dental insurance benefits, affecting the more than 50,000 people who participate in the retiree dental insurance program. [Exc. 71-84; R. 1116] The changes were challenged by The Retired Public Employees of Alaska, a non-profit corporation that seeks to educate retirees and to assist them in obtaining the benefits to which they are entitled. [Exc. 1-8] RPEA contended that the changes reduce the available coverage and thereby violate retirees' constitutional rights not to have their benefits diminished. [Exc. 6-7]

RPEA and the State agreed that the central legal question – whether the constitution protects retiree dental insurance benefits – was amenable to resolution as a matter of law. [R. 382-83] Based on comprehensive summary judgment briefing, the superior court ruled that retiree dental insurance benefits, like medical insurance benefits, are constitutionally protected against diminishment. [Exc. 133-34, 142-43]

The State declined to seek interlocutory review of this controlling legal question [R. 2299-2300], so the litigation proceeded to discovery and a six-day trial. [Tr. 5-1282] Following trial, the superior court determined as a matter of fact that the 2014 Plan introduced many changes that decrease the coverage available to participants, that these

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[1] Alaska Constitution, art. XII, § 7.

disadvantages are not offset by corresponding new advantages, and thus the changes as a group violate the non-diminishment clause. [Exc. 170-79]

On appeal, the State principally challenges the superior court's legal ruling that retiree dental benefits are protected by the constitutional guarantee against diminishment. [At. Br. 23-35] Assuming they are, the State next challenges the court's factual finding that the 2014 Plan diminishes coverage compared to the 2013 Plan. [At. Br. 36-46] Finally, the State appeals the superior court's award of certain costs to RPEA as the prevailing litigant and two orders the court entered to enforce its judgment. [At. Br. 46-50]

RPEA responds to each of the State's arguments below, and asks this Court to affirm the superior court's rulings in all respects.

ISSUES PRESENTED

I.A. Does the Alaska Constitution protect retirees' dental insurance benefits against diminishment?

I.B. Did the superior court commit clear error in finding as a matter of fact that the 2014 Plan diminishes coverage as compared to the 2013 Plan?

II. Did the superior court abuse its discretion in awarding costs to RPEA beyond those specifically authorized by Civil Rule 79?

III.A. Did the superior court err when it enjoined the State from providing the unconstitutional 2014 Plan to retirees who did not express a choice between the 2013 and 2014 Plans during the open enrollment period in 2019?

III.B. Did the superior court err in ordering the State to provide RPEA with

information identifying certain claims that were denied as a result of the State's decision to implement the unconstitutional 2014 Plan?

STATEMENT OF FACTS

In 2014, the State unilaterally changed the dental benefits available to retirees.

The State of Alaska, since 1979, has offered dental insurance as one of the benefits available to public employees when they retire. [Exc. 112, 159] Dental insurance is offered only as part of a package that also includes vision and audio insurance; the combination is commonly referred to as "DVA insurance." [Exc. 159-60; Tr. 38, 616]

A person contemplating public employment can easily learn of the benefits then promised to retirees.[2] Upon retiring, a State employee completes a form to select the benefits she wishes to receive. [Exc. 19-36] Some retirement benefits are available to all or most retirees without payment of any premium, whereas some require all retirees to make monthly payments, typically through a reduction in the retiree's monthly payment from the State. [Exc. 26, 29; Tr. 607] Retiree DVA insurance requires payment of premiums. [Exc. 26]

Between 1979 and 2003, the State periodically altered the coverage available to retirees selecting DVA insurance.[3] None of these changes was challenged legally, and, from retirees' perspective, the changes were favorable and tended to improve the coverage

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[2] *See, e.g.*, State of Alaska, Division of Retirement and Benefits website, *www.doa.alaska.gov/drb*.

[3] *Compare, e.g.*, Exc. 116-19 (1979 Plan); R. 1328-33 (1984 Plan), 1342-47 (1989 Plan), 1421-38 (2003 Plan).

available.[4] The State made no substantive changes to the retiree dental insurance program between 2003 and 2014. [Tr. 816]

In 2013, the State unilaterally decided to change the dental portion of DVA insurance coverage, with the changes to take effect on January 1, 2014. [Exc. 13 ¶ 16; Tr. 782-91][5] The State implemented the new package of provisions by canceling the then-existing dental insurance plan and replacing it with a different plan provided by Moda Health/Delta Dental of Alaska. [Exc. 13 ¶ 16, 71-84] Prior to 2014, the State offered a custom program, where it selected the benefits to offer, then chose a third-party administrator ("TPA") to manage the claims processing. [Tr. 64-65] The State periodically contracted with a new TPA without changing the benefits package. [Tr. 52-54, 817-18, 910-11] By all accounts, the plan in effect from 2003 through 2013 was generous compared to the plans offered to public employees in many jurisdictions.[6] By contrast, the 2014 Plan was intended to be comparable to those offered in other jurisdictions, and it was essentially an "off-the-shelf" plan developed by Moda, the company the State selected as the new TPA. [Tr. 66, 853-55, 871-78]

The dental insurance plan that took effect on January 1, 2014, contained numerous obvious diminishments in coverage. Some of these included:

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4 *See id.*

5 The State provided only minimal notice of the new plan to retirees before it took effect. Alert retirees understood the changes only by reviewing the Division of Retirement and Benefits' website in early 2014. [Tr. 66, 102-03]

6 *See* Tr. 65; *see also* Tr. 1128-32, 1141-42, 1147-50, 1155-64 (testimony by State's expert identifying aspects of the 2014 Plan that are typical of retiree dental plans, though offering less coverage than the 2013 Plan).

- The 2014 Plan introduced yearly frequency limits on dental cleanings ("prophylaxis"), allowing only specified exceptions, where no fixed limits previously were part of the plan. [Exc. 165; Tr. 135-39, 914-15]

- The 2014 Plan limited coverage for full-mouth x-rays to once in five years, whereas the 2013 Plan covered such x-rays once a year. [Exc. 164; Tr. 129-30] The 2014 Plan also limited the types of x-rays that will be covered when used for diagnosis, where no limitations on type were contained in the 2013 Plan. [Exc. 164; Tr. 127-29]

- The 2014 Plan extended the time limit within which dentures could be replaced from 5 years to 7 years, regardless of the reason for needing replacement dentures. [Exc. 168; Tr. 176-77] The 2014 Plan added a 7-year time limit for covering replacements of crowns, bridges, and partial dentures, where the 2013 Plan had no fixed time limits. [Exc. 167; Tr. 165, 168-71]

- The 2014 Plan deleted coverage for topical fluoride treatments for most adults, and added frequency limits on such treatments for persons under age 19. [Exc. 165; Tr. 134-35]

- The 2014 Plan eliminated coverage for specific services that previously were covered, including diagnostic casts and study molds, palliative emergency care, indirect pulp capping, periodontal splinting, and inlays. [Exc. 164, 166, 167; Tr. 133-34, 149, 152-53, 156-58, 166-67, 936-38]

The only new coverage added by the 2014 Plan was for athletic mouthguards, available to an adult once every two years. [Exc. 168, 170-71; Tr. 183-84]

The 2014 Plan reclassified some services from class II to class III (reducing coverage from 80% to 50% of the allowed cost); it reclassified some other services from class II to class I (increasing coverage from 80% to 100% of the allowed cost). [Exc. 164-66, 168; Tr. 141-43, 147-49, 175-76]

The 2014 Plan also introduced a network with steerage. [*Compare* Exc. 62-64 *with* Exc. 75-76; Exc. 168; Tr. 117-21, 622-23][7] A "network" is, essentially, a list of dentists

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[7] Networks without steerage were part of the retiree dental plan under some previous

who have agreed to charge plan members no more than the TPA's approved prices for various services. [Tr. 54, 120-21][8] In exchange, the TPA provides these dentists' names to members and promotes use of these dentists over non-network dentists. [Tr. 56, 1043; R. 1218] "Steerage" means that patients who see a non-network dentist receive reimbursement for their costs at a lower percentage rate, even if the non-network dentist charges *less* than the TPA's approved price – so the amount subject to balance billing tends to increase. [Tr. 622-27, 693-94][9] The financial penalty for seeing a non-network dentist applies even if a retiree lives in a community with a non-network dentist but no network dentist; this situation applies in a number of communities in rural Alaska and also in parts of other states where Alaska retirees live. [Exc. 169; Tr. 193, 838-40]

The State did not analyze the changes before implementing them to determine whether overall the diminishments were offset by enhancements. [Tr. 807-08]

Procedural history

Complaint

RPEA filed suit against the State in January 2016, contending that imposing the

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TPAs, but the TPA prior to Moda had no network. [Tr. 53-54, 959]

[8] In other words, to use the simplest example, for a fully covered service (i.e., a service not subject to deductible or co-pay), the network dentist agrees to accept as full payment a price set by the TPA, whereas a non-network dentist may "balance bill" the patient – i.e., bill the patient the difference between the dentist's standard fee and the fee allowed by the TPA. [Tr. 54-56]

[9] Under the 2014 Plan, retirees who reside in Alaska and see a non-network dentist receive coverage at approximately 75% of the allowed cost for services by a network dentist. [Exc. 169; Tr. 121, 1045] Members of the retiree dental plan who reside outside Alaska also are financially penalized for seeing a non-network dentist, but Moda did not disclose the nature or amount of the penalty. [Exc. 75-76, 169; Tr. 120, 1045-47]

2014 Plan on retirees violates the Alaska Constitution's non-diminishment clause. [Exc. 1-8] RPEA principally sought declaratory and injunctive relief. [Exc. 7-8] Its complaint specifically requested declarations that the retiree DVA plan is an accrued benefit protected by Article XII, section 7 of the Alaska Constitution; that the 2014 Plan diminishes the accrued benefits State employees had before January 1, 2014; and that adoption of the 2014 Plan therefore violated these employees' constitutional rights. [Exc. 7] RPEA's complaint sought a permanent injunction prohibiting the State from continuing to use the 2014 Plan for retirees who were hired before January 1, 2014, and requiring the State either to reinstate the previous retiree dental plan or to adopt a new plan that offers comparable advantages. [Exc. 8] RPEA's complaint also sought its costs and attorney fees and "such other relief as the court deems just and equitable." [*Id.*]

Partial summary judgment

The parties agreed to bifurcate the legal and factual questions and, as a first step, to brief the issue whether retiree dental insurance benefits are an accrued benefit protected by the Alaska Constitution. [R. 382-84, 379] Thus, RPEA and the State submitted cross-motions for summary judgment on this legal question.[10]

The court heard oral argument on December 7, 2016 [Exc. 135-43], then ruled from the bench that dental insurance benefits are like medical insurance benefits in the sense that they vest when an employee is hired and therefore may not later be diminished. [Exc. 133-

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[10] *See* RPEA's Motion and Memorandum Supporting Partial Summary Judgment [R. 291-306, with Exhibits at Exc. 19-84 and R. 376-78], State's Opposition and Cross-Motion [R. 222-42, with Exhibits at Exc. 85-132], RPEA's Opposition and Reply [R. 202-19, with Exhibits at R. 220-21, 172-88], State's Reply [R. 189-200].

34, 142-43] The court analogized to an option contract: employees are told when they are hired that they will have an option to purchase DVA insurance when they retire, and the insurance available at retirement must be no less favorable than the insurance available when the employee is hired. [Exc. 143]

Trial

Trial was held over six days in April and July, 2019. [Tr. 5-1282] The trial focused on the factual question whether the 2014 Plan overall diminishes the benefits available to retirees as compared to the 2013 Plan. [R. 639 (RPEA's trial brief), 633 (State's trial brief)]

RPEA presented witnesses who explained the coverage of the 2013 and 2014 Plans, and the way the State administers all of its retiree benefit plans through contracts with a third-party administrator. [Exc. 159-69; Tr. 31-66, 105-86, 907-56] A major controversy at trial concerned whether the 2013 Plan covered a series of services not expressly listed in the plan handbook. [R. 542-48, 464-71, 429-33 (closing arguments)] The court ultimately found that it did. [Exc. 156-58, 162-63 ¶¶ 23-25]

RPEA also presented testimony from two dentists who explained the dental services covered under the 2013 but not the 2014 Plan; they discussed how the changes diminish coverage for certain patients, and they refuted the State's claim that the changes do no more than ensure that coverage is limited to services that are dentally necessary. [Tr. 244-89, 434-510] Both testified that the 2014 Plan does not cover some dentally necessary services that were covered under the 2013 Plan. [*Id.*]

An expert in benefit plan evaluation testified, and explained his opinion that, from the perspective of retirees participating in the dental insurance program, the 2014 Plan is

less advantageous than the 2013 Plan in terms of the services that are covered. [Tr. 356-59, 402]

The State presented two representatives of the Division of Retirement and Benefits [Tr. 604, 1032] and two experts. One expert discussed the changes in the 2014 Plan in terms of how the coverage under the 2014 Plan compares to plans offered to public retirees around the country. [Tr. 1128-65] RPEA asserted that her testimony was irrelevant, since the factual question before the court was how the 2014 Plan compares to the 2013 Plan, not how it compares to any other plan. [Tr. 1081] The State's other expert, Richard Ward, claimed that he had calculated and compared the "actuarial value" of the 2013 Plan and the 2014 Plan [Tr. 649-68] – but the superior court rejected his testimony on a number of grounds. [Exc. 172-75]

After trial, the parties submitted written closing arguments and proposed findings of fact and conclusions of law.[11]

Superior court's decision

On April 16, 2019, the court issued its findings and conclusions. [Exc. 156-80] The court accepted and signed RPEA's proposed findings and conclusions, and added some observations of its own. [*Id.*] In its own words, the court found the State's analysis to have been "biased with a view to protect the decision to change the third-party administrator, MODA, rather than to provide an objective and neutral comparison of the two plans." [Exc.

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[11] *See* RPEA's Closing Argument [R. 538-96], RPEA's Proposed Findings and Conclusions [R. 688-709], State's Closing Argument [R. 449-501], State's Proposed Findings and Conclusions [R. 502-36], RPEA's Reply Argument [R. 424-48].

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The remedy section declared the 2014 Plan unconstitutional and enjoined the State from continuing to offer that plan as the sole dental plan available to retirees. [Exc. 179] The court offered the State three options: (1) return to using the 2013 Plan; (2) provide retirees with the right to choose between the 2013 Plan and the 2014 Plan; and (3) develop a new plan that RPEA accepted as being comparable to, and not a diminishment from, the 2013 Plan. [*Id.*] The court allowed either party to submit a request for additional briefing on the remedy. [Exc. 180]

Attorney fees and costs

The court declared RPEA the prevailing party, entitled to move for attorney fees and costs under AS 09.60.010(c). [Exc. 180] RPEA filed a timely motion for full reasonable attorney fees and costs. [Exc. 225-35; R. 740-823 (exhibits), 861-65 (cost bill)] The State opposed the request for full attorney fees, contending RPEA was not a public interest litigant. [Exc. 237-42][12] It did not oppose RPEA's request for costs included in the cost bill submitted in accordance with Civil Rule 79. [Exc. 242] The State opposed RPEA's request for additional costs associated with experts, which RPEA contended the court was authorized to award under AS 09.60.010(c)'s language directing the award of "full reasonable attorney fees and costs" to a prevailing constitutional litigant. [Exc. 231-35, 242-45, 253-55]

The court granted RPEA's request for full attorney fees and costs in excess of those

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[12] The State does not renew this argument on appeal.

authorized by Rule 79. [Exc. 190]

Post-trial issues: Enforcement of the court's order

The superior court initially declared that its order would take effect on May 1, 2019. [Exc. 158] The State promptly moved for an eight-month stay – until January 1, 2020 – on the ground that it could not put a new retiree dental plan into effect in less time than that. [R. 418-20] It also moved for prompt entry of a final judgment so that it could file an appeal. [R. 421-22]

RPEA opposed the eight-month stay but agreed to non-oppose a shorter stay to give the parties and the court a reasonable time to brief and consider the issues.[13] The court entered an order granting a limited stay by agreement. [R. 682]

RPEA also opposed the motion for entry of final judgment, noting that it already anticipated problems with enforcement of the court's order and did not want to be in an awkward position with proceedings in two courts and a possible need to litigate the jurisdiction of the superior court to act. [R. 402-03; *see also* R. 1006-09 (State's reply), R. 2651-52 (Tr. 2-6)] Final judgment was entered on August 8, 2019. [Exc. 181]

Although the court *denied* the State's motion for a stay until January 2020 [Exc. 257], the State continued to offer only the unconstitutional plan throughout 2019. It announced in August that it would implement a two-plan system effective January 1, 2020, under which retirees could choose whether to participate in the 2013 Plan or the 2014 Plan.

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[13] *See* R. 410-11 (RPEA's non-opposition to limited stay), 398-401 (RPEA's opposition to stay until January 2020); *see also* R. 683-84 (State's unopposed motion for a limited stay), 995-1005 (State's reply in support of its motion for stay until 2020), 987-91 (RPEA's surreply and order accepting it).

[R. 2653 (Tr. 10), 962-84; Exc. 260-61] Later, the State announced that membership in the 2013 Plan would cost slightly more. [Exc. 186]

The court gave the State no orders on how to implement a plan responsive to its April 2019 order, other than to tell the State, in response to a motion by RPEA, that it could not use the unconstitutional 2014 Plan as the default for retirees who, during the 2019 open enrollment period, failed to select which plan they preferred. [Exc. 195][14]

The court also ordered the State to identify certain claims that were denied as a result of the State's operation of an unconstitutional plan; the order applied only to claims submitted after January 29, 2016 (the date RPEA filed its complaint) by retirees who did not select the 2014 Plan. [Exc. 195-96, 223] RPEA did not seek and was not granted the right to seek reimbursement for claims wrongfully denied. [*Id.*][15] Any relief to retirees could come only in separate actions. The order requiring the State to identify these claims has been stayed pending appeal based on RPEA's non-opposition. [At. Br. 21]

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[14] The court first made this ruling orally at a status conference on November 19, 2019, but the State failed to ensure that the record on appeal includes the transcript or even the log notes of this hearing. After the State moved to stay that order pending appeal [R. 2306-24], the court issued an order denying the stay, in which it wrote: "The 2014 plan was found to be unconstitutional. The State has provided no justification as to why it could ignore the court's order and require people to continue in that plan unless they opted out. Every retiree has a right to be enrolled in a constitutionally firm plan, but they can voluntarily opt out of it and into a constitutionally infirm plan – not the other way around." [Exc. 214] *See also* Exc. 259-61, 263-64 (RPEA motion for order precluding the State from using the 2014 Plan as the default for retirees who did not select a plan during the open enrollment period), 282-83 (State's opposition), 293 (RPEA reply); R. 2285-2305 (RPEA opposition to motion for stay), 2253-84 (State's reply).

[15] *See also* Exc. 264-65 (RPEA's motion), 279 (State's opposition), 291 (RPEA reply); R. 2220-26 (State's motion for reconsideration or clarification), 2210-12 (RPEA's court-invited response).

STANDARDS OF REVIEW

This Court applies its independent judgment when reviewing questions of law, including interpretation of the constitution.[16]

This Court reviews a superior court's fact-findings deferentially, particularly when the fact-findings are based primarily on oral testimony, "because the trial court, not this [C]ourt, judges the credibility of witnesses and weighs conflicting evidence."[17] A fact-finding should be reversed only if it is clearly erroneous. A finding is clearly erroneous if the finding leaves this Court "with a definite and firm conviction on the entire record that a mistake has been made."[18]

This Court reviews most questions concerning the award of costs and attorney fees for abuse of discretion.[19] The interpretation of a statute that applies to the award is reviewed de novo.[20] These same standards apply to review of post-judgment rulings to enforce the court's judgment.[21]

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16 *See Taffe v. First Nat'l Bank of Alaska*, 450 P.3d 239, 242-43 n.8 (Alaska 2019); *Duncan v. Retired Public Employees of Alaska, Inc.*, 71 P.3d 882, 886 (Alaska 2003).

17 *Ott v. Runa*, 463 P.3d 180, 185 (Alaska 2020), quoting *Sheffield v. Sheffield*, 265 P.3d 332, 335 (Alaska 2011); *see Burns v. Burns*, 466 P.3d 352, 359 (Alaska 2020).

18 *Riddle v. Lanser*, 421 P.3d 35, 44 (Alaska 2018) (internal quotation marks omitted).

19 *See id.*

20 *See Alaska Conservation Found. v. Pebble Ltd. P'ship*, 350 P.3d 273, 279 (Alaska 2015).

21 *See Horchover v. Field*, 964 P.2d 1278, 1281 (Alaska 1998) (whether the trial court enforced a judgment or instead added terms is a legal question that this Court reviews de novo; if the court acted to enforce its judgment, this Court reviews the enforcement action for abuse of discretion).

ARGUMENTS

I. THE SUPERIOR COURT CORRECTLY DETERMINED THAT THE 2014 RETIREE DENTAL PLAN UNCONSTITUTIONALLY DIMINISHES RETIREES' ACCRUED BENEFITS.

The Alaska Constitution provides expressly that "[m]embership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship" and "[a]ccrued benefits of these systems shall not be diminished or impaired."[22] The State's appeal challenges the superior court's legal determination that retirees' dental benefits are a type of accrued benefits constitutionally protected against diminishment, and the court's factual determination that the 2014 retiree dental plan provides overall diminished benefits as compared to the 2013 Plan. RPEA contends that the superior court resolved both these issues correctly.

A. THE ALASKA CONSTITUTION PROTECTS RETIREES' DENTAL INSURANCE BENEFITS AGAINST DIMINISHMENT.

The Territorial government of Alaska, even before Statehood, offered retirement benefits to its employees.[23] The framers of the Alaska Constitution drafted Article XII, section 7 to ensure that public employees would not work for years, expecting these benefits, and then have the State or other public employer decide not to provide these benefits.[24] Retirement benefits are important to public employees, since public salaries

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[22] Alaska Constitution, art. XII, § 7.

[23] *See* Proceedings of the Alaska Constitutional Convention 2288-89 (Jan. 16, 1956); Exc. 131-32.

[24] *See* Proceedings of the Alaska Constitutional Convention 2288-90 (Jan. 16, 1956), 2790-91 (Jan. 20, 1956).

often do not match those available in the private sector, but public retirement benefits frequently are more secure and more generous.[25]

In *Hammond v. Hoffbeck*, this Court held that all the benefits that are part of the retirement system are protected by the Alaska Constitution against diminishment.[26] It does not matter that not all retirees ever avail themselves of these programs.[27]

The State began offering medical insurance benefits to State employees in 1975.[28] To receive these benefits, a retiring employee must submit a form electing coverage. [Exc. 33-35] Retirees may waive the benefit.[29] Most retirees electing coverage do not pay out-of-pocket for their retiree medical insurance, although some employees who are eligible to select medical insurance must pay monthly premiums for that coverage.[30] The State has always advised employees that the exact coverage of their medical insurance may change over time. [*E.g.*, R. 177] In *Duncan*, this Court held that medical insurance benefits are protected by Article XII, section 7, even though they likely were not a benefit contemplated by the framers.[31] Consequently, as *Duncan* explained, the State may change the coverage

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25 *See Hammond v. Hoffbeck*, 627 P.2d 1052, 1057 n.10 (Alaska 1981).

26 *See id.* at 1055-56.

27 *See, e.g.*, *Sheffield v. Alaska Public Employees' Ass'n, Inc.* ("*APEA*"), 732 P.2d 1083, 1084-89 (Alaska 1987) (optional early retirement benefits are constitutionally protected); *Hoffbeck*, 627 P.2d at 1058 (occupational disability benefits are constitutionally protected).

28 *See* AS 39.35.535 (initially enacted as SLA 1975, ch 200, § 2); *Duncan*, 71 P.3d at 885.

29 *See* Exc. 35 (retiree may check a box electing "No medical coverage").

30 *See* Exc. 29 (row on "Premiums Required").

31 *See* 71 P.3d at 888.

package over time as health care evolves, but the overall value of the coverage to retirees as a group may not be diminished.[32] At retirement, each employee is entitled to medical insurance benefits equivalent in value to those available to retirees on the day the employee was hired, or to any improved insurance package that the State offered during the employee's tenure.[33]

In 1979, the State added DVA insurance to the benefits available to retirees.[34] As with retiree medical insurance, the State's retiree DVA insurance is available only to participants in one of the State's retirement plans[35]; the insurance is thus a part of the retirement package. To select retiree DVA insurance, a retiring employee completes the same Application for Retirement Benefits she completes to obtain retiree medical insurance benefits. [Exc. 33-35] The form also allows retirees to select other retirement benefits, including long-term care insurance. [*Id.*] Historically, over 80% of retirees select DVA insurance. [Tr. 38, 1253-54; R. 1986]

DVA and long-term care insurance are often termed "optional" or "elective" benefits, where those terms are used in two senses. [At. Br. 8-9] First, the enabling statute

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32 *See id.* at 891.

33 *See id.* at 886. Additionally, an individual retiree may demand to continue to receive the benefits of a former system, rather than the one in place when she retired, if she can show that the change in the package of benefits presents a "serious hardship" to her, even when the changes overall do not disadvantage retirees as a group. *See id.* at 892.

34 *See* Exc. 112; AS 39.30.090(a)(10).

35 *See* AS 39.30.090(a)(10) ("A person receiving benefits under AS 14.25, AS 22.25, AS 39.35, or former AS 39.37 may obtain auditory, visual, and dental insurance for that person and eligible dependents under this section.").

provides that the State *may* offer these benefits,[36] whereas other statutes provide that the State will offer retirement benefits and medical insurance to specified employees.[37] Second, the State calls these benefits "optional" or "elective," because a retiring employee may choose them, whereas nearly all employees are provided retirement and medical benefits.

The fact that some benefits are "optional" in either sense is not legally significant in this case. As to the first meaning of "optional," once the State chooses to offer a certain benefit to retirees, the benefit is part of the package of retirement benefits offered to the employee on the day he is hired.[38] That the State legally could have chosen not to offer this benefit to retirees is immaterial. This case concerns a benefit that the State has chosen to offer throughout the past 40 years. As to the second meaning of "optional," *all* benefits must be elected at the time an employee retires. [Exc. 33-35] A retiree may choose not to participate in any of the benefit programs.[39]

The only true difference between DVA and other optional benefits (on the one hand) and medical benefits (on the other) is that all retirees who select an optional benefit must pay a monthly premium for the insurance, whereas most retirees do not need to pay monthly premiums for their medical insurance. [Exc. 29] However, the State conceded below that

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36 *See* AS 39.30.090(a).

37 *See* AS 39.35.370 (retirement benefits), .535 (medical benefits).

38 *See generally APEA*, 732 P.2d at 1084-89 (constitution protects the benefits of an optional early retirement program, which subsequently was cancelled).

39 *See* AS 39.35.510 (retiree may waive retirement benefits); Exc. 35 (retiree may waive medical benefits).

even retirees who must pay premiums for their medical insurance receive constitutional protection for this benefit.[40] In other words, the State has acknowledged that payment of premiums during retirement cannot be the determinative factor on whether a benefit is protected against diminishment by Article XII, section 7.

The State's position on appeal – that this difference in payment (for most but not all retirees) makes DVA insurance not an "accrued benefit" protected by the constitution [At. Br. 23] – is inconsistent with *Duncan* and other cases.

This Court has held repeatedly that a public employee's retirement benefits "accrue" on the day he or she is hired.[41] That means that the benefits available to a retiree on the day of hiring may not subsequently be diminished.[42] Further, this Court has held that the constitutional term "accrued benefits" must be interpreted broadly,[43] so that the entire retirement package offered at the time of employment is part of the employee's contract. Constitutional protection extends to "all retirement benefits that make up the retirement benefit package that becomes part of the contract of employment when the public employee

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[40] *See* R. 236 ("The State recognizes that not all PERS members are entitled to receive major medical insurance at no cost and that these retirees must pay premiums. *See* [Exc. 29]. The State does not contend that major medical was not a part of the employment contract for those employees that must pay premiums.").

[41] *See McMullen v. Bell*, 128 P.3d 186, 190 (Alaska 2006); *Duncan*, 71 P.3d at 886; *Flisock v. State, Div. of Retirement & Benefits*, 818 P.2d 640, 643 (Alaska 1991); *Hoffbeck*, 627 P.2d at 1057.

[42] *See Duncan*, 71 P.3d at 886 ("system benefits offered to retirees when an employee is first employed and as improved during the employee's tenure may not be 'diminished or impaired'"); *Flisock*, 818 P.2d at 643-45; *Hoffbeck*, 627 P.2d at 1057.

[43] *See Duncan*, 71 P.3d at 887.

is hired."[44] Moreover, this Court has made clear, the constitution protects the details of a benefit that determine its value to the retiree, not just the general concept of the benefit.[45]

Nothing in *Duncan* or in any other case establishes that, to be constitutionally protected, the retirement benefit must be provided during retirement without cost to the retiree. (As noted earlier, even the State has not consistently embraced that position.) The question is solely what was the employee told when first hired about the benefits that would be available upon retirement.[46]

The superior court used a commonsense analogy to an option contract. [Exc. 143] A contract is no less binding merely because it offers the employee an *option* to purchase something at a later point in time, as distinct from stating a binding commitment that the retiree will purchase it. A new employee who is told that dental insurance will be available when she retires can look at the terms of the retiree dental package in effect at that time, and she can rely on having the same – or better – insurance available to her when she retires.[47] Knowing that, an employee can plan. For example, she might opt not to pay for

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[44] *Id.* at 888; *see also APEA*, 732 P.2d at 1087 (Article XII, section 7 protects the "practical effect of the whole complex of provisions" provided to retirees (internal quotation marks omitted)).

[45] *See Flisock*, 818 P.2d at 643-45 (constitution requires State to use the method of calculating monthly retirement benefits that was in effect when the employee was hired, when that method included counting cashed-in leave when calculating the monthly retirement benefit); *APEA*, 732 P.2d at 1084-89 (constitution requires State to use the actuarial table in effect at the time the employee was hired, not a less advantageous one adopted later, when calculating an employee's early retirement benefit).

[46] *See Duncan*, 71 P.3d at 887-88; *Flisock*, 818 P.2d at 643-45; *APEA*, 732 P.2d at 1089.

[47] The State contends that the offer to let an employee purchase a retiree dental plan when she retires is not sufficiently definite to create a valid option contract [At. Br. 34-35],

dental insurance while she is employed, preferring to save her money to fund dental insurance in her retirement years, when her dental needs likely will be more expensive. If the State could cancel or diminish the DVA coverage just before or after the employee retires, her long-term planning and expectations would be defeated. Equivalent coverage might not be easily available for an individual of retirement age suddenly forced to shop for a commercial dental insurance plan.[48]

The State also attempts to distinguish medical insurance from DVA insurance by calling medical insurance a form of "deferred compensation," part of a unilateral contract that the employee accepts when she begins working, while insisting that DVA insurance differs because it is offered pursuant to a bilateral contract that the employee may accept, if it is available, when she retires. [At. Br. 24-29] This argument uses different terms, but at base it does not differ from the State's main argument, discussed above. Whether dental insurance is part of the contract that employees form when they are hired is the central question this Court must resolve, not something the State may presume. The State offers no principled basis for defining some retiree benefits as "deferred compensation" while

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but the State's argument begins with a faulty premise: that the package of dental benefits may change. In fact, the point of the constitutional protection is that the package may *not* change, except in ways advantageous to retirees. Thus, the offer of retiree dental benefits to a new employee is very specific: the employee will be able to purchase the retiree dental plan then in effect, or another more advantageous plan if one is subsequently offered.

[48] This is even more true for long-term care insurance. Retirees who select this optional benefit pay premiums to ensure the benefit will be available in the future if they need it. No one would pay premiums – possibly for decades – if there were a risk that the coverage could be withdrawn or diminished right before the retiree or a covered family member needs the health care the premiums have paid for.

others, described in the same employee handbooks, are merely something that might be available later.

This Court's treatment of early retirement benefits provides an instructive analogy. For a period of time prior to 1986, the State offered an optional early retirement benefit, under which eligible employees could opt to retire at age 50 instead of the then-usual minimum retirement age of 55; an early retiree received the regular retiree benefits, but monthly payments were adjusted actuarially to be equivalent over the retiree's lifetime to the benefits that would be available if the employee retired at age 55.[49] In 1980, the PERS board changed the actuarial calculation; as a result, an employee taking early retirement after 1980 would receive less in monthly payments than the employee would have received under the formula in effect when the employee was hired.[50] This Court held that altering the formula, which diminished retirees' benefits, violated the non-diminishment clause.[51] The holding is significant to the current case because, like DVA benefits, the early retirement benefits were entirely "optional." Employees were told when they were hired about this benefit they might choose in the future, but the choice of whether to accept the benefit did not occur until the moment of retirement. Presumably, many employees never selected early retirement benefits. Yet those who chose the benefit were entitled to receive it on the same terms offered to them at the time they were hired.

For the same reasons that the State calls the contract for DVA insurance benefits

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49 *See APEA*, 732 P.2d at 1084 (discussing former AS 39.35.370(a)-(c)).

50 *See id.*

51 *See id.* at 1084-89.

"bilateral," the contract for early retirement benefits can be termed bilateral: In both settings, the available benefit is an offer to contract in the future; the benefit is accepted only if the employee chooses it at the time of retirement. Since the early retirement benefit option is constitutionally protected, so too must the constitution protect the retiree DVA insurance option.

The State discusses case law from other jurisdictions [At. Br. 31-32] – but cases from other states are of limited value. No other court has addressed exactly the issue presented in this case. Only seven states have a constitutional provision equivalent to Alaska's Article XII, section 7,[52] and, even among those that do, some courts distinguish between retiree pension benefits and retiree health insurance benefits.[53] The State cites a Nebraska cases that distinguished between pension benefits and long-term disability benefits,[54] without noting that this Court has held that disability benefits *are* protected against diminishment.[55] Rather than consider the Nebraska case the State cites, this Court might consider cases from Hawai'i and Illinois, two states that (unlike Nebraska) have a

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[52] *See* How Are Pensions Protected State-by-State?, *https://www.governing.com/finance101/gov-pension-protections-state-by-state.html* (last visited September 23, 2020).

[53] *See, e.g.*, *Musselman v. Governor*, 533 N.W.2d 237 (Mich. 1995), *modified*, 545 N.W.2d 346, 347-48 (Mich. 1996).

[54] At. Br. 31-32, citing *Livingston v. Metro. Util. Dist.*, 692 N.W.2d 475, 480-81 (Neb. 2005).

[55] *See Hammond v. Hoffbeck*, 627 P.2d 1052, 1055-58 (Alaska 1981). RPEA recognizes that Nebraska disability benefits differ from Alaska's long-term disability benefits because Nebraska retirees must select the benefits and pay a premium. *See Livingston*, 629 N.W.2d at 480.

non-diminishment clause in their constitutions.[56] In a decision comparable to *Duncan*, the Hawai'i Supreme Court held that retirees' health benefits are protected just like retirement benefits.[57] The critical factor in the court's analysis was that both are based on membership in the state retirement system.[58] Notably, the Hawai'i court did *not* distinguish between retirement benefits and medical insurance on the ground that, in Hawai'i, retirement benefits are funded by contributions made by the state and employees during their years of active service, whereas participation in the retiree medical insurance plan may require retirees to pay premiums.[59] The Illinois Supreme Court held (like *Duncan*) that the constitutional non-diminishment clause protects retiree medical benefits.[60] Like the Hawai'i court, the Illinois court focused on the fact that the benefit "is derived from membership in one of the State's public pension systems. If it qualifies as a benefit of membership, it is protected."[61] The logic of the Hawai'i and Illinois cases applies to Alaska's retiree DVA insurance. The DVA benefit is available only to members in one of the State's public retirement systems; in other words, it "derives from membership in one of the State's public pension systems." Consequently, this Court should hold that the

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56 *See* Haw. Const. art. XVI, § 2; Ill. Const. art. XIII, § 5.

57 *See Everson v. State*, 228 P.3d 282, 297-99 (Haw. 2010).

58 *See id.*

59 *See id.* at 298.

60 *See Kanerva v. Weems*, 13 N.E.3d 1228, 1239-44 (Ill. 2014).

61 *Id.* at 1244; *see also id.* at 1240 ("Although some of the benefits are governed by a group health insurance statute and others are covered by the Pension Code, eligibility for all of the benefits is limited to, conditioned on, and flows directly from membership in one of the State's various public pension systems.").

Alaska Constitution protects retiree DVA benefits against diminishment.

As a fallback position, the State asks this Court to hold that at most the constitution protects the opportunity to purchase DVA coverage, rather than the scope of coverage. [At. Br. 32-35][62] This Court should reject this argument, because the "protection" offered under this theory is meaningless, as a single example illustrates. Under the State's theory, the State could offer a robust dental insurance plan to retirees in 1990, when an employee is first hired. When the employee retires 30 years later, in 2020, all the State would have to offer to satisfy the constitution is dental insurance that covers one cleaning per year, with no other service. This protection against diminishment of benefits is illusory. This is not a sensible reading of a constitutional guarantee.

This Court should affirm the superior court's conclusion that, when public employees are hired, they are offered the opportunity to purchase, when they retire, the specific retiree dental insurance plan then available to retirees or another one of equivalent or enhanced value. That benefit therefore is protected against diminishment.

B. THE SUPERIOR COURT CORRECTLY DETERMINED THAT THE 2014 PLAN OVERALL DIMINISHES COVERAGE AS COMPARED TO THE 2013 PLAN.

The superior court's conclusion that the 2014 Plan diminishes coverage compared to the 2013 Plan is based on numerous specific findings of fact. [Exc. 159-75] The centerpiece of the court's analysis is the table that summarizes the changes the State made

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[62] The State cites an ERISA case on medical benefits. [At. Br. 35, citing *In re Unisys Corp. Retiree Medical Benefits "ERISA" Litigation*, 58 F.3d 896 (3d Cir. 1995)] This Court in *Duncan* specifically rejected the holding in that case as inapposite to a constitutionally protected benefit. *See* 71 P.3d at 887.

in 2014. [Exc. 164-68] The State does not contend that any fact-finding in the table is erroneous. [At. Br. 36-46] This Court can look at the table, as the superior court did, and reach the same conclusion: The 2014 Plan introduced many diminishments and very few enhancements.

Instead of properly applying the standard of review appropriate to fact-findings – where the appellate court accepts the trial court's findings unless they are clearly erroneous[63] – the State asks this Court to accept the testimony of its own witnesses. [At. Br. 39, 43-45] RPEA asks this Court to adhere to the well-established standard for reviewing facts, and, on that basis, to affirm the superior court's findings.

(1) The superior court did not err in not considering the premiums charged.

The State's main defense to its decision to adopt the 2014 Plan was its claim that the 2014 Plan offers retirees lower premiums. [Exc. 157 ("The defendant's focus was solely on the premium paid rather than the impact on the benefits offered."); R. 452-56] The State renews this argument on appeal, asserting that "premiums must play a part" in evaluating whether the 2014 changes enhance or diminish coverage. [At. Br. 37] The State does not make clear precisely what part in the analysis reduced premiums should play – and it should be clear to this Court that a plan that costs less but provides less coverage is not a non-diminished plan under *Duncan*.

Duncan expressly rejected the State's claim that medical insurance benefits were not diminished because the State continued to pay the same premium per retiree, even

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63 *See supra* at 13.

though the dollars bought less due to the increasing cost of medical care.[64] This Court held that the constitution protects coverage, not premiums.[65]

As discussed in the preceding argument, the fact that retirees pay the premiums for DVA insurance, while most retirees do not pay premiums for their medical insurance, should not support a different analysis of coverage, which would compel a different interpretation of the constitution. The State alone sets the premiums. [Tr. 42, 620-21] To set the premium, the State takes into account the estimated cost of covered dental services, the administrative fees of the TPA, the State's own administrative and legal expenses, and the State's decisions on funding a reserve account. [Tr. 620, 884] To let concern for premiums determine whether retirees' benefits are diminished would mean that retirees' guarantee against diminished benefits would depend on the State's choices in negotiating contracts with TPAs and the expenses the State chooses to incur to administer its plans.[66] Retirees' protection against excessive premiums inheres in their right to discontinue participation in the DVA plan if they find the premiums unreasonably expensive for the coverage offered. Further, the State may use the fact that retirees pay premiums to offer two plans – one that preserves the existing coverage with increasing premiums and another with reduced coverage and reduced premiums. This is, of course, exactly what the State

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64 *See* 71 P.3d at 888-89.

65 *See id.* ("The natural and ordinary meaning of 'benefits' in a health insurance context refers to the coverage provided rather than the cost of the insurance.").

66 Further, there actually is no "dental insurance" premium. Retirees purchase DVA insurance [R. 1903], so the premium also is affected by health care costs and administrative costs associated with vision and audio insurance.

did after losing at trial.

The doomsday scenario that the State paints concerning the "actuarial death spiral" [At. Br. 38-39] resembles the argument the State presented in *Duncan*: that it should be allowed to reduce coverage because increasing medical costs threatened the State's long-term ability to pay any benefits to retirees.[67] This Court understood the practical realities and respected the State's concern as "serious," but found the argument was not "sufficient to change the meaning of the constitutional language in question."[68] That same response is appropriate here.

Moreover, the State is wrong that the record establishes that any diminishment in coverage is offset by the reduction in premiums. [At. Br. 40] No such evidence was presented at trial. If, hypothetically, there is a way to compute the overall benefit to retirees of a package that offers lower premiums and less coverage and compare that to a package with higher premiums and more coverage, no witness offered such an analysis.

Also, factually contrary to the State's claim [At. Br. 40], the credible trial evidence did not establish that the 2014 Plan pays a higher percentage of the cost of covered care. Although the State's expert, Richard Ward, offered that opinion [Tr. 651-68; R. 2122], his methodology was suspect and his conclusions were rejected by the trial court on a number of grounds [Exc. 173-75]:

- Most critically, Ward was mistaken in multiple respects regarding what he

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67 *See* 71 P.3d at 888-89.

68 *Id.* at 889.

treated as covered and not covered under the 2013 Plan. The parties contested whether the 2013 Plan covered a series of services not expressly listed in the plan handbook.[69] The court accepted RPEA's evidence that it did [Exc. 156-58, 162-63 ¶¶ 23-25, 177-78] – and the State does not challenge this fact-finding on appeal. Ward's analysis is unreliable because it depended on an interpretation of coverage under the 2013 Plan that the superior court rejected.[70]

- In calculating the percentage of costs covered by the 2014 Plan, Ward excluded all out-of-network claims [Tr. 659], for which retirees typically receive reimbursement at a lower percentage. [Tr. 624; Exc. 173][71] His exclusion of non-network claims skewed the analysis in favor of the State. [Exc. 173][72]

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69 *See supra* at 8.

70 *Compare* R. 2121, 2130 (Ward's lists of changes that he believed had no actuarial impact and those that he considered diminishments and enhancements) *with* Exc. 164-68, 170-71 (court's findings on changes and diminishments); *see also* R. 579-83 (RPEA's closing argument providing greater details on Ward's erroneous assumptions about coverage under the 2013 Plan); *see generally* Tr. 894-95, 922-26, 946 (RPEA witness who helped administer the 2013 Plan testified that Exhibit 1001 [R. 1043-49] accurately lists services covered under the 2013 Plan and Exhibit 1007 [R. 1100-05] accurately describes coverage under the 2013 Plan).

71 Out-of-network claims submitted by Alaska retirees comprised 25-35% of their total claims in 2014-2016; out-of-network claims from retirees residing outside Alaska comprised 12-17% of their total for those years. [Tr. 190; R. 1115]

72 RPEA demonstrated this using Moda's data, as reported to the State, which included both network and out-of-network claims. For each year for which data were available, RPEA calculated the percentage of covered claims that was paid by the 2014 Plan. For each year, the percentage paid by the plan considering all claims is *less* than the percentage Ward calculated using just network claims. *See* R. 575-79 (explaining the calculation based on dividing the average amount the plan paid per member per month ("PMPM") by the average total amount of covered charges per member per month). For the data RPEA used, see R. 1286 (listing "Spend Per Member Per Month" and "Allowed PMPM" for 2014-2016); for Ward's calculations, see R. 2122. RPEA's calculations for the percentage

- In calculating the percentage paid by the 2013 Plan, Ward adjusted for inflation, but he made no inflation adjustment for the years covered by the 2014 Plan. [Tr. 664-65, 716-18] Ward explained that, in any plan with a fixed deductible – and both the 2013 and 2014 Plan have a $50 deductible applicable to class II and class III services – the effect of inflation is to increase the percentage of covered services paid by the plan. [Tr. 665, 714-16, 720] Thus, adjusting for inflation for 2013, but not for 2014-2017, also tended to exaggerate the percentage of covered claims paid by the 2014 Plan. [R. 577]

For these reasons and others, the trial court expressly rejected Ward's opinions. [Exc. 173-75] Because the trial court's bases for rejecting Ward's opinions were reasonable, this Court must accept them. Based on the trial court's fact-findings, this Court cannot accept the State's claim that the record shows that the 2014 Plan offers better coverage for lower premiums.

This Court should reject the State's claim that, because the superior court did not focus on premiums, this Court should find that it erred in concluding that the 2014 Plan offers diminished coverage compared to the 2013 Plan.

(2) The superior court did not err in not requiring RPEA to present an actuarial analysis to prove diminished coverage.

Duncan required this Court to resolve three legal questions: whether the Alaska Constitution protects retiree medical insurance coverage against diminishment, whether diminishment should be evaluated by examining premiums or coverage, and whether

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of allowed cost paid by the plan were, for 2014, 68.4% (compared to Ward's 72.1%); for 2015, 68.8% (compared to Ward's 72.6%); and for 2016, 69.5% (compared to Ward's 73.0%).

diminishment in the context of medical insurance should be measured from the perspective of an individual retiree or from the perspective of retirees as a group.[73] After addressing those issues, this Court offered "a number of cautions that may help to guide any equivalency analysis of health coverage changes."[74] The first caution the Court offered was that "equivalent value must be proven by reliable evidence."[75] This means, the Court continued, "offsetting advantages and disadvantages should be established under the group approach by solid, statistical data drawn from actual experience – including accepted actuarial sources – rather than by unsupported hypothetical projections."[76]

Drawing on this language, the State contends that RPEA could not prove diminished benefits without a formal actuarial analysis. [At. Br. 40-42] This Court should reject that claim as unsupported by *Duncan*. First, the quoted part of *Duncan* is unquestionably dicta; it cannot fairly be read as a holding prescribing how all parties in all diminishment cases must prove their claims.[77] Second, *Duncan* states only that reliable proof *may* use accepted actuarial sources in lieu of data drawn from actual experience; it does not state that actuarial analysis is required. Third, the passage in *Duncan* on which the State relies – "equivalent

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73 *See* 71 P.3d at 886.

74 *Id.* at 891-92.

75 *Id.* at 892.

76 *Id.*

77 The *Duncan* Court was reacting to arguments the State advanced in *Hoffbeck*, where the State attempted to defend certain changes as non-diminishments based on hypotheticals that did not correspond to the circumstances of the individuals who sued. *See Duncan*, 71 P.3d at 892, referring to *Hoffbeck*, 627 P.2d at 1058.

value must be proven by reliable evidence . . . including accepted actuarial sources"[78] – implicitly addresses the State, rather than a plaintiff challenging the State's plan, because the *challenger* will want to show *non-equivalent* values. *Duncan*'s language suggests that the State should not introduce a new plan unless and until it has subjected the proposed plan to rigorous analysis to satisfy itself and members that the new plan does not diminish the coverage that is constitutionally protected.[79] Arguably, the State should be required to provide a credible, *Duncan*-compliant analysis demonstrating equivalence before a challenger has any burden of proving that the State's analysis is flawed. Unquestionably, the State performed no such analysis before it implemented significant changes in the retiree dental plan. [Tr. 807] It developed its analysis only for litigation. [Tr. 671][80]

Most important, this Court's central point in *Duncan* was to stress that any analysis of equivalency must be based on "reliable evidence," rather than "unsupported hypothetical projections." RPEA met this test. It did not rely on hypothetical projections. It did rely on reliable evidence – principally the language of the 2013 Plan as compared to the 2014

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78 71 P.3d at 892.

79 The State acknowledged its fiduciary duty to retirees in administering health insurance contracts. [Tr. 628] A fiduciary should never act in a way that would violate retirees' constitutional rights. *See generally O.K. Lumber v. Providence Wash. Ins. Co.*, 759 P.2d 523, 525 (Alaska 1988) (recognizing the fiduciary relationship inherent in every insurance contract).

80 The superior court observed: "The defendant was in the best position to provide a complete and thorough evaluation of the 2013 and 2014 dental plans, but did not conduct that evaluation except to prepare for litigation. The analysis/comparison by the defendant was biased with a view to protect the decision to change the third-party administrator, MODA, rather than to provide an objective and neutral comparison of the two plans." [Exc. 157]

Plan, supplemented by reliable first-hand testimony of how the 2013 Plan was administered in practice.[81] Unlike the retiree medical plan, which encompasses 45 pages in one of the State's plan handbooks, the dental plan can be described in 8 pages.[82] The dental plan covers just 34 distinct services. [Exc. 164-68] Thus, it is possible to compare two plans by looking at each item separately and determining whether coverage for each remained the same, was enhanced, or was diminished. The trial court did exactly that; after reviewing the plan booklets and listening to trial testimony, the court itemized the changes in a table. [*Id.*] The court found that coverage for 24 services was diminished and coverage for three services was enhanced. [Exc. 170][83] The State has not claimed that any of these findings is mistaken.

In the clearest case, where a plan change includes *only* diminishments and no enhancements, it would be nonsensical to suggest that a plaintiff challenging the changes would fail if it did not offer an actuarial analysis. The present case is nearly that clearcut.

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[81] *See* R. 588-91 (Table 1 to RPEA closing argument) (providing citations to specific exhibits and testimony to establish the coverage of the 2013 Plan and 2014 Plan), 550-54, 436-39 (narrative descriptions of changes in RPEA's closing argument).

[82] *Compare* R. 1781-1826 (medical plan description in the Retiree Insurance Information Booklet for the 2003 Plan, as amended through 2016) *with* R. 1735-42 (amended dental plan description in the same booklet) *and* R. 1834-42 (dental plan description before 2014 amendments).

[83] The court (evidently inadvertently) omitted coverage for two services from the summary count; coverage for both (root canal and retreatment, and denture adjustment, repair, and relining) is shown in the court's table as diminished. [Exc. 166, 168] The table also shows that coverage for three services was unchanged. [Exc. 166-67] The court deliberately did not list benefits associated with implants as either a diminishment or improvement, because the preponderance of the evidence did not establish that benefits were improved rather than remaining unchanged. [Exc. 170-71] *See generally* R. 553 (discussing the evidence relating to implants).

Here, simply counting the services for which coverage was enhanced and those for which coverage was diminished should be sufficient to demonstrate reliably that the diminishments are not offset by corresponding enhancements. But the superior court did more than that. It also considered "the magnitude of each change, the number of members affected by the changes, the fact that two of the enhancements are in themselves a mix of an enhancement (improvement of the class of coverage) and a diminishment (frequency limitations were imposed), and the fact that the only unequivocal enhancement (coverage for athletic mouthguards) is of limited utility to a largely retired population." [Exc. 171] The court observed that, if the balance between enhancements and diminishments were close, it would want to defer to an expert – but the comparison here is not close. [Exc. 177][84]

The State attacks one portion of the court's findings – the phrase that states the court considered the number of people affected by the changes. [At. Br. 42] The State misunderstands what the court evidently meant. The trial testimony established that a major way in which retirees were affected by the 2014 changes was that many decided *not* to seek treatment for services they knew would not be covered.[85] Therefore, simply

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[84] The court also had expert testimony from RPEA's witness, who was accepted as an expert benefit consultant; that expert testimony supported the court's conclusion. [Exc. 171; Tr. 331-402]

[85] RPEA's witness Kathleen ("Kelly") Farmer was operations manager for the TPA who administered the 2013 Plan from 2009 through 2013. [Tr. 894-95] She testified from firsthand experience that retirees typically are very knowledgeable about their coverage and tend not to receive treatment that will not be covered. [Tr. 971] RPEA's two expert dentists corroborated this. Both testified that their patients considered whether services

counting claim denials, as the State does, does not capture the number of people adversely affected by the changes. Another aspect of considering the number of people affected by the changes was to examine age categories; although some changes enhanced benefits for participants under age 19, they had a minimal effect on participants in the retiree dental program, because only a tiny percentage of plan participants are that young.[86]

In short, the superior court appropriately found that, even though RPEA did not offer an actuarial analysis, RPEA proved with reliable evidence that the 2014 Plan offers diminished coverage to retirees as a group.

The State touts the testimony of its own expert, Richard Ward, but, as already discussed, the trial judge listed multiple reasons for rejecting Ward's testimony. [Exc. 173-75] In asking this Court to substitute its own findings on credibility, the State contends that Ward's methodology should be accepted because, the State says, Ward used both the methodology required by the Affordable Care Act ("ACA") and the methodology used by the State's experts on remand in *Duncan*. [At. Br. 43] Even were this Court inclined to re-assess credibility, the State's references to the ACA and to the reports presented during the *Duncan* remand provide no sound basis for overriding the superior court's credibility findings.

The ACA methodology was developed so applicants can compare plans to

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would be covered by insurance, and that some refused necessary care because it would not be covered. [Tr. 238, 432-23]

[86] *See* R. 1288 (in 2017, only approximately 6% of all plan participants were under age 50).

determine the percentage of the overall covered costs the plan will likely cover. [R. 1224][87] However, defining actuarial value in terms of the average percentage of covered costs paid by the plan rather than by the consumer does not take into account what services are or are not covered. [Tr. 668, 730-31] Two examples make this point clearly. If the 2013 Plan paid 100% of the allowed cost for any number of cleanings per year (and there is evidence it did [Tr. 914-15]), and the 2014 Plan paid 100% of the allowed cost for only two cleanings per year (which it did for most members [Exc. 78-79]), both have the same actuarial value – but clearly the earlier plan provided greater coverage. And if the 2013 and 2014 Plans generally covered the same services, but the 2013 Plan also covered additional services at 50% or 80% of the approved cost, while the 2014 Plan did not cover those services at all, the 2014 Plan would have a higher actuarial value under Ward's definition.

As to whether Ward actually used the same mathematical approach as the experts on remand in *Duncan*, the record is unclear,[88] but it seems doubtful. The experts in *Duncan* needed to value two medical plans, which required assessing their comparative values to a member over his or her lifetime.[89] Ward at best compared claims-handling decisions in

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[87] An admitted exhibit, a letter from the American Academy of Actuaries, explains the calculation of actuarial value for purposes of the ACA: "The calculation takes into account a plan's various cost-sharing features, such as deductibles, coinsurance, copayments, and out-of-pocket limits. Aside from cost-sharing features, however, the calculation does not reflect other plan features that may be important for consumers who are choosing plans." [R. 1224]

[88] The experts' model, which was accepted by the superior court on remand, is not described in detail in the superior court's opinion. *See Retired Public Employees of Alaska, Inc. v. Matiashowski*, 2006 WL 463279 (Alaska super. Apr. 27, 2006).

[89] *See generally Duncan*, 71 P.3d at 885 n.7 (summarizing some of the changes in coverage in the medical plan, including an increase in the lifetime medical benefits).

one year of the 2013 Plan to four individual years of the 2014 Plan. [R. 2122; Exc. 173] More important, even if Ward used an appropriate model, his conclusions are valid only if he inputted good data; Ward acknowledged this. [Tr. 721-23] Ward himself characterized the HealthSmart claim-handling data for 2013 as incomplete and impossible to work with. [Tr. 653-54; Exc. 174] No reliable analysis can be based on such data.[90] Beyond that, as discussed above, Ward made a series of mistakes regarding the services that were and were not covered by the 2013 Plan, so he did not do an accurate comparison[91]; his analysis of claims-handling under the 2014 Plan was incomplete, because he excluded all non-network claims, which increased the percentage of the costs that the Plan appeared to pay[92]; and he adjusted for inflation only for the 2013 Plan.[93] All of these problems made his purported actuarial analysis unreliable. The trial court did not err in finding that the State did not offer a reliable actuarial calculation to refute RPEA's evidence of diminishments. [Exc. 157, 172-75]

The State also attacks the trial court's conclusion that loss of freedom to choose one's dentist without incurring a financial penalty is a kind of diminishment, even if it

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90 The problems with the data may explain why the dollar amounts Ward listed as paid for certain services by the 2013 Plan differ significantly from the dollars paid as reported by the TPA to the State. *Compare, e.g.*, R. 2130 (amounts reported spent in 2013 on bridges and dentures) *with* R. 1190 (same); *see generally* R. 440 (explaining the comparison).

91 *See supra* at 27-28; Exc. 174-75.

92 *See supra* at 28. Contrary to the State's claim [At. Br. 44 & n.110], nothing in the *Matiashowski* opinion establishes that the experts excluded non-network claims when computing the actuarial value of two plans.

93 *See supra* at 29; Tr. 716.

cannot be measured economically. [At. Br. 45; *see* Exc. 171] This Court need not consider this issue, because the superior court's analysis, based on its careful examination of the coverages that were diminished and enhanced, is sound, and standing alone it supports the court's conclusion that the 2014 Plan overall provides diminished coverage to participants.

In sum, this Court should uphold the superior court's fact-findings and its conclusion that the 2014 retiree dental plan offers members diminished benefits compared to the 2013 Plan. This Court should not accept the State's position that, to succeed with a diminishment claim, a plaintiff must present a sophisticated actuarial analysis, even where a commonsense examination of the changes establishes diminishments without corresponding enhancements. An actuarial analysis is expensive,[94] and any plaintiff challenging a plan necessarily must rely on the State and its agents to produce the raw data in a useable form. That was a problem here. [Tr. 961] RPEA ultimately paid Moda, the third-party administrator, to conduct some simple analyses, which Moda then provided to the State as well as RPEA. [Exc. 231-32]

This Court should uphold the superior court's conclusion that, even without an actuarial analysis, RPEA met its burden of proving that the 2014 Plan diminishes coverage as compared to the 2013 Plan.

II. RPEA WAS ENTITLED TO RECOVER ITS FULL REASONABLE COSTS AS A SUCCESSFUL CONSTITUTIONAL LITIGANT.

Alaska Statute 09.60.010(c)(1) provides that, in a civil action concerning the

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[94] The State contracted to pay Ward up to $40,000 for his actuarial analysis and testimony. [Tr. 670]

establishment, protection, or enforcement of a right under the Alaska Constitution, the court "*shall award . . . full reasonable* attorney fees and *costs*" to a prevailing plaintiff. (The elided passage refers to limitations not at issue in this case.)

Relying on the unambiguous statutory direction to award "full reasonable attorney fees and costs," RPEA moved for an award of full reasonable attorney fees and, not literally full reasonable costs, but certain reasonable costs beyond those authorized in Civil Rule 79 – specifically, expenditures for data analysis that benefited both parties, full costs for the fees charged by two of its testifying expert witnesses, and the costs of a non-testifying consulting expert. [Exc. 231-35][95] The State did not contend the costs were unreasonable, but it argued that nothing beyond Civil Rule 79 costs should be awarded. [Exc. 242-45] The court granted RPEA's motion. [Exc. 190]

On appeal, the State renews its argument that a prevailing constitutional litigant's recoverable costs should be limited to those allowed by Rule 79. [At. Br. 49]

This Court should reject that argument and should hold that the superior court did not err in interpreting the statutory language directing the award of full reasonable costs in accordance with its plain meaning. Alternatively, without reaching the statutory construction question, this Court can reaffirm its prior ruling that a trial court has discretion

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[95] Two of RPEA's expert witnesses provided their services *pro bono*, and RPEA did not seek to recover any costs for their work. [Exc. 233] RPEA also observed that the largest component of its request for non-Rule 79 costs was for fees paid to its expert Kelly Farmer, and much of the out-of-court work she did in reviewing discovery could be characterized as contract paralegal work; her hourly rate of $110/hour is lower than most paralegals charge; thus, RPEA pointed out, those fees properly could have been claimed under Civil Rule 82(b)(2). [Exc. 233]

to award costs beyond those listed in Rule 79,[96] and on that basis conclude that the trial court did not abuse its discretion in awarding the requested costs here.

In construing any statute, this Court considers the plain language of the statute, the legislative history, and the purpose behind the law.[97] The clearer the statutory language, the more compelling must be the evidence in the legislative history and purpose that establishes that the legislature intended the statute to have a different meaning than the plain language supports.[98]

The State cites no legislative history that shows an intent to limit costs recoverable by a successful constitutional litigant to those authorized by Rule 79. Review of the minutes of the five committee hearings devoted to the bill that enacted AS 09.60.010(c) reveals no discussion at all of costs.[99]

The State's only basis for disregarding the statutory language is to note that the legislature, in enacting AS 09.60.010(b)-(e), intended to limit, not expand, payments to public interest litigants. [At. Br. 48-49] This broad claim is only partly true. The pertinent

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96 *See Hickel v. Southeast Conference*, 868 P.2d 919, 931 (Alaska 1994).

97 *See Alaska Spine Center, LLC v. Mat-Su Valley Medical Center, LLC,* 440 P.3d 176, 180-81 (Alaska 2019); *Alaska Conservation Found. v. Pebble Ltd. P'ship*, 350 P.3d 273, 279 (Alaska 2015).

98 *See Alaska Spine Center*, 440 P.3d at 181; *Alaska Ass'n of Naturopathic Physicians v. State, Dep't of Commerce, Cmty & Econ. Dev.*, 414 P.3d 630, 634 (Alaska 2018).

99 For hearings on HB 145, see House Jud. Comm. Hearing Minutes, starting at Tape 03-45 Side B at 0776 (Apr. 28, 2003); House Jud. Comm. Hearing Minutes, starting at Tape 03-52 Side B at 0506 (May 7, 2003); House Finance Comm. Hearing Minutes, starting at Tape HFC 03-86 Side A (May 9, 2003); House Finance Comm. Hearing Minutes, starting at Tape HFC 03-88 Side A (May 12, 2003); Sen. Jud. Comm. Hearing Minutes, starting at Tape 03-53 Side A (May 18, 2003).

sections of AS 09.60.010 were enacted in 2003.[100] For a decade before that, various legislators tried each year, without success, to eliminate the court-created public interest litigant exception to Civil Rule 82.[101] In 2003, the governor tried a different tactic and had legislators introduce a bill to eliminate the public interest litigant exception only for certain natural resource cases.[102] The final version of the bill reflects that legislators expanded the governor's proposal, eliminating the public interest litigant exception to Rule 82 for all non-constitutional litigation, while creating a statutory exception to Rule 82 for constitutional cases. In taking this approach, legislators endorsed the goals articulated by this Court in adopting the public interest litigant exception: to encourage citizens to bring important litigation challenging government action by making it possible for citizens to recover the expenses they incurred.[103] Upholding the award of reasonable, non-Rule 79 costs to RPEA is consistent with that purpose as well as with the statutory language, and is not contradictory to any legislative history.[104]

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100 *See* SLA 2003, ch 86, § 2.

101 *See* House Jud. Comm. Hearing Minutes (Apr. 28, 2003) (statements of Asst. Attorney General Craig Tillery); House Jud. Comm. Minutes (May 7, 2003) (statement of Rep. Les Gara at Tape 03-54 Side A at 0001).

102 *See* 2003 House Journal (March 3, 2003) at pages 360-61 (Governor's Transmittal Letter).

103 *See Alaska Conservation Found.*, 350 P.3d at 280 (legislature "replaced our public interest litigation exception to Rule 82 with a new statutory provision that encourages and protects parties bringing constitutional claims").

104 *See Hickel v. Southeast Conference*, 868 P.2d 919, 933 (Alaska 1994) (Rabinowitz & Matthews, JJ., dissenting) (expressing their opinion that denying recovery of expert witness costs to prevailing litigants will tend to discourage important public interest litigation).

Alternatively, this Court has stated that, even when Rule 79 applies, a superior court has discretion to use Rule 94 to relax Rule 79.[105] This provides an alternative basis for upholding the award of non-Rule 79 costs to RPEA.

Finally, if this Court rejects these arguments, at minimum it should remand to permit RPEA to request payment of Ms. Farmer's fees to the extent they can be documented as reasonable paralegal fees.

III. THE SUPERIOR COURT APPROPRIATELY ISSUED ORDERS NECESSARY TO ENFORCE ITS RULING THAT THE 2014 PLAN IS UNCONSTITUTIONAL AND TO PROVIDE RPEA RELIEF THAT IS JUST AND EQUITABLE.

RPEA, in its complaint, sought declaratory and injunctive relief, an award of its attorney fees and costs, and "such other relief as the court deems just and equitable." [Exc. 7-8]

The court's April 17 order awarded RPEA the declaratory and injunctive relief it sought. [Exc. 175, 179] The court initially directed the State to begin providing a constitutional – i.e., non-diminished – retiree dental plan by May 1, 2019. [Exc. 158] The court later recognized that the allowed time was unreasonably short, but the court *denied* the State's motion to be allowed until January 1, 2020, to implement a constitutional plan. [Exc. 257] Still, the State adhered to its own preferred timetable and did not provide

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[105] *See Southeast Conference*, 868 P.2d at 931 (superior court has discretion to relax Civil Rule 79 and Administrative Rule 7(c) and to award costs beyond what the rules allow when "leaving plaintiffs with uncompensated expert costs would unjustly chill public interest litigation or undercut the purpose of the public interest attorney rule").

retirees the ability to participate in a non-diminished dental insurance program until January 2020, more than eight months after the court's April 17 order. [Exc. 182]

The State now objects to two of the orders the court issued in response to RPEA's efforts to enforce the April 17 order and the final judgment based on that order. [At. Br. 46-48] Neither order was error.

A. THE COURT PROPERLY PRECLUDED THE STATE FROM TREATING THE 2014 PLAN AS THE DEFAULT.

The State announced in August 2019 that it had decided to comply with the court's April order by offering retirees the option of enrolling in either the 2013 Plan or the 2014 Plan (renamed the Legacy Plan and the Standard Plan). [R. 2653 (Tr. 10); Exc. 166] The 2013 Plan would have higher premiums. [R. 2655 (Tr. 20-21); Exc. 186] The State began publicly disclosing additional details of how it would implement the two-plan system in late August, with more information posted to its website in September. [Exc. 260-61] These pronouncements made clear for the first time that the State would declare an open enrollment period to start in November, and that the State would place any retiree who did not affirmatively select one plan or the other into the 2014 Plan. [Exc. 260-61, 273] RPEA protested. It asserted that retirees who prefer lower premiums are free to waive their constitutional right to a non-diminished plan – but constitutionally the State may not treat a retiree's non-action as a waiver of constitutional rights. [Exc. 263-64, 293] The superior court agreed and prohibited the State from making the 2014 Plan the default option for

retirees who did not select a plan for 2020. [Exc. 195][106]

Contrary to the State's contentions, the order prohibiting the State from treating the 2014 Plan as the default option neither granted new relief nor amended the final judgment. [At. Br. 46-47] The court's November 19 order enforced the August 8 final judgment. The entire point of the litigation and the judgment in RPEA's favor was to require the State to respect retirees' constitutional right to participate in a non-diminished dental insurance plan. The State's announcement that it would continue to provide only the unconstitutional plan to any retiree who did not take specific action in a specific time period was patently inconsistent with the judgment. The State may not avoid complying with the fundamental purpose of an order by insisting that the court did not specifically tell it everything it could not do in its purported efforts to comply. No case compels a court to draft an order or judgment in such a way as to anticipate and expressly forbid every attempt by the defendant

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[106] After failing to obtain a stay pending appeal [R. 2306-24; Exc. 214], the State complied with this order. It extended the open enrollment period and sent out new information. [Exc. 206; R. 2301-02] It advised that retirees who selected or were defaulted into one plan would be free to change between plans during the open enrollment period in any following year. [Exc. 184] By the time this appeal is fully briefed and this Court issues its decision, the "default" enrollment for anyone who failed to select a plan during the initial open enrollment period will have expired, effectively mooting the issues raised by the State concerning the court's authority to direct which plan could be the default option. This Court could choose not to address the State's appeal on this point. *See Clark v. State, Dep't of Corrs.*, 156 P.3d 384, 387 (Alaska 2007) ("We will not generally decide questions of law where the facts have rendered the legal issues moot. A claim is moot where a decision on the issue is no longer relevant to resolving the litigation, or where it has lost its character as a present, live controversy, that is, where a party bringing the issue would not be entitled to any relief even if he or she prevailed." (footnotes and internal quotation marks omitted)).

to circumvent an order.[107]

The court's order was not improper under *State v. Alaska Civil Liberties Union.*[108] The circumstances of this case are very different. In the *ACLU* litigation, this Court, in its first opinion, held that public employers' refusals to provide spousal benefits to same-sex couples who could not then legally marry in Alaska violated the Alaska Constitution's equal protection clause.[109] After additional briefing on appropriate remedies, this Court remanded to the superior court with directions to enter such orders as it deemed necessary to ensure compliance with this Court's decision within seven more months.[110] The Department of Administration then developed new regulations conferring medical and retirement systems benefits on same-sex partners of state employees.[111] When plaintiffs objected to some of those regulations, the superior court directed various revisions – and this Court, granting a petition for review by the State, held that it had not intended to authorize the superior court to review those details.[112] Rather, this Court explained, it had set a short deadline for compliance and thus, "absent a basis for finding bad faith, discriminatory intent, or clear facial invalidity," the usual presumption of regularity applied

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107 *Cf. Horchover v. Field*, 964 P.2d 1278, 1282-85 (Alaska 1998) (upholding superior court's post-judgment order to require defendant to provide an accounting, where the accounting was necessary to determine whether the recalcitrant defendant had complied with the court's judgment).

108 159 P.3d 513 (Alaska 2006) ("*ACLU II*").

109 *See Alaska Civil Liberties Union v. State*, 122 P.3d 781, 783 (Alaska 2005).

110 *See ACLU II*, 159 P.3d at 514.

111 *See id.*

112 *See id.*

to the new regulations, and any new constitutional challenges to particular regulations should be addressed in separate proceedings.[113]

In the current case, the superior court order forbidding the State from designating the 2014 Plan as the default addressed a "clear facial invalidity" in the State's proposal for complying with the court's judgment. Having held the 2014 Plan unconstitutional, the court quite properly could prohibit the State from forcing anyone to participate in it. Nor was the superior court's order problematic as an overbroad interpretation of limited authority granted by this Court; the superior interpreted and enforced its own order. Courts have inherent authority to do just that.[114]

This Court should find no problem with the order preventing the State from treating the 2014 Plan as the default plan for retirees who did not select a plan during the 2019 open enrollment period.

B. THE SUPERIOR COURT PROPERLY REQUIRED THE STATE TO IDENTIFY SOME OF THE CLAIMS THAT WERE DENIED BECAUSE THE STATE OPERATED AN UNCONSTITUTIONAL PLAN.

The State operated its unconstitutional plan for over six years, including eight and one-half months after the superior court's order declaring the plan unconstitutional. During those months, both the court and RPEA expressed concern that retirees continued to be

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113 *See id.* at 514-15.

114 *See* AS 22.10.020(c) ("The superior court and its judges may issue injunctions . . . and all writs necessary or proper to the complete exercise of its jurisdiction."), (g) ("Further necessary or proper relief based on a declaratory judgment . . . may be granted, after reasonable notice and hearing, against an adverse party whose rights have been determined by the judgment."); *see generally* Exc. 288-94 (RPEA's arguments to the superior court).

denied the benefits to which the court had determined they were entitled. [R. 2653-55 (Tr. 12-20); Exc. 262-65, 291] The court inquired in August 2019 whether the State was keeping any records of claims denied that would have been granted under the 2013 Plan, and the State said it was not. [R. 2653 (Tr. 12-13)] The State's representative in the courtroom, Emily Ricci, advised that "we could absolutely do a retrospective claims review and make sure that we are capturing any sort of denied claims and who those individuals were." [R. 2654 (Tr. 15)] The court indicated the State should do that, at minimum, and Ms. Ricci answered, "Yeah." [*Id.* (Tr. 15-16); *see also* R. 2657 (Tr. 26-27) (reiterating court's concern to identify at least the people whose claims had been denied since the court's order was announced)]

Despite this conversation between the court and Ms. Ricci, the State took no steps to identify any denied claims that would have been granted under the 2013 Plan. [Exc. 264-65] RPEA therefore sought an order directing the State to do what it had agreed to do. [*Id.*] The court heard from the parties in writing and at a status conference on November 19,[115] then entered an order directing the State to conduct the analysis it had said it could do to identify certain claims that had been denied that would have been granted if the State had not implemented the unconstitutional 2014 Plan. [Exc. 223][116] The order applies only

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[115] *See* Exc. 274-86 (State's opposition), 287-94 (RPEA reply); R. 2190 (order setting status conference for November 19, 2019); *see also supra* at 12 n.14 (noting State's failure to make the transcript or log notes of the November 19 status conference part of the record on appeal).

[116] This portion of the court's order was stayed, based on RPEA's non-opposition, after the State declared that the review would cost over $1.2 million and the cost would have to be borne by retirees. [At. Br. 21] For briefing on this issue, see State's motion for reconsideration and clarification [R. 2220-26, with exhibits at Exc. 197-207 and R. 2238-

to retirees who were enrolled in the 2013 Plan after January 1, 2020; it extends back to the date in January 2016 when RPEA filed its complaint. [*Id.*]

The State maintains that this order was improper and inconsistent with both the complaint and the superior court's April 2019 order. [At. Br. 47] This Court should reject this claim.

RPEA's complaint expressly sought declaratory and injunctive relief and "such other relief as the court deems just and equitable." [Exc. 8] When the superior ruled in April 2019 that the 2014 Plan represents an unconstitutional diminishment of retirees' benefits, it became both just and equitable, and fully consistent with the complaint, to consider how best to rectify the unconstitutional situation the State had created, particularly when the State opted to prolong for eight months the period of time in which it operated only the unconstitutional plan.

An order for money damages at that stage would have been an improper expansion of the relief requested in the complaint, but the order to identify some of the claims that were wrongfully denied while the unconstitutional plan was in effect was an appropriate equitable remedy within the court's discretion. Individual retirees might then, in separate actions, apply for reimbursement or other relief; those potential individual claims and the kinds of relief that could or should be granted are not before this Court. This kind of litigation, in separate proceedings, is akin to the separate proceedings the Court said would

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52], Order requesting response from RPEA regarding motion for clarification [Exc. 208-13], RPEA's response [R. 2210-12], State's reply [R. 2697-2711], Order [Exc. 221-24].

be required in *ACLU II*, if the plaintiffs there, or other parties, sought to challenge the State's actions in ways beyond those addressed in the original complaint.[117]

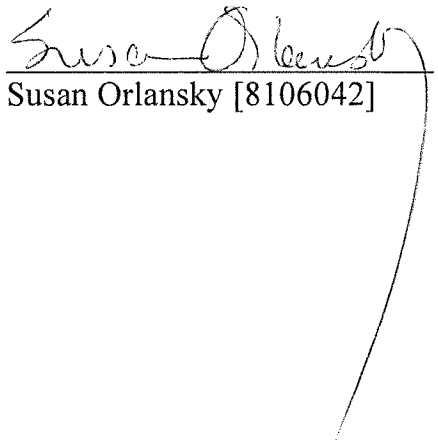
This Court should uphold the superior court's right to exercise its discretion to award equitable relief beyond that specifically requested in the complaint, where the complaint broadly asked for all equitable relief that the court deemed just.[118]

CONCLUSION

This Court should affirm in all respects the trial court's orders that the State has challenged.

Respectfully submitted, this 28th day of September, 2020.

REEVES AMODIO LLC



Susan Orlansky [8106042]

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[117] *See* 159 P.3d at 514-15. As noted earlier, RPEA agreed to stay the court's order, after learning the astronomical cost the State assigned to the project that it earlier had volunteered that it "absolutely could do." Further proceedings on remand might narrow the order.

[118] *See generally Recreational Data Servs., Inc. v. Trimble Navigation Ltd.*, 404 P.3d 120, 139-40 (Alaska 2017) (ordering award of nominal damages even where nominal damages were not specifically requested in the complaint, noting that plaintiff had sought general damages and "such other relief [as it is] entitled to under law").

IN THE SUPREME COURT FOR THE STATE OF ALASKA

KELLY TSHIBAKA, COMMISSIONER OF THE DEPARTMENT OF ADMINISTRATION, Appellant, v. THE RETIRED PUBLIC EMPLOYEES OF ALASKA, INC., Appellee.	)	No. S-17577

Superior court: 3AN-16-04537 CI

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE ERIC A. AARSETH, PRESIDING

APPELLEE'S EXCERPT OF RECORD
VOLUME I OF I

Filed in the Supreme Court
for the State of Alaska on
this ____ of September, 2020.

Meredith Montgomery, Clerk
Appellate Courts

By:_____
Deputy Clerk

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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. LESLIE RIDLE, COMMISSIONER OF THE ALASKA DEPARTMENT OF ADMINISTRATION, Defendant.	Case No. 3AN-16-04537 CI

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MOTION AND MEMORANDUM IN SUPPORT OF AWARD OF FULL REASONABLE ATTORNEYS' FEES AND COSTS

INTRODUCTION

This court has ruled that RPEA is the prevailing party and is a constitutional litigant entitled to recover full reasonable attorneys' fees and costs under AS 09.60.010(c),[1] and set today as the deadline for submitting a motion for fees and costs. RPEA now formally moves for an award of its full reasonable fees and costs for successfully pursuing its constitutional claim. As discussed below, RPEA should be awarded $226,015.00 in full reasonable attorneys' fees, $11,595.21 in Civil Rule 79 costs, and $51,758.75 in other reasonable costs.

[1] Findings and Conclusions at 22 (Apr. 16, 2019).

ARGUMENTS

I. RPEA QUALIFIES FOR AN AWARD OF ITS FULL REASONABLE ATTORNEYS' FEES AND COSTS UNDER AS 09.60.010(c) AND (d).

There should be no question that RPEA qualifies for an award of its full reasonable attorneys' fees and costs in this case. The two basic prerequisites for full recovery under AS 09.60.010 are (1) that the claim on which the party prevailed "concern[ed] the establishment, protection, or enforcement of a right under the United States Constitution or the Constitution of the State of Alaska"[2]; and (2) that the prevailing party "did not have sufficient economic incentive to bring the suit, regardless of the constitutional claims involved."[3]

Both these requirements are satisfied here:

(1) This case involved only one cause of action: "Violation of Alaska Constitution Article XII, § 7."[4] Thus, unlike cases that involve a mix of constitutional and non-constitutional claims, here there is no need to apportion the attorney hours between separate types of claims.[5] In short, *all* of the attorneys' fees and costs incurred in this case "were devoted to claims concerning rights under the Constitution of the State of Alaska upon which the claimant ultimately prevailed."[6]

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2 AS 09.60.010(c).

3 AS 09.60.010(d)(2).

4 Complaint at 6-7.

5 *See* AS 09.60.010(d)(1); *compare Lake & Peninsula Borough v. Oberlatz*, 329 P.3d 214, 227 (Alaska 2014) (requiring apportionment of attorneys' hours when suit involved both constitutional and non-constitutional claims).

6 AS 09.60.010(d)(1); *see also Manning v. State, Dep't of Fish & Game*, 355 P.3d 530, 539-40 (Alaska 2015) (discussing how hours necessarily expended even on purely

(2) RPEA is a nonprofit corporation whose primary purpose is to educate retired State employees about their retirement benefits and to assist them in obtaining the benefits to which they are legally entitled. RPEA sought no relief for itself. It sought no money damages, but only declaratory and injunctive relief on behalf of retirees, including both its members and other retirees who are not members of RPEA.[7] When a plaintiff seeks only declaratory and injunctive relief, this is strong evidence that the plaintiff had no sufficient economic incentive to bring the suit.[8]

Based on the nature of this case and controlling case law, this court correctly determined that RPEA is a constitutional litigant entitled to an award of its full reasonable attorneys' fees and costs.

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II. THE ATTORNEYS' FEES REQUESTED ARE REASONABLE AND WERE NECESSARILY INCURRED IN THIS LITIGATION.

The reasonableness of a request for attorneys' fees depends on the billing rates of the attorneys and the number of hours they billed.[9] RPEA's attorneys set their billing rates in this case at $300/hour (for Susan Orlansky) and $200/hour (for Gavin Kentch).[10] These charges are below market rate in this community for attorneys of comparable

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procedural matters qualify as costs incurred in connection with claims concerning constitutional rights, unless the State proves the issue would not have arisen if the constitutional issue had not been part of the case).

7 Complaint at 7-8; RPEA's Proposed Findings and Conclusions at 21-22.

8 *See Alaska Conservation Foundation v. Pebble Ltd. P'ship*, 350 P.3d 273, 284-85 (Alaska 2015).

9 *See generally Nautilus Marine Enterprises, Inc. v. Exxon Mobil Corp.*, 332 P.3d 554, 558-59, 560-62 (Alaska 2014) (separately discussing the reasonableness of attorneys' rates and the number of hours expended).

10 *See* Affidavit of Susan Orlansky ¶ 4; Affidavit of Gavin Kentch ¶ 4.

experience.[11] RPEA's lead counsel accepted a discounted rate based on the public interest nature of this case.[12] Case law would support a request calculated using higher rates[13] – but to simplify the litigation of attorneys' fees, RPEA seeks reimbursement only for the actual, discounted rates that it paid its counsel.

The number of hours billed is also eminently reasonable. RPEA's attorneys were efficient. For example:

- For most of the case, only one lawyer worked on this litigation, avoiding any possibility of duplicative efforts; a second attorney was brought in only to assist at trial and with the post-trial briefing.[14]
- To minimize costs, RPEA minimized formal discovery. RPEA served and responded to written discovery; all discovery disputes were resolved between the parties, and the court files thus show no contested discovery motions. RPEA scheduled only one formal deposition (of Emily Ricci) and one "informal deposition" (of Moda employees).[15] By contrast, the

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11 *See* Orlansky Aff. ¶ 5; Kentch Aff. ¶ 7.

12 *See* Orlansky Aff. ¶ 4.

13 *See Cizek v. Concerned Citizens of Eagle River*, 71 P.3d 845, 849 (Alaska 2003) (court may award attorneys' fees based on a determination of a reasonable rate, even if the client has no obligation to pay its attorneys); *Arctic Slope Native Ass'n v. Paul*, 609 P.2d 32, 38 (Alaska 1980) (court may award attorneys' fees based on attorneys' customary rates, even when the attorneys worked for the client at a discounted rate).

14 *See* Orlansky Aff. ¶¶ 1-2; Kentch Aff. ¶ 2. Additionally, a paralegal was retained through Mr. Kentch's office (but billed to RPEA through Ms. Orlansky's office) for one day of work in checking citations as part of preparing the written closing argument. *See* Orlansky Aff. ¶ 2; Exhibit 1 to Orlansky Aff. at 51.

15 RPEA served Moda with a Notice of Rule 30(b)(6) Deposition. After Moda's in-house counsel advised that multiple employees would be required to answer the

State scheduled depositions of all six of RPEA's witnesses.

- RPEA worked cooperatively with the State on many procedural matters, avoiding the time and expense of contested motions for continuances and other procedural matters on which parties often disagree.

Detailed, itemized invoices are provided with this memorandum.[16] Review of these entries will show that the work performed by RPEA's counsel was reasonable in nature and amount, particularly in light of the fact that both the legal and factual issues in this case were novel, requiring more time to learn the relevant body of facts, to determine what kinds of witnesses and documents could be used to prove the claim, and to learn how to critique and challenge the evidence relied on by the State. This court almost certainly has seen much larger bills for more run-of-the-mill cases that included a six-day trial with ten witnesses, including multiple experts.

Because the total hours and the hourly rates are reasonable, this court should award RPEA the full attorneys' fees that RPEA incurred in bringing this suit.

III. RPEA'S COSTS ARE REASONABLE.

RPEA's costs can be divided into two categories: those specifically addressed in Civil Rule 79 and other costs reasonably incurred in this litigation. These two categories are discussed separately in the sections that follow.

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questions listed in RPEA's Notice, RPEA agreed that, instead of a series of depositions, it would conduct what was essentially a conference call, in which Moda chose the individuals to participate, so they could consult with each other even during the call, and no one was placed under oath. The State's counsel was invited to – and did – attend. *See* Orlansky Aff. ¶ 9.

16 *See* Exhibit 1 to Orlansky Aff.; Exhibit 1 to Kentch Aff.

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A. Civil Rule 79 costs

The cost bill filed with this motion itemizes the costs that RPEA incurred that are specifically allowed under Civil Rule 79 and Administrative Rule 7. Receipts and other documents substantiating these costs will be made available to the State upon request.

The Rule 79 costs requested are summarized below:

(1)	Filing fee (Rule 79(f)(1))	$200.00
(2)	Postage for service of process (Rule 79(f)(2))	$37.80
(3)	Depositions (Rule 79(f)(6))	$2,615.00
(4)	Witness fees for experts (Rule 79(f)(7))	$572.00[17]
(5)	Travel costs for witnesses (Rule 79(f)(2), (g)(1)(D))	$5,249.64
(6)	Computerized legal research	$523.07
(7)	Copying costs from a copy center and court reporter (Rule 79(f)(12)(A))	$137.88
(8)	Copying costs, in-house (Rule 79(f)(12)(B))	$468.82
(9)	Court-ordered transcript[18]	$1,791.00
	Total:	**$11,595.21**

This court should award RPEA all the costs listed in the Cost Bill.

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[17] *See* Orlansky Aff. ¶ 14 (explaining how this number was calculated).

[18] This amount represents one-half the total cost of having the trial testimony transcribed. The parties agreed to have the transcript prepared, and to split the cost, so that the attorneys could refer to the transcript in preparing proposed findings, and so that the court also could use the transcript in preparing its decision. RPEA provided a copy of the full transcript to the court. While the court did not literally "order" preparation of the transcript, the court set the briefing schedule to accommodate the time needed to complete preparation of the transcript, and presumably the court benefited from having a copy of the transcript. RPEA believes that the transcript cost should be treated as if it were for a "court-ordered" transcript for purposes of Rule 79. Alternatively, RPEA's transcript cost of $1791 should be considered a reasonable cost for purposes of Argument III(B).

B. Other reasonable costs

The statute governing the award of fees and costs to a prevailing constitutional litigant provides expressly that the court "*shall award . . . full reasonable* attorney fees and *costs*."[19] This provision is much broader than Rule 79, which allows for an award in most cases of only certain specified costs.[20]

RPEA does not seek an award of literally all the costs it reasonably incurred in connection with bringing this suit, but it seeks an award of the following reasonable costs that are not otherwise covered by Rule 79:

(1) Payment to Moda for analyzing data ($2940)

During the discovery phase of this case, RPEA sent interrogatories to the State, requesting various categories of information on claims paid and denied by Moda. The State responded that it was not then in possession of the requested information; it stated that it would forward RPEA's requests to Moda, and would later provide RPEA with any information that Moda produced without cost to the State.[21] Meanwhile, with deadlines for expert reports approaching, RPEA's counsel contacted Moda's in-house counsel and set up the "informal deposition" described *supra* at note 15. The communications with Moda established that Moda had the relevant data and the ability

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[19] AS 09.60.010(c) (emphasis added).

[20] Rule 79 complies with AS 09.60.010(a), which directs the Supreme Court to "determine by rule . . . the costs, if any, that may be allowed a prevailing party in a civil action." This language in subsection (a) is much narrower than the language in subsection (c) of AS 09.60.010, which states that the court shall award "full reasonable . . . costs."

[21] Orlansky Aff. ¶ 9. Eventually, about a week before expert reports were due, the State produced large databases showing Moda's claim handling, but the format was difficult for RPEA's witness to use. *See* Kelly Farmer testimony at Tr. 961.

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to analyze it, but, as a non-party, Moda asserted that it could not be required to spend its resources analyzing data to respond to RPEA's discovery requests.[22] Arguably, Moda was the State's agent and therefore could be compelled (by the State or the court) to produce the requested information; however, RPEA accepted Moda's position and agreed to pay Moda's reasonable costs for analyzing data in the categories that RPEA requested. Moda did the work, then produced the analysis to the State as well as to RPEA. Only RPEA paid for the analysis.[23] RPEA provided the analysis to the court as its Trial Exhibits 1008, 1009, 2024, 2025, and 2026.[24]

Given the volume of data at issue and the special skills required to analyze it, the decision to pay Moda for this analysis was a reasonable and cost-effective[25] way to obtain evidence for use at trial. The cost incurred for the analysis should be considered a reasonable cost that RPEA incurred in presenting its constitutional claim and therefore RPEA should be entitled to recover this cost.

(2) Expert fees paid to Todd Allen and Kelly Farmer ($11,475 and $30,002.50)

Civil Rule 79 and Administrative Rule 7 authorize recovery of very limited costs for expert witnesses: up to $150/hour for time spent actually testifying at trial. As the court knows, a party retaining an expert witness must pay for much more than simply

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22 Orlansky Aff. ¶ 9.

23 *Id.*

24 Exhibits 2024, 2025, and 2026 were marked and labeled as exhibits by the State. RPEA had marked and labeled the identical tables as a single exhibit, its Exhibit 1010, but agreed to withdraw its exhibit and to use the State's three exhibits. *See* Orlansky Aff. ¶ 9.

25 RPEA paid Moda $175/hour for the analysis. *See* Orlansky Aff. ¶ 9.

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the trial testimony – including the expert's time to review relevant documents, conduct appropriate analyses, prepare a written report, and prepare to answer questions at deposition and trial.

RPEA made efforts to keep its expert costs low. It used four testifying experts, two of whom did all of their work for free. The other two experts, Todd Allen and Kelly Farmer, charged very reasonable rates: $175/hour and $110/hour, respectively. Their total bills to RPEA for expert time (not including any out-of-pocket expenses) were $11,475 and $30,002.50, respectively.[26]

Mr. Allen's time was spent in the way experts typically spend their time: reviewing documents, drafting a report, and preparing to testify.[27]

The bulk of Ms. Farmer's time was spent reviewing the voluminous discovery produced by the State – 20,937 Bates-stamped pages, which included giant spreadsheets each labeled as a single "page."[28] In that sense, much of Ms. Farmer's work corresponded to work that customarily is performed by a lawyer and is sometimes delegated to a paralegal, which would be recoverable as part of attorneys' fees.[29]

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[26] The small amount recoverable under Civil Rule 79(f)(7) for Mr. Allen's time testifying at trial ($425) has been subtracted from his bill to RPEA to avoid double-counting. No subtraction was made as to Ms. Farmer's reimburseable time under Rule 79(f)(7), because the available invoices, for which reimbursement is requested in this section, do not include any time spent in June, when Ms. Farmer testified. *See* Orlansky Aff. ¶ 9; Exhibit 3 to Orlansky Aff.

[27] Mr. Allen's bills to RPEA are provided as Exhibit 2 to the Orlansky Affidavit.

[28] Ms. Farmer's bills to RPEA are provided as Exhibit 3 to the Orlansky Affidavit. *See also* Orlansky Aff. ¶ 9.

[29] *See* Civil Rule 82(b)(2) ("[A]ctual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk.").

During trial preparation, RPEA's lead counsel did not retain a paralegal or bill for paralegal work performed by staff in her office, and counsel did not spend significant time reviewing the discovery.[30] As a mix of expert witness and paralegal work, Ms. Farmer's time was a cost reasonably incurred in pursuit of RPEA's constitutional claim.

Because RPEA is a constitutional litigant entitled to an award of full reasonable costs, it should be awarded the costs it incurred for services by Mr. Allen and Ms. Farmer.

(3) Costs paid to a consulting actuarial expert ($7,341.25)

A centerpiece of the State's defense was the "actuarial analysis" presented by Richard Ward. RPEA did not retain an actuary to testify at trial, but it retained a non-testifying expert to consult and to assist its counsel with cross-examination of Mr. Ward.[31] The consultant selected was Cirdan Health Systems. Individuals with Cirdan reviewed the State's expert reports, conferred with RPEA counsel, and provided suggestions for questions to ask and other resources to use to challenge Mr. Ward's work.[32]

The cost of a consulting expert was a reasonable cost incurred by RPEA to present its constitutional claim to the court, and should be a recoverable cost under AS 09.60.010(c). The bill from Cirdan as a consulting expert was significantly less than the

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30 *See* Exhibit 1 to Orlansky Aff.

31 Orlansky Aff. ¶ 9.

32 The invoices from Cirdan to RPEA are provided as Exhibit 4 to the Orlansky Affidavit.

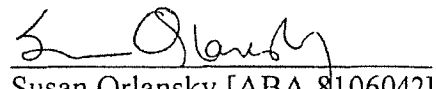
cost RPEA would have incurred for retaining a testifying expert to rebut Mr. Ward's analysis.

CONCLUSION

RPEA respectfully requests that the court find that the costs it actually incurred for counsel were all reasonably and necessarily incurred in connection with its constitutional claim. Similarly, RPEA requests that the court find that the costs it actually incurred, as described above, were reasonably incurred and are recoverable under Civil Rule 79 and AS 09.60.010(c). The State should be required to pay the fees and costs awarded to RPEA from the State's general fund, not from any trust or account funded in full or part by retirees.

Dated this 1 day of May, 2019.

REEVES AMODIO LLC



Susan Orlansky [ABA 8106042]

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

FILED
STATE OF ALASKA
DISTRICT
2012 MAY 23 PM 4: 12
CLERK TRIAL COURTS
BY: _____
DEPUTY CLERK

THE RETIRED PUBLIC EMPLOYEES OF ALASKA, INC.,	)	
Plaintiff,	)	
v.	)	
KELLY TSHIBAKA, in her official capacity as Commissioner of the Department of Administration,*	)	
Defendant.	)	Case No. 3AN-16-04537 CI

#14

DEFENDANT'S OPPOSITION TO RPEA'S MOTION FOR AN AWARD OF FULL REASONABLE ATTORNEYS' FEES AND COSTS

RPEA brought this action on behalf of its constituents to protect a contractual benefit that it asserts its members earned in exchange for their public employment.[1] Central to RPEA's argument—and the Court's decision in favor of RPEA—was the claim that the retirees' dental benefits were "'an element of the consideration that the state contracts to tender in exchange for services rendered by the employee.'"[2] Despite this, RPEA now asserts that it is entitled to full reasonable attorneys' fees as a constitutional litigant pursuant to AS 09.60.010(c)(1). But because RPEA's members

* Kelly Tshibaka is substituted for her predecessor, Leslie Ridle, as Commissioner of the Department of Administration. Alaska Rule of Civil Procedure 25(d)(1).

1 Complaint, ¶ 4 ("RPEA has standing to sue on behalf of its constituents, and has done so in the past."); *id.*, ¶ 12 ("The Alaska Constitution, Article XII, § 7 provides that membership in a state employee retirement system constitutes a contractual relationship and that the accrued benefits of these systems 'shall not be diminished or impaired.'").

2 RPEA's Mem. in Opp'n to Def's Cross-Motion for Summ. J, at 1 (quoting *Duncan v. Retired Public Employees of Alaska, Inc.*, 71 P.3d 882, 887 (Alaska 2003).

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had a sufficient economic interest to bring this lawsuit, regardless of the constitutional claims involved, RPEA does not qualify for full fees under the statute. Further, even if it qualifies as a constitutional litigant, AS 09.60.010(c)(1) only allows RPEA to recover costs authorized by Rule 79. RPEA is not entitled to recover the costs associated with obtaining documents from Moda, expert preparation fees, or the fees incurred for a non-testifying expert. The State respectfully asks the Court to deny RPEA's motion for full fees and award attorneys' fees consistent with Alaska Rule of Civil Procedure 82, which provides for 30 percent of reasonable fees for a case decided after trial. The State also asks the Court to limit RPEA's recovery of costs to only those costs allowed for under Rule 79.

ARGUMENT

I. RPEA is not entitled to full reasonable fees under AS 09.60.010(c)(1).

Alaska Statute 09.60.010(c)(1) provides that in a civil action brought to assert rights under the federal or state constitution, the court shall award "full reasonable attorney fees and costs to a claimant, who, as a plaintiff . . . has prevailed in asserting the right." But the statute also includes an important limitation: "the court shall make an award *only if the claimant did not have sufficient economic incentive to bring the suit*, regardless of the constitutional claims involved."[3]

The Alaska Supreme Court has held that the analysis of whether a party had a sufficient economic incentive to bring litigation under AS 09.60.010 is essentially the

[3] AS 09.60.010(d)(2) (emphasis added).

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same as the Court's analysis under the old common law public interest litigant exception to the Alaska rules governing attorneys' fees.[4]

"As the party claiming public interest litigant status, [RPEA has] the burden of showing that it did not have sufficient economic interest to file suit."[5] To meet that burden, the Court must look to both the "nature of the claim and relief sought" and "the direct economic interest at stake."[6] This requires the Court to consider the facts of the case.

RPEA argues that it "sought not relief for itself."[7] Instead, "[i]t sought no money damages, but only declaratory and injunctive relief on behalf of retirees, including both its members and other retirees who are not members of RPEA."[8] But although RPEA's complaint requested "only declaratory and injunctive relief," the Alaska Supreme Court has said that "'[e]conomic interest need not take the form of damages,' and requesting injunctive relief does not guarantee a lack of economic motivation."[9] That is especially the case here, where the relief sought was the protection of what RPEA has characterized as an accrued benefit—dental coverage—that amounted to deferred

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4 *Alaska Conservation Found. v. Pebble Ltd. Partnership*, 350 P.3d 273, 281 (Alaska 2015).

5 *Fairbanks North Star Borough v. ICHRRA*, 137 P.3d 289, 291 (Alaska 2006).

6 *Alaska Conservation Found.*, 350 P.3d at 282.

7 Motion, at 3.

8 Motion, at 3.

9 *Alaska Conservation Found.*, 350 P.3d at 282 (quoting *Matanuska-Susitna Borough Sch. Dist. v. State*, 931 P.2d 291, 403 (Alaska 1997)).

compensation because the retirees had earned this level of coverage as compensation for their public employment. RPEA cannot escape that this litigation was about money simply by requesting an injunction requiring the State to cover a certain level of dental care.

For the same reason, RPEA's argument that it lacks a "direct economic interest" in the outcome of the litigation is without merit. The fact that RPEA is a non-profit organization does not mean it does not have economic interests sufficient to motivate litigation.[10] RPEA relied on the economic interests of its members to obtain the standing necessary to pursue this litigation.[11] An association has standing to sue on behalf of its members when:

> (1) its members would otherwise have standing to sue in their own right; (2) the interests its seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[12]

RPEA's primary purpose is "to assist [retirees] in obtaining the benefits to which they are legally entitled."[13] RPEA's members had standing because they were the ones

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10 *See e.g., Kachemak Bay Watch, Inc. v. Noah*, 35 P.2d 816, 820–21, 828 (Alaska 1997) (upholding superior court's denial of public interest litigant status to a non-profit corporation).

11 Complaint, ¶ 4 ("RPEA has standing to sue on behalf of its constituents, and has done so in the past.")

12 *Alaskans for a Common Language, Inc. v. Kritz*, 3 P.3d 906, 915 (Alaska 2000).

13 RPEA's Closing, at 1.

legally entitled to the dental benefits.[14] In furtherance of its primary purpose, RPEA argued to this Court—and the Court agreed—that dental coverage is "'regarded as an element of the bargained-for consideration given in exchange for an employee's assumption and performance of the duties of his employment.'"[15] In other words, RPEA's position is that "[dental] benefits are 'in the nature of deferred compensation.'"[16]

Among the many diminishments to dental coverage identified by RPEA was the implementation of a network with steerage. RPEA argued that the 2014 plan diminished its members' benefits because they are "financially penalized for seeing a dentist who has not joined the Moda network."[17] Thus, RPEA was seeking to protect the financial interest of its members.

That RPEA has a direct economic interest in the outcome of the litigation is further apparent when looking at what the Alaska Supreme Court has considered to be

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[14] That RPEA's members had a sufficient economic interest to pursue this litigation is further evidenced by the fact that some retirees administratively appealed the denial of their coverage by arguing that the 2014 changes amounted to a diminishment of their benefit. *See, e.g.*, In the Matter of Bradley D. Owens, OAH 15-0621-PER, Notice Regarding Proposed Action (attached as Exhibit A). Mr. Owens is not alone in his willingness to pursue litigation over retiree benefits. Additional decisions issued by the Office of Administrative Hearings regarding retiree benefits can be found on its website at: https://aws.state.ak.us/OAH/Category/Item?cat=101.

[15] RPEA's Memo. ISO Mot. for Partial Summ. J., at 2 (quoting *Hammond v. Hoffbeck*, 627 P.2d 1052, 1056 (Alaska 1981)).

[16] RPEA's Memo. ISO Mot. for Partial Summ. J., at 2 (quoting *Hammond*, 627 P.2d at 1056).

[17] RPEA's Closing Argument, at 31.

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only an indirect interest. For example, in *Kodiak Seafood Processors Association v. State*, the court held that although the association's members had "a significant stake in the crab and bottom fisheries around Kodiak," the "potential economic benefit to KSPA from this litigation is indirect" because the litigation itself would not reopen those fisheries.[18] In other words, KSPA did not have a *direct interest* because even if it prevailed in the litigation, it would not benefit economically unless other events also occurred that were not tied to the litigation. Here, RPEA's economic interest is unquestionably direct—the purpose of the litigation was to ensure that its members could obtain the level of dental coverage that RPEA argued the retirees had earned in exchange for their public employment; and RPEA's victory in this Court will—absent reversal on appeal—produce that outcome.

Alaska Statute 09.60.010(d)(2) directs that "the court shall make an award only if the claimant did not have sufficient economic incentive to bring the suit, regardless of the constitutional claims involved."[19] Stripped of its constitutional dimension, this case boils down to benefit recipients—through an association working on their behalf—suing the State to ensure that they get reimbursed for a certain level of dental coverage. If a borough and school district have a sufficient economic incentive to challenge the State's education funding system to defeat their claim to public interest litigant status,[20] then

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18 900 P.2d 1191, 1198–99 (Alaska 1995).

19 AS 09.60.010(d)(2).

20 *Matanuska-Susitna Borough School District v. State*, 931 P.2d 391, 403 (Alaska 1997) (holding borough and school district had sufficient economic incentive to

RPEA cannot meet its burden under AS 09.60.010 because this litigation is directly related to compensation that its members earned in exchange for work performed.

II. RPEA may not recover costs beyond those authorized under Rule 79.

In addition to full, reasonable attorney's fees, RPEA seeks a total of $63,353.96 in costs. Of those costs, $11,595.21 are costs recoverable under Rule 79, and $51,758.75 are costs RPEA seeks under AS 09.60.010. The State does not object to RPEA's Rule 79 costs, but does object to RPEA's attempt to seek "other reasonable costs" beyond what is authorized by Rule 79. This includes RPEA's request for $2,940 paid to Moda to analyze data, $41,477.50 paid to expert witnesses for work other than testifying, and $7,341.25 paid to a non-testifying actuarial expert.

Alaska Statute 09.60.010 narrowed the public interest litigant exception previously recognized by the Alaska Supreme Court.[21] It did not broaden it. The statute was enacted to "expressly overrule" the court's public interest litigation decisions "'insofar as they relate to the award of attorney fees . . . to or against public interest

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challenge state education funding formula); *see also Kenai Lumber Co., Inc. v. LeResche*, 646 P.2d 215, 223 (Alaska 1982) (holding timber company had sufficient economic interest to challenge amendment to long term timber sale contract between State and competitor).

[21] *See Alaska Conservation Found.*, 350 P.3d at 280 ("[T]he Alaska Legislature abrogated and replaced our public interest litigation exception to Rule 82 with a new statutory provision that encourages and protects parties bringing constitutional claims."); *State v. Native Village of Nunapitchuk*, 156 P.3d 389, 395 (Alaska 2007) (quoting superior court's finding that AS 09.60.010 overruled Alaska Supreme Court decisions and created "a limited constitutional claimant public interest litigant exception").

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litigants in future civil actions.'"[22] The legislature was concerned that the "judicially created doctrine" had "created an unbalanced set of incentives for parties litigating issues that [fell] under the public interest litigant exception,'" and that "'[t]his imbalance [had] led to increased litigation, arguments made with little merit, difficulties in compromising claims, and significant costs to the state and private citizens.'"[23]

Despite this purpose, RPEA argues that AS 09.60.010 entitles it to costs beyond those allowed by Civil Rule 79. But even under the Supreme Court's more expansive public interest litigant jurisprudence, there was no public interest exception to the scope of allowable costs under Rule 79. To the contrary, in *Hickel v. Southeast Conference*, the Supreme Court expressly declined to find a public interest exception to Administrative Rule 7(c), which limits the amount of expert witness fees a prevailing party may recover under Rule 79.[24] Here, RPEA seeks to recover *all* of its expert witness fees, including fees that it paid to a non-testifying expert. The Supreme Court "has allowed an award of costs for experts' pre-trial preparation time *only* in (1) cases involving bad faith or reprehensible conduct, or (2) in divorce cases where awards of

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22 *Krone v. State, Dep't of Health and Social Servs.* 222 P.3d 250, 254 (Alaska 2009) (quoting Chapter 86, § 1(b), SLA 2003)).

23 *Id.* (quoting Chapter 86, § 1(b), SLA 2003)).

24 868 P.2d 919, 931 (Alaska 1994); *see also* Administrative Rule 7(c) ("Recovery of costs for a witness called to testify as an expert is limited to the time when the expert is employed and testifying and shall not exceed $150.00 per hour, except as otherwise provided in these rules.").

costs are not governed by Rule 7(c)."[25] Moreover, the court has interpreted Rule 7(c) to mean that "'[a] party may not recover . . . any costs associated with experts if they do not testify.'"[26]

Rather than adopting a public interest exception to the Rule 79 cost limitations, the court in *Hickel* left the issue to the trial court's discretion under Rule 94. Civil Rule 94 allows the trial court to dispense with a rule of procedure if it is "manifest to the court that a strict adherence to [the rule] will work injustice." The Supreme Court concluded that the superior court had discretion to ignore Administrative Rule 7(c) if it decided that "leaving plaintiffs with uncompensated expert costs would unjustly chill public interest litigation or undercut the purpose of the public interest attorney rule."[27]

Nothing in the legislative history of AS 09.60.010 suggests that the Legislature wanted to expand the Supreme Court's public interest litigant jurisprudence to require the State to pay for costs that not even the Supreme Court required it to pay under its version of the public interest litigant exception to Rule 82. Instead, everything in the legislative history suggests that the Legislature wanted to narrow the scope of the public interest litigant exception and put the parties on "more equal footing."[28] As such, the Court should decline RPEA's request for an expansive reading of AS 09.60.010 and

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25 *Hickel*, 868 P.2d at 931. RPEA has made no allegation of bad faith in this case.

26 *Id.* (quoting *Atlantic Richfield Co. v. State*, 723 P.2d 1249, 1253 (Alaska 1986).

27 *Id.* (internal quotation marks omitted).

28 Ch. 86, § 1(a), SLA 2003.

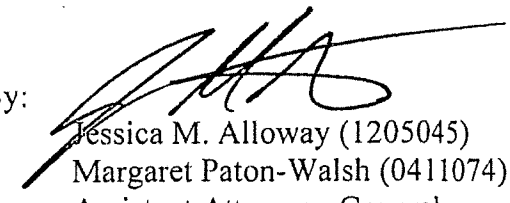
limit RPEA's recovery to the costs authorized under Rule 79 and Administrative Rule 7(c).

CONCLUSION

RPEA has asked this Court to award it $226,015.00 in full reasonable attorneys' fees, $11,595.21 in Civil Rule 79 costs, and $51,758.75 in other reasonable costs. Because RPEA is not entitled to full, reasonable attorneys' fees under the statute and because it requests costs in excess of what is authorized by Rule 79, the State asks the Court to deny RPEA's motion for fees, instead making a reduced award based on Alaska Rules of Civil Procedure 79 and 82.

Dated: May 23, 2019.

KEVIN G. CLARKSON
ATTORNEY GENERAL

By: 
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THIRD DISTRICT
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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. KELLY TSHIBAKA, COMMISSIONER OF THE ALASKA DEPARTMENT OF ADMINISTRATION, Defendant.	Case No. 3AN-16-04537 CI

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RPEA'S REPLY IN SUPPORT OF MOTION FOR FULL ATTORNEYS' FEES AND COSTS

INTRODUCTION

For starters, it is important to note what the State does not dispute. At this point, there is no dispute that (1) RPEA is the prevailing party, (2) RPEA is entitled to an award of attorneys' fees, (3) RPEA's entire suit involves a constitutional claim, (4) the hours expended by RPEA's attorneys are reasonable, (5) the rates charged by RPEA's attorneys are reasonable, and (6) RPEA is entitled to recover the costs claimed in its cost bill.

The arguments below respond to the two challenges the State has articulated.

I. RPEA QUALIFIES FOR AN AWARD OF ITS *FULL* REASONABLE FEES UNDER AS 09.60.010.

AS 09.60.010(c)(1) and (d)(2) together provide for an award of full reasonable attorneys' fees when the claim on which the plaintiff prevailed concerned the establishment, protection, or enforcement of a right under the state constitution, and the

party "did not have sufficient economic interest to bring the suit, regardless of the constitutional claims involved." The State concedes the first prong of the test, and contests the second. This court should reject the State's position and award RPEA its full fees, because neither RPEA as an organization nor any its members had a sufficient economic incentive to bring the case.

In support of its claim that RPEA, through its members, had a "direct economic interest" in the outcome of this case, the State notes that RPEA relied on the interests of its members as the basis to establish its own standing to pursue this case. [Opp. at 4-5] But standing is a very different question. The Supreme Court has written: "'Standing' is not synonymous with 'economic incentive.'"[1] The State also refers to individual retirees' administrative appeals, in which some retirees attempted to challenge a denial of benefits under the 2014 dental plan. [Opp. at 5 n.14] These administrative appeals prove nothing. The Supreme Court's cases have never suggested that an individual's willingness to pursue an administrative appeal establishes an economic incentive to pursue litigation in the court system, where (in the administrative appeal) claimants often proceed pro se and attorney fees cannot be awarded no matter the outcome, so long as the appeal was not frivolous or pursued in bad faith.

Furthermore, the State's claim that retirees *benefit* economically from this

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[1] *Oceanview Homeowners Ass'n, Inc. v. Quadrant Constr. & Eng'g*, 680 P.2d 793, 799 n.3 (Alaska 1984); *see id.* at 799 (holding that a homeowners association, with standing to litigate a zoning decision, did not have sufficient economic incentive to disqualify it from being a public interest litigant).

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litigation is an unexpected position for the State to take: Throughout this case, the State has claimed that the revisions to the retiree dental plan that it adopted in 2014 benefited RPEA's members by reducing their premiums; in its motion for a stay, the State continues to assert that, as a result of RPEA's prevailing at trial, retirees' premiums will increase substantially.[2] In other words, in all its other pleadings, the State believes that retirees' economic interests are disserved by RPEA's litigation. The State cannot have it both ways.

In any event, before considering the extent that any retiree may benefit from this lawsuit, the Supreme Court directs that the first consideration must be whether the plaintiff's primary motivation in bringing suit was economic. In *Alaska Conservation Foundation v. Pebble Limited Partnership*,[3] the Supreme Court stated: "Since *Kenai Lumber* our focus has been on primary purpose: A litigant has sufficient economic incentive to bring a claim when it is brought primarily to advance the litigant's direct economic interest, regardless of the nature of the suit."[4] In *Kenai Lumber*, the Court

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2 *See* Affidavit of Ajay Desai ¶¶ 9-13, filed with Defendant's Motion to Stay Order Until January 1, 2020.

3 350 P.3d 273 (Alaska 2015).

4 *Id.* at 281-82, referring to *Kenai Lumber Co., Inc. v. LeResche*, 646 P.2d 215 (Alaska 1982); *see also Ninilchik Traditional Council v. Noah*, 928 P.2d 1206, 1218-19 (Alaska 1996) (holding that two commercial fishermen's associations qualified as public interest litigants where economic motivation was not a significant factor in bringing the suit); *Eyak Traditional Elders Council v. Sherstone, Inc.*, 904 P.2d 420, 426 (Alaska 1995) (holding that plaintiff was a public interest litigant even though it sought over $300,000 in compensatory damages, since its primary motivation was to protect ancestral lands for their historic and cultural value).

explained that, where the sums at stake for an individual or corporation are large enough, a court can conclude that the plaintiff was not acting in the public interest but in his own private interest.[5]

To determine whether a plaintiff group qualifies as a public interest litigant, the court must consider the economic interests of a typical member.[6] Where all or most members "would individually reap substantial economic benefits from successful litigation, the group itself may properly be denied status as a public interest litigant. But a group may be a public interest litigant even though some members might profit from successful litigation."[7]

The Supreme Court has stressed repeatedly that the economic interest of a typical member of a group must be "substantial" in order to find that the group is not a public interest litigant.[8] The Supreme Court has never set a dollar amount that either precludes

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5 *See Kenai Lumber*, 646 P.2d at 223.

6 *See Matanuska Elec. Ass'n, Inc. v. Rewire the Board*, 36 P.3d 685, 697 (Alaska 2001); *Keane v. Local Boundary Comm'n*, 893 P.2d 1239, 1251 (Alaska 1995); *Citizens for the Preservation of the Kenai River, Inc. v. Sheffield*, 758 P.2d 624, 627 (Alaska 1988).

7 *Rewire the Board*, 36 P.3d at 697 (footnotes omitted).

8 *See, e.g.*, *Kachemak Bay Watch, Inc. v. Noah*, 935 P.2d 816, 827-28 (Alaska 1997) (upholding denial of public interest litigant status where members of the plaintiff group had "substantial personal economic interest" in the outcome of the litigation); *Fairbanks Fire Fighters Ass'n, Local 1324 v. City of Fairbanks*, 934 P.2d 759, 763 (Alaska 1997) (a public interest litigant "may have some minimal or indirect personal interest in the outcome of an action, so long as that party's interest is insufficient to provide an incentive to litigate in the absence of public interest concerns"), 764 (denying public interest litigant status to group that sought direct payment of "substantial funds" to its members); *Municipality of Anchorage v. Citizens for Representative Governance*, 880 P.2d 1058, 1062-63 (Alaska 1994) (the prospect of some individuals losing a monthly stipend of

or establishes public interest litigant status – but it has said that a claim for over $25,000 for an individual qualifies as a sufficient economic interest to preclude public interest litigant status,[9] and it has twice repeated that a plaintiff seeking an award "in the low four figures" lacks an economic incentive to bring a lawsuit.[10]

Applying these standards to this case supports the conclusion that RPEA is a public interest litigant. Its primary motivation in bringing the suit was to establish that "optional" benefits – like DVA insurance – are covered by the non-diminishment clause in Article XII, § 7 of the Alaska Constitution. RPEA's complaint and litigation strategy show that RPEA did not sue primarily to gain financial benefits for its members. RPEA assumed the burden of litigating on behalf of *all* participants in the retiree dental plan, even though only RPEA members would bear the costs of the suit. RPEA commenced the case with a motion for partial summary judgment on the central legal question of

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$900 or $1150 was not sufficient compensation to defeat plaintiffs' public interest litigant status); *Citizens Coalition for Tort Reform, Inc. v. McAlpine*, 810 P.2d 162, 171 (Alaska 1991) ("merely minimal economic interest cannot destroy a litigant's capacity to satisfy the fourth criterion" of the public interest litigant test); *Alaska Survival v. State, Dep't of Natural Resources*, 723 P.2d 1281, 1292 (Alaska 1986) (plaintiffs who were economically dependent on land for which they sued to block disposal qualified as public interest litigants; "a more substantial financial interest is required before a litigant will be deemed to have an independent economic incentive to bring suit"; plaintiffs' interests were personal and not commercial and therefore were "not the type of substantial economic interest sufficient to bar a litigant from qualifying as a public interest plaintiff").

9 *See Murphy v. City of Wrangell*, 763 P.2d 229, 233 (Alaska 1988).

10 *See Keane*, 893 P.2d at 1251 n.25; *Murphy*, 763 P.2d at 233; *see also Citizens for Representative Governance*, 880 P.2d at 1062-63 (prospect of losing a monthly stipend of $900 or $1150 was not sufficient economic interest to defeat plaintiffs' public interest litigant status).

whether the non-diminishment clause applies.[11] RPEA sought only declaratory and injunctive relief, not damages – and it never suggested that retirees should be compensated for past losses caused by the State's unconstitutional modifications of the retiree dental plan. In disclaiming a financial focus, RPEA accepted that retirees will gain no compensation for having suffered from five and a half years of unconstitutional diminishment of benefits. RPEA's interest throughout has been to gain clarity in the law and then, ideally, to establish a new set of procedures for the State to use going forward, where optional benefit plains are subjected to proper actuarial analysis before the State unilaterally implements changes that diminish some benefits and enhance others.

RPEA and its members unquestionably will receive no *direct* economic benefits as a result of this suit. At most, some may receive indirect benefits, if the increased value of the dental services that are covered as a result of prevailing in the litigation exceed any increase in premiums. But any indirect economic benefits that some RPEA members may receive will be too small per person to deny RPEA public interest litigant status. The dental benefit to any member of the retiree dental plan may be no more than $2000 per year. The changes in the 2014 plan – such as denying most adult members the right to coverage for fluoride treatment or for a third cleaning – deprive retirees who want such services of at most a couple of hundred dollars of covered service per year. By imposing

[11] RPEA was surprised when the State chose not to petition for review of this court's summary judgment ruling, even after RPEA advised that it would not oppose interlocutory appellate review.

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up to a 25% penalty for seeing an out-of-network provider,[12] the 2014 plan could penalize a member no more than $500/year. Since most members now see network dentists[13] and very few members reach the $2000 maximum in any year,[14] the typical member suffers a loss of coverage of much less than $500/year. This is not the kind of substantial economic interest that would motivate an individual to file a complex lawsuit, regardless of the constitutional interest at stake. This is the kind of suit that could be brought only by a nonprofit organization, like RPEA, acting to benefit many small stakeholders.[15]

This court should find that RPEA's primary motivation in filing this suit was not economic, and that any direct economic interest of a typical RPEA member in the outcome of the suit is not substantial and therefore not a basis for denying RPEA public interest litigant status. Accordingly, this court should award RPEA its full attorneys' fees.

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[12] The 2014 plan added the limitation that the plan will pay 75% of the 80th percentile of the prevailing charge when a member in Alaska sees a non-network provider. *See* Trial Exhibit 1003 at 6403.

[13] *See* Trial Exhibit 1008, Tables 14 and 15.

[14] *See id.*, Table 9 (in 2016, 3258 participants out of over 50,000 reached the $2000 maximum).

[15] Of all the reported cases addressing public interest litigants' attorneys' fees, this case is probably most like *Krone v. State, Department of Health & Social Services*, 222 P.3d 250 (Alaska 2009). *Krone* was a class action that challenged changes in the way that DHSS determined eligibility for long-term health care services in the home. *See id.* at 251. When plaintiffs prevailed, the State evidently did not contest their status as public interest litigants, notwithstanding that all the plaintiffs in the class sued to reinstate benefits they had lost. The State appealed only how full fees should be computed when the prevailing public interest plaintiffs were represented pro bono. *See id.* at 255-58.

II. AS 09.60.010(c) PERMITS AN AWARD OF FULL COSTS, NOT JUST RULE 79 COSTS.

The State contends that this court may not award RPEA its reasonable litigation costs, only costs specifically allowed in Rule 79. [Opp. at 7-9] The State is wrong. AS 09.60.010(c) supports – and arguably requires – an award of full reasonable costs to a prevailing constitutional public interest litigant.

Somewhat surprisingly, the interpretation of AS 09.60.010(c) as it applies to cost awards remains a matter of first impression. No reported case discusses this issue.

Contrary to the State's assertion, *Hickel v. Southeast Conference*[16] did not decide this question. *Hickel* was decided in 1994, long before AS 09.60.010(c) was enacted.[17] Plaintiffs in *Hickel* asked the superior court to create a public interest exception to Administrative Rule 7(c) to allow for an award of expert witness fees in excess of what was then allowed in the administrative rule.[18] The Supreme Court held that the superior court had discretion to do this under Civil Rule 94, which allows the court to relax an administrative rule, but it also held that the court did not abuse its discretion in not doing so.[19] *Hickel* did not address AS 09.60.010(c) because that statute did not then exist.[20]

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16 868 P.2d 919 (Alaska 1994).

17 *See* SLA 2003, ch 86, § 2 (amending AS 09.60.010 by adding subsections (b)-(e)).

18 *See* 868 P.2d at 931.

19 *See id.* at 931-32. Justices Rabinowitz and Matthews dissented on this point. They believed that "[f]ailure to fully reimburse the reasonable costs of necessary expert witnesses employed by prevailing public interest litigants creates an unwarranted barrier to litigation of important issues of public interest."). *Id.* at 933 (dissenting opinion).

20 *See* n.17 *supra*. Prior to 2003, AS 09.60.010 consisted only of what is now

No case that RPEA or the State has located addresses the "full . . . costs" language in AS 09.60.010(c). In interpreting a statute, Alaska case law directs this court to consider the plain language of the statute, the legislative history, and the purpose of the statute.[21]

The plain language of the statute strongly supports RPEA's request for full costs:

> In a civil action or appeal concerning the establishment, protection, or enforcement of a right under the United States Constitution or the Constitution of the State of Alaska, the court
>
> (1) *shall award*, subject to (d) and (e) of this section, *full reasonable* attorney fees and *costs* to a claimant, who as plaintiff . . . has prevailed in asserting the right[.][22]

If the legislature meant to restrict cost awards to the costs allowed under Rule 79 or Administrative Rule 7, it easily could have inserted language to impose that limitation. If the legislature intended pre-existing court rules on costs to control, it would have said nothing at all about costs in subsection (c), leaving cost awards to all prevailing parties to be addressed in subsection (a). Instead, the legislature enacted the provision that it did, including language directing the superior court to award "full reasonable attorney fees and costs" – with no indication that "full" does not modify "costs" as well as "attorney fees."

The plain language of a statute may be disregarded in favor of another

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subsection (a), which then, as now, directed the supreme court to establish by rule or order what costs, if any, may be allowed to a prevailing party in a civil case.

[21] *See Alaska Ass'n of Naturopathic Physicians v. State, Dep't of Commerce, Cmty & Econ. Dev.*, 414 P.3d 630, 634 (Alaska 2018).

[22] AS 09.60.010(c)(1) (emphases added).

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interpretation, if the legislative history and purpose support an interpretation at odds with the plain language – but the plainer the language, the more compelling must be the legislative history and purpose that support a different construction.[23] The party arguing for the less obvious interpretation, different from the plain meaning, bears the burden of demonstrating that the legislative history is contrary to the plain meaning.[24] Here, the State points to no legislative history that specifically reflects consideration of cost awards. The State cites only to the preamble to the bill – its statement of purpose – where the legislature made clear its intent to restrict the category of plaintiffs who could recover full attorneys' fees if they win or be exempt from paying fees if they lose. This legislative language says nothing to convey an intent to limit the cost award to plaintiffs who qualify for an award of full fees. The award of reasonable costs in excess of those allowed by Rule 79 is consistent with the plain language of the statute and not inconsistent with the legislative history or purpose.

The State makes no argument that the additional costs for which RPEA requests reimbursement were not reasonable or necessarily incurred in support of the constitutional claim on which RPEA prevailed.

This court should award RPEA all the costs that it requested.

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[23] *See Alaska Ass'n of Naturopathic Physicians*, 414 P.3d at 634 ("We decide questions of statutory interpretation on a sliding scale: [T]he plainer the language of the statute, the more convincing any contrary legislative history must be . . . to overcome the statute's plain meaning." (internal quotation marks and footnotes omitted)).

[24] *See Alaska Spine Center, LLC v. Mat-Su Valley Medical Center, LLC*, __ P.3d __, 2019 WL 1416034 at *6 (Alaska Mar. 29, 2019).

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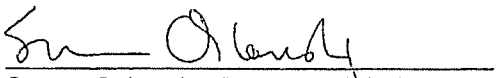
Respectfully submitted, this 10 day of June, 2019.

REEVES AMODIO, LLC



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Certificate of Service:

I certify that I served a copy of the foregoing Reply by mail and email on:

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By: Michelle Dehmer

Date: 06.10.19

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

THE RETIRED PUBLIC EMPLOYEES OF ALASKA, INC.,	)	
Plaintiff,	)	
v.	)	
KELLY TSHIBAKA, in her official capacity as Commissioner of the Department of Administration,*	)	
Defendant.	)	Case No. 3AN-16-04537 CI

~~[PROPOSED]~~ ORDER ~~GRANTING~~ DENIED #16
MOTION TO STAY ORDER UNTIL JANUARY 1, 2020

For the reasons provided in State's motion and supporting affidavit, the Motion to Stay Order is ~~GRANTED~~ DENIED.* ~~The Court's order dated April 17, 2019 is stayed until January 1, 2020.~~

Dated at Anchorage, Alaska this 13th day of ~~April~~ August, 2019.

Eric A. Aarseth
Superior Court Judge

* As discussed at the hearing on August 8, 2019, the Court finds that the State is proceeding in a timely fashion and in good faith. The original deadline stated in the Court's order was unrealistic. EAA

* Kelly Tshibaka is substituted for her predecessor, Leslie Ridle, as Commissioner of the Department of Administration. Alaska Rule of Civil Procedure 25(d)(1).

I certify that on 8/15/19 a copy of the following was mailed/emailed to each of the following at their addresses of record.

Mr Orlansky / Alloway Patrick Walsh
Ad EXC. 257 Assistant

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MAY - 1 2019

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

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DEPUTY CLERK

THE RETIRED PUBLIC EMPLOYEES OF ALASKA, INC.,	)	
Plaintiff,	)	
v.	)	
KELLY TSHIBAKA, COMMISSIONER OF THE ALASKA DEPARTMENT OF ADMINISTRATION,	)	Case No. 3AN-16-04537 CI
Defendant.	)	

#75

MEMORANDUM IN SUPPORT OF RPEA'S MOTION TO ENFORCE COURT ORDER AND FOR RELIEF

INTRODUCTION

On April 16, 2019, this court issued its order declaring that the 2014 retiree dental plan unconstitutionally diminishes the dental benefits previously available to members under the 2013 retiree dental plan.[1] The court gave the State three options for providing members with a constitutionally acceptable retiree dental plan: (1) revert to the 2013 plan for all members; (2) offer members a choice between participating in the 2013 plan and the 2014 plan; and (3) develop a new retiree dental plan that could differ from the 2013 plan but that would not diminish the benefits previously available.

Initially, the court gave the State only a short time to implement one of these

[1] This memorandum uses the shorthand "2014 plan" and "2013 plan" in the same way these terms have been used by the court and the parties throughout this case.

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options. After hearing from the State about the logistical challenges of changing the dental coverage offerings, the court gave the State an indefinite extension of time to continue working to implement a constitutional retiree dental plan package. However, the court never accepted the State's suggestion that the State should be allowed to do nothing beyond preparing to remedy the problem starting in 2020.

Five months have passed since this court's order. Yet the State continues to operate the 2014 plan and to subject retirees on a daily basis to all of the diminishments they have suffered for the more than five years since that plan took effect. The State has done *nothing* to reduce the impacts of the unconstitutional plan.

Evidently, the State intends at least a long-term solution. It says it is working toward implementing a two-plan approach that will take effect on January 1, 2020. The details of the proposed two-plan solution have not been disclosed, and there are troubling aspects of what has been disclosed. Most notably, the State is intending to implement a preference for the 2014 plan, such that members of the DVA plan who do not affirmatively select the 2013 plan during an upcoming short open enrollment period will, by default, be continued in the unconstitutional 2014 plan. Additionally, it appears that members selecting the 2013 plan will be required to pay more.

STATEMENT OF FACTS

The court is familiar with the State's comments at the August 8 status conference and the written Status Report that the State filed on August 16. These were the first times that the State disclosed anything about how it intended to respond to this court's April 16

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order. Both August statements described, in very general terms, the State's intention to implement a two-plan system, where retirees could select between the 2013 plan and the 2014 plan. Few details were provided then about how the shift to the two-plan system would be implemented.

Some details were provided on August 22, when representatives of the Division of Retirement and Benefits ("DRB") presented a series of slides to the Retiree Health Plan Advisory Board.[2] Slide page 4 describes a two-plan system where retirees can choose between the so-called "Legacy Plan" (the 2013 plan) and the "Standard Plan" (the 2014 plan).[3] Slide page 5 states that the two dental plans will have different coverage provisions and different monthly premium rates, but it provides no specific information about the differences.[4]

Slide page 9 describes the intended open enrollment process: An enrollment

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[2] A full copy of this DRB slide presentation can be viewed at: *http://doa.alaska.gov/drb/alaskaCare/retiree/RHPAB-MeetingMaterials_08222019.pdf.* Copies of the specific slides discussed in this memorandum are provided as Exhibit A to the Affidavit of Bradley Owens, attached to this memorandum.

[3] These names are potentially misleading. It would be more accurate to refer to the plan in effect for at least ten years between 2003 and 2013 as the "Standard Plan" and to call the newer plan the "Modified Plan."

[4] Obviously, DRB will need to provide members with complete and accurate information about the different coverages available under the two different options. If the State were willing to share its proposed language with RPEA in advance of publicizing the details to all retirees, RPEA could communicate in good faith to ensure that the descriptions are accurate and clear. If the State declines to work with RPEA in this way (which does *not* involve "negotiating" over the details of plans in the way the State has already refused), then RPEA will have no alternative other than to seek emergency relief from the court if the differences are not set forth clearly and accurately.

period will open for three weeks in November (November 6-27). The slide states that, "[i]f no plan selection is made, members will remain in the plan they currently have today, the Standard Plan." In other words, the State intends to make the current, unconstitutional 2014 plan the default option. Only if a member affirmatively selects the 2013 plan during the short open enrollment period will that member receive the coverage guaranteed by the constitution.

On September 10, the State posted additional information about the two-plan system on its website,[5] along with answers to some Frequently Asked Questions ("FAQs").[6] The answer to FAQ 9 reaffirms that the current, unconstitutional 2014 plan will be the default plan:

> If you are currently enrolled in the DVA plan and take no action, meaning you do not make any plan selection by the end of the open enrollment period, you will remain in the plan you currently have today, the AlaskaCare Retiree Standard DVA Plan.

The answer to FAQ 17 explains that, if a member does not elect to change from the current, unconstitutional dental plan during the brief open enrollment period, then the member typically must wait another year:

> [Y]ou will only be able to make changes to your plan each year during open enrollment (this year's open enrollment period is November 6 to 27, 2019). You will not be able to make changes to your plan outside the open enrollment period, unless you have a qualifying household status change.

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[5] This additional information can be viewed at: *http://doa.alaska.gov/drb/alaskacare/retiree/plans/dva.html*

[6] The Retiree DVA Plan FAQs can be viewed at: *http://doa.alaska.gov/drb/alaskaCare/retiree/faqs/retireeGeneralFaqs.html#dental*

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REQUESTED RELIEF

At the status conference, RPEA expressed its dismay that there had been no communication from the State to RPEA (directly to its members, leaders, or counsel) about how the State intended to respond to this court's order. Since that time, DRB has shared some information with retirees, and RPEA representatives have been able to obtain some information by attending meetings and reviewing the website.

This court indicated at the status conference that it would allow the State to proceed to implement the plans it deemed appropriate, without micromanaging the effort, but allowed RPEA to return to court to ask for relief if RPEA believed the State's actions do not meet the letter or spirit of the court's April 16 order. Because of the absence of any ability to work with the State outside of court, RPEA believes it has no choice but to ask this court now for relief.

RPEA outlines below its specific requests for orders to the State, so that the court and RPEA can be ensured that retirees receive the relief that this court ordered in April.

(1) The State should not be permitted to continue offering only the unconstitutional 2014 plan throughout 2019, but should be required to provide members some short-term relief.

As noted above, all members of the retiree dental plan continue to suffer the restraints unconstitutionally imposed in 2014. RPEA previously listed several short-term options that the State could implement, seemingly without undue difficulty; doing that much would at least give members partial relief, as a stopgap, while the State moves forward with implementing a long-term constitutional solution. In particular, RPEA

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suggested that the State easily could (i) stop enforcing the new frequency and age limitations that it added into the 2014 plan and (ii) stop imposing out-of-network penalties on members who receive covered services from a non-network provider. As far as RPEA can tell, the State has not adopted these options or taken any other action to reduce the harms of the 2014 plan; certainly, it has not contacted RPEA to discuss these or other options.

RPEA believes it rightfully could demand that the State immediately make *all* of the 2013 benefits available to all members of the retiree dental plan, but it is not pushing quite that hard. However, because the State appears to be making no good faith efforts to ameliorate any of the effects of the 2013 plan on a short-term basis, RPEA asks the court to direct the State immediately to stop enforcing the frequency and age limitations and financial penalties that it added in 2014. These limitations and penalties later may be restored only as to those who choose to participate in the 2014 plan after being given an opportunity to select instead to participate in a fully constitutional plan.

(2) The State should be prohibited from establishing the unconstitutional 2014 plan as the default plan under the two-plan system it is designing for 2020.

The court declared the 2014 plan unconstitutional. It allowed the State to give retirees the option of continuing with the plan, if they prefer its coverages to the coverages provided by the 2013 plan. But selecting the 2014 plan entails a waiver of the constitutional right to undiminished benefits. For a waiver of constitutional rights to be effective, it must be knowing and voluntary; even in a civil setting, waiver requires an

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affirmative act and cannot be inferred from silence and non-action.[7] Thus, the only way the 2014 plan can be a lawful plan for a retiree is if a retiree knowingly and affirmatively selects it as his or her preferred plan, in lieu of any other constitutional plan the State is then offering. The State's proposal to make the 2014 plan the default plan means that any retiree who, for any reason, fails to submit a choice within a certain three-week period will be treated as having waived the constitutional right to undiminished benefits without any showing that the retiree did so knowingly and voluntarily. RPEA therefore asks the court to preclude the State from making the 2014 plan the default option.

(3) The State should be directed to conduct a complete retrospective review of claims denied under the 2014 plan that would have been granted had the 2013 plan remained in effect.

During the August 8 status conference, the court inquired whether the State was doing anything to identify the services that had been requested by members under the 2014 plan, which were denied but would have been covered under the 2013 plan. Emily Ricci responded for DRB. She advised that no such review had been undertaken but that DRB absolutely could do this type of retrospective claim analysis to identify which members were affected in this way. RPEA suggested that reimbursements for denied services would be appropriate, at minimum for members who received such denials after April 16, 2019.

To the best of RPEA's knowledge, the State has not yet conducted this type of

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[7] *See Brandner v. Providence Health & Services—Washington*, 394 P.3d 581, 588 (Alaska 2017).

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analysis. RPEA requests that the court direct the State to commence this kind of review promptly and to notify the court and RPEA when it begins, how long it should take, and when it is concluded. RPEA further requests that the court order the State to provide RPEA with a complete copy of correspondence between the State and Moda or Segal (or whoever is engaged to conduct the review), so that RPEA is informed about the scope and nature of the review, and the data that are used. When the review is complete, the State should be required to provide a copy of the report that identifies the claims that were denied.[8]

RPEA is not asking now that this court order reimbursement to members who were denied coverage for services under the 2014 plan who would have received coverage under the 2013 plan, but it reserves the right to do so after the analysis is complete.

(4) The State should be directed to provide RPEA with its complete premium rate analysis and all data used in the analysis to determine the new rates.

The State has disclosed publicly that it expects different premiums for the two plans it intends to offer, and that the 2013 plan premiums will be more expensive. Because premiums most likely will affect members' choices in the open enrollment period, the data and assumptions used should be subject to review by independent experts, to make sure that the analysis is done fairly and properly. RPEA requests that the court

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[8] Such a report would be provided to RPEA subject to the protective order in place in this case, which allows RPEA to receive HIPAA-protected information and requires RPEA to protect its confidentiality.

direct the State to provide all the information to RPEA as soon as it is available, and at least 30 days before the open enrollment period, so that any challenges to the rate determinations can be made before members start selecting between plans.

(5) The State should be directed to disclose to RPEA and the court all costs it incurs to develop and implement the two-plan system, in order to ensure that no premium funds are used.

The State has disclosed that it expects to pay $60,000 to Segal Consulting to have it build and maintain an online benefit enrollment platform for retirees to use when choosing between the two dental plans. RPEA believes this cost is indicative of the high administrative costs involved in developing and implementing a two-plan system. These costs are being incurred solely because of the State's decision to implement an unconstitutional retiree dental plan in 2014. The State and not retirees should bear all the added costs of "becoming constitutional," since the costs of having a two-plan system would never have arisen if the State had done a proper diminishment analysis before abandoning the 2013 plan in favor of the more limited 2014 plan.

So that RPEA and the court can monitor who pays for the State's mistakes, the State should be required to disclose to RPEA the amount of funds taken from retirees' premiums that are being used in developing and implementing the new two-plan system to rectify the adoption of the unconstitutional 2014 plan. Only with such disclosure can RPEA and the court be assured that the State is not using any of the retirees' money to pay for correcting the unconstitutional situation the State created.

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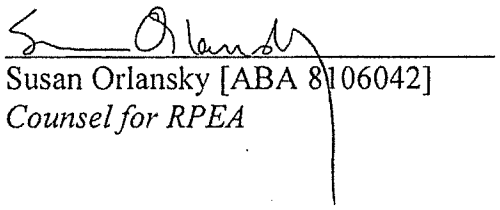
Respectfully submitted, this 19 day of September, 2019.

REEVES AMODIO, LLC



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Counsel for RPEA

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

2019 SEP 17 PM 2:36
CLERK TRIAL COURTS
BY: _____
DEPUTY CLERK

THE RETIRED PUBLIC EMPLOYEES OF ALASKA, INC.,	)	
Plaintiff,	)	
v.	)	
	)	Case No. 3AN-16-04537 CI
KELLY TSHIBAKA, COMMISSIONER OF THE ALASKA DEPARTMENT OF ADMINISTRATION,	)	
Defendant.	)	

AFFIDAVIT OF BRADLEY OWENS

I, Bradley D. Owens, having been duly sworn upon oath, depose and state as follows:

1. I am an individual who resides in Anchorage, Alaska. I have personal knowledge of the facts stated in this affidavit.
2. I am a member of the Retired Public Employees of Alaska (RPEA) and currently hold the position of Executive Vice President of RPEA.
3. I attended a meeting of the AlaskaCare Retiree Health Plan Advisory Board (Board) on August 8, 2019. During this meeting, Emily Ricci, the Health Care Policy Administrator for the Division of Retirement and Benefits (DRB), presented a report to the Board which was entitled "Retiree Dental, Vision, and Audio Plan Overview and Update" (Report). During this presentation, DRB provided printed copies of this Report to the Board. I was also provided a copy of this Report by DRB at this meeting. A complete copy of the report is also posted on the Board webpage at: http://doa.alaska.gov/drb/alaskaCare/retiree/RHPAB-MeetingMaterials_08222019.pdf

4. I have attached copies of several pages, or slides, from this Report as Exhibit A to the RPEA Motion to Enforce Court Order and Related Relief. These pages include the cover slide, as well as pages/slides # 4, 5 and 9.
5. The information provided in the accompanying memorandum concerning statements at the August 8, 2019 Status Hearing, which I attended telephonically, are based upon a transcript of that hearing which I have reviewed and confirm to be accurate descriptions of those statements and discussions.

Further your affiant sayeth naught.

Subscribed and sworn to before me, this 11th day of September 2019

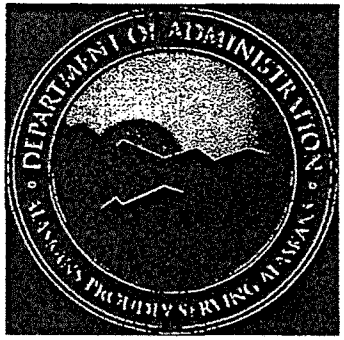
MICHELLE DEHNER
Commission # 170214001
NOTARY PUBLIC
My Commission Expires 02-14-2021
STATE OF ALASKA

Notary public
My commission expires 02.14.21

Ex A
1 of 4

AlaskaCare Retiree Health Plan Advisory Board

Retiree Dental, Vision, and Audio Plan Overview and Update



Division of Retirement and Benefits
Department of Administration

l Meeting: August 22, 2019

Ex. A 2 of 4

Remedy

- The case is ongoing, and the State has determined it will appeal the superior court decision.
- However, in an effort to mitigate the uncertainty to retiree's dental benefits caused by the litigation, beginning January 1, 2020, and for the foreseeable future, the Division will offer members of the AlaskaCare retiree dental plan a choice between two DVA plans:
  1. the plan that was in place prior to 2014, the **AlaskaCare Retiree Legacy Dental Plan**, and
  2. the plan that is currently in place now, the **AlaskaCare Retiree Standard Dental Plan**.

Ex. A 3 of 4

Considerations

- The Legacy Dental Plan will have different coverage provisions and different monthly premium rates than the Standard Dental Plan.
  - Premiums for each plan are under development and will be provided when available to members
  - A benefit comparison between the two plans is under review and will be provided to members when available.
- Offering two plans will provide stability by allowing members who prefer their current benefits to stay in the current, Standard Plan.
- Offering two plans will provide choice by allowing members who preferred the previous plan to elect the 2013 Legacy Plan.

Ex A
4 of 4

1st Annual Open Enrollment

- Opens November 6th – Closes November 27th.
- Current DVA plan members, and retirees who retired, or dropped or reduced coverage on or after January 1st 2014 will be eligible to participate.
- Members will use an online portal to make benefit elections.
  - Paper forms will be provided to members upon request.
- If no plan selection is made, members will remain in the plan they currently have today, the Standard Plan.
- If a member changes their elections, they will receive a new ID card in early January.

jnu.law.ecf@alaska.gov

FILED
STATE OF ALASKA
THIRD DISTRICT
2019 OCT -7 PM 4:
CLERK OF THE TRIAL COURT
BY _____
DEPUTY CLERK

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

THE RETIRED PUBLIC EMPLOYEES OF ALASKA, INC.,	)
Plaintiff,	)
v.	)
KELLY TSHIBAKA, in her official capacity as Commissioner of the Department of Administration,	)
Defendant.	)
	) Case No. 3AN-16-04537 CI

DEFENDANT'S OPPOSITION TO RPEA'S MOTION TO ENFORCE COURT ORDER AND FOR RELATED RELIEF 25

INTRODUCTION

In March of 2016, the Retired Public Employees of Alaska ("RPEA") filed suit against the Commissioner of the Department of Administration ("State"). At issue was whether the retiree dental plan adopted by the State, and effective January 1, 2014 ("the 2014 Plan), diminished or impaired the benefits available to retirees, when compared against the dental plan in place prior to 2014 ("the 2013 Plan"). In December 2016, the Court granted partial summary judgment to RPEA finding that the optional coverage provided under the Retiree Dental-Vision-Audio Plan ("DVA Plan") was an accrued benefit within the meaning of Article XII, §7 of the Alaska Constitution and thus could not be diminished or impaired. In April and July 2018, a six-day trial was held to determine whether the 2014 Plan resulted in a diminishment of benefits.

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On April 17, 2019, the Court issued an order finding in favor of RPEA and adopting RPEA's proposed findings of Fact and Conclusions of Law. RPEA's proposed order, as adopted in full by the Court without modification, provided in relevant part:

> Based upon the above findings and conclusions, it is ordered as follows:
>
> A. The court declares that the 2014 changes to the retiree dental plan are unconstitutional.
>
> B. The court enjoins the State from continuing to offer the 2014 retiree dental plan as the only dental plan available to retirees.
>
> C. The State may (1) return to the 2013 retiree dental plan; (2) provide individual retirees the option of returning to the 2013 plan or continuing with the 2014 plan; or (3) negotiate a new alternative plan that RPEA accepts as comparable and not diminishing retirees' benefits.
>
> D. On motion of either party, the court will set a schedule for additional briefing on remedy.
>
> E. RPEA is the prevailing party, and, as a constitutional litigant, RPEA is awarded its full reasonable costs and attorney fees in accordance with AS 09.60.010(c).[1]

The Court's order was effective May 1, 2019, and gave the parties until May 17, 2019 to move for additional or alternate remedies.[2]

On May 7, 2019, the Court temporarily stayed implementation of its April 17, 2019 order until it could rule on the State's request to stay the order until

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[1] RPEAs Proposed Findings of Facts and Conclusions of Law at 21-22.

[2] Order Adopting RPEA's Proposed Findings of Facts and Conclusions of Law at 3.

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January 1, 2020.[3] On August 8, 2019, the Court held a status conference. After the status conference, the Court issued final judgment in favor of RPEA.[4] The Court noted that it would continue to exercise jurisdiction to ensure the State complied with the Court's April 17, 2019 order.[5]

On August 13, 2019, the Court issued an order denying the State's Motion to Stay the April 17, 2019 order until January 1, 2020.[6] However, in that order, the Court did not impose a new deadline, instead making a finding that the State was proceeding in a timely fashion and in good faith.[7] The Court acknowledged that the original deadline set forth in the Court's April 17, 2019 order was unrealistic.[8] On August 16, 2019, the State filed a status report with the Court providing a comprehensive timeline of activities taking place to implement the Court's order.[9]

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[3] Order Granting Unopposed Motion to Stay Order Until Court Resolves Pending Motion to Stay.

[4] Final Judgment.

[5] *Id.* RPEA argues that it seeks the additional relief requested in order to assist it in monitoring the State's compliance with the Court's order. *See* RPEA's Motion for Enforcement at 2. However, the Court did not vest RPEA with any authority to monitor compliance, the Court retained that jurisdiction for itself.

[6] Order Den[ying] Motion to Stay Order Until January 1, 2020.

[7] *Id.*

[8] *Id.*

[9] Defendant's Status Report on Implementation of Court's Order Dated April 17, 2019.

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RPEA did not seek any additional remedies before final judgment was entered. It now asks this Court to alter or amend final judgment by imposing additional remedies under the thinly veiled guise of a motion to "enforce" court order. The relief that RPEA is requesting is precluded by the court rules, and even if allowed under the rules, violates the Separation of Powers Doctrine. Accordingly, as a matter of law, RPEA's motion must be denied.

ARGUMENT

I. RPEA Seeks To Have The Court Alter Or Amend Final Judgment In Contravention Of The Court Rules.

RPEA asks the Court to enforce its April 17, 2019 order by implementing the following *remedies* after entry of final judgment:

(1) Prohibit the State from continuing to offer only the 2014 plan through the remainder of 2019 and (a) cease enforcing the frequency and age limitations included in the 2014 Plan and (b) cease imposing the 2014 out-of-network rates.

(2) Prohibit the State from allowing the 2014 Plan to serve as the default plan during open enrollment.

(3) Require the State to conduct a retrospective review of claims denied under the 2014 Plan that would have been granted had the 2013 Plan remained in effect.

(4) Require the State to provide RPEA with its complete premium rate analysis and all data used in the analysis to determine new rates.

(5) Require the State to disclose to RPEA and the Court all costs incurred to develop and implement the two-plan system, and specify which funds, if any, are taken from the trust governing the DVA Plan.

RPEA's motion is untimely under Civil Rule 59(f) and precluded by Appellate Rule 203. Accordingly, pursuant to the court rules, the motion must be denied.

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A. RPEA's Motion is Untimely Under Civil Rule 59(f).

This Court provided ample opportunity for both parties to file motions for additional remedies. RPEA failed to do so. At the August 8, 2019 status conference, the issue of remedies was once again discussed, and RPEA affirmed that it had not sought damages in its complaint and did not specifically request any additional remedies. Now deciding that it doesn't like *how* the State is implementing the Court's order, RPEA seeks a second – or third – bite at the remedy apple.[10]

Rule 59(f) of the Alaska Rules of Civil Procedure requires any party moving to amend or alter a judgment to do so no later than 10 days after the entry of judgment. Here, the court entered final judgment on August 8, 2019, and RPEA did not file the instant motion until September 17, 2019. To get around the strict timelines under Rule 59(f), RPEA attempts to couch its current motion as a motion to enforce the court's order. The problem is that none of the "relief" RPEA seeks actually was included in the Court's order – an order drafted by RPEA.

For example, RPEA now asks the Court to require the State to immediately cease enforcing the frequency and age limitations and out-of-network rates included in the

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[10] Any suggestion by RPEA that it only recently learned of the problems with the State's implementation is unfounded. The State immediately notified the Court that it would not be able to comply with its order until January 1, 2020. RPEA could have asked for retrospective claims review by the Court's deadline for any requests for additional remedies. Moreover, RPEA itself proposed allowing the State to offer two dental plans. When including that option in its proposed findings of fact and conclusions of law, RPEA could have also requested that the State provide a premium rates analysis and disclose any costs associated with developing the two plans. RPEA failed to make those requests and cannot now do so.

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2014 Plan. This piecemeal approach goes beyond the Court's order, which merely directed the State to cease offering the 2014 Plan as the *only* plan available to retirees. The Court could have included these remedies in its final order and judgment but did not. RPEA could have included these remedies in its proposed order, in a motion for remedies when such motion was invited by the Court, or at the August 8 status conference. It did not. Regardless, the proposed remedy is inappropriate because it asks the State to restore a benefit without any corresponding premium payment adjustment.

Likewise, RPEA's request that the Court order the State to conduct a retrospective claims review is another attempt to amend or alter the final judgment. Nowhere in the Court's April 17, 2019 order did the Court include any requirement for claims review. Again, RPEA could have requested such relief on multiple occasions but did not do so. To impose such a requirement now would be a clear amendment to the final judgment.

Nowhere in its order (again, as drafted by RPEA) did the Court impose the remedies RPEA now seeks to "enforce." Even if the proposed relief was viewed as being related to the Court's order, the Court has already found the State to be proceeding in a timely fashion and in good faith.[11] Based upon the Court's own findings, RPEA's "enforcement" motion is unnecessary.

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[11] *See* Order Den[ying] Motion to Stay Order Until January 1, 2020.

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Despite drafting the order adopted in its entirety by the Court, and being given multiple opportunities to seek additional remedies, RPEA did not previously request any of the relief it now seeks. Because RPEA's requested relief goes beyond enforcing an existing order, the proposed relief can only be viewed as a motion to alter or amend final judgment by imposing additional remedies – which can only be granted under Civil Rule 59(f) – the time for which has expired. Accordingly, RPEA's motion must fail.

B. The Relief that RPEA Seeks is Under the Jurisdiction of the Appellate Court.

Appellate Rule 203 states in relevant part that "[t]he supervision and control of the proceedings on appeal is in the appellate court from the time the notice of appeal is filed with the clerk of the appellate courts, except as otherwise provided in these rules." The State filed its notice appealing the superior court's ruling in this matter on September 13, 2019.[12] Pursuant to the court rules, from that date forward, this matter was, and continues to be, under the purview of the Alaska Supreme Court.

In its May 23, 2019 Opposition to the State's Motion for Entry of Final Judgment, RPEA acknowledged its understanding of the appellate court's jurisdiction when it stated "the initiation of an appeal invariably limits the flexibility of a superior court to conduct additional proceedings."[13] RPEA argued in its opposition that final

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[12] Notice of Appeal

[13] RPEA's Opposition to Motion for Entry of Final Judgment at 1.

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judgment should be delayed pending the State's implementation of the Court's April 17 Order.[14] The Court rejected that argument when it entered final judgment. Now, absent a remand order, this Court cannot modify any matters directly involved in the appeal.[15]

The Court has issued final judgment in this matter and the State has appealed. Accordingly, the Alaska Supreme Court has jurisdiction and control of this matter pursuant to the Alaska Rules of Appellate Procedure. Because RPEA's motion falls under the purview of the Supreme Court, its motion must fail here.

II. Even If The Court Rules Allowed The Relief That RPEA Now Seeks, Such Relief Would Violate The Separation Of Powers Doctrine.

Alaska recognizes the Separation of Powers Doctrine.[16] This Doctrine forbids one branch of government from encroaching upon and exercising the powers of another branch of government.[17] The remedies that RPEA seeks would in fact require the Judicial Branch to encroach upon the powers vested in the Executive Branch.

Our Supreme Court has long recognized that the framers of the Alaska Constitution purposefully created a strong executive branch of government.[18] The

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[14] *Id.* at 2.

[15] *Smallwood v. Central Peninsula General Hosp., Inc.*, 227 P.3d 457, 460 (Alaska 2010).

[16] *Public Defender Agency v. Superior Court, Third Judicial Dist.*, 534 P.2d 947, 950 (Alaska 1975).

[17] *Bradner v. Hammond,* 553 P.2d 1 (Alaska 1976).

[18] *Id.*

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remedies now requested by RPEA fall within the powers of the executive branch, specifically the Commissioner of Administration ("Commissioner"). "When an act is committed to executive discretion, the exercise of that discretion within constitutional bounds is not subject to the control or review of the courts."[19] This is because the judicial branch lacks the fact-finding ability and expertise of the executive departments.[20]

The Commissioner is the administrator of the Public Employees' Retirement System (PERS), the Teachers' Retirement System (TRS) and the Judicial Retirement System (JRS).[21] The Commissioner is also responsible for the administration of the retiree health care trusts.[22] If the Court were to grant RPEA's requested remedies, such an order would in effect subject the Commissioner's actions to the review and control of the Court – an impermissible function under the Separation of Powers Doctrine.

For example, RPEA asks the Court to prohibit the Commissioner from designating the 2014 plan as the default plan. However, the open enrollment process, including designation of the default plan, is clearly within the Commissioner's discretion as administrator of the plans and associated trusts. Further, RPEA's motion doesn't take into account that open enrollment materials are already in production.

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[19] *Public Defender Agency v. Superior Court, Third Judicial Dist.*, 534 P.2d 947, 950 (Alaska 1975).

[20] *Guerrero ex rel. Guerrero v. Alaska Housing Finance Corp.*, 123 P.3d 966, 976-77 (Alaska 2005).

[21] *See* AS 39.35.003, AS 14.25.003, AS 22.25.025.

[22] *See* AS 39.30.097(c).

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Granting RPEA's requested remedy here would not only violate the Separation of Powers Doctrine but would result in great expense at having to reproduce the open enrollment materials thus delaying implementation of the Court's order. The attached Exhibit A reflects some of the open enrollment materials currently in production for mailing to retirees.[23]

RPEA also asks the Court to require the State to provide its complete premium rate analysis including all data used in the analysis. Again, the setting of premiums is the responsibility of the Commissioner. Establishing the 2020 premiums for the DVA Plan entailed, among other tasks, reviewing 12 months of claims data for the DVA Plan. This involved approximately 140,000 claims containing protected health information of DVA plan participants. RPEA provides no valid argument for why the Commissioner's role should be usurped and the privacy of plan members violated. The complexity of the premium setting process is exemplified by the attached Exhibit B and underscores that this function falls squarely under the fact-finding ability and expertise of the executive branch.

Finally, RPEA asks for an accounting of trust funds. Once again, if RPEA's motion were granted, it would only result in the Court encroaching upon the powers of the executive branch. Alaska Statute 39.30.097(c) clearly designates the Commissioner

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[23] As the attached Exhibit A reflects, the State is ahead of the schedule provided to the Court in its August status report. Open enrollment will begin on October 16, 2019 (approximately 3 weeks earlier than originally scheduled). Materials currently in production for open enrollment are scheduled to be mailed on October 11, 2019.

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as the administrator of the retiree health care trusts. The management of the trusts, including an accounting of the trusts, falls under the purview of the Commissioner.

"RPEA seeks additional, related relief...in order to assist it, in practical terms, in monitoring the State's compliance with this court's order."[24] The State submits that the court rules preclude the relief RPEA is seeking; however, even if allowed, RPEA's request would be barred by the Doctrine of Separation of Powers. In no way did the Court's order implicitly or explicitly bestow upon RPEA the oversight responsibilities vested in the Commissioner of Administration – because the Court knew to do so would violate the Doctrine. Accordingly, its motion must fail as a matter of law.

III. RPEA Cannot Raise New Constitutional Claims Arising From The State's Implementation Of The Court's Order.

RPEA asks the Court to prohibit the State from making the so called unconstitutional 2014 Plan the default plan during the open enrollment period alleging a constitutional violation. This is a new claim and any constitutional question arising from the details of implementing the Court's order must be asserted by future challenge in separate proceedings.[25] Regardless, RPEA's "constitutional claim" is a red herring the Court should ignore.

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[24] RPEA's Motion to Enforce Court Order and for Related Relief at 2.

[25] *State v. Alaska Civil Liberties Union,* 159 P.3d 513, 514-15 (Alaska 2006). (reversing superior court and concluding that, at the remedial stage, constitutional review of the individual details of the state's implementation plan would "hamper the primary goal of expeditious compliance and exceed the scope of the remedies sought in the original complaint.").

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While RPEA now likes to refer to the 2014 plan as "unconstitutional," their own words refute that statement. RPEA's own proposed findings and conclusions, which were fully adopted by the Court, only declares the 2014 *changes* to the retiree dental plan unconstitutional – not the entire plan. Further, RPEA didn't seek to eliminate the 2014 plan as an option for retirees based on any belief that it was unconstitutional as a whole – quite the contrary – RPEA's proposed order included providing retirees with the option of returning to the 2013 plan or continuing with the 2014 plan. Surely, RPEA would not have suggested such if they believed the 2014 plan was unconstitutional.

The plan as a whole has not been declared unconstitutional and RPEA cannot bring a new complaint after final judgment in the form of a "motion to enforce the court's order." Accordingly, RPEA's motion must fail.

CONCLUSION

As this Court has previously found, the State has worked in a timely fashion and in good faith to implement the Court's order. The State's updated implementation plans, attached hereto and incorporated herein as Exhibit C, clearly demonstrate the State's continued commitment to meeting its proposed implementation date of January 1, 2020. That date is not unreasonable. In *State v. Alaska Civil Liberties Union*,[26] the Supreme Court gave the State seven months to promulgate regulations implementing the Court's order. The State's implementation of this Court's order is

[26] 159 P.3d 513 (2006).

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exponentially more complicated as demonstrated by the attached Exhibit C, and the State's proposed implementation date of January 1, 2020 is appropriate.

RPEA's requested remedies are untimely under Civil Rule 59(f), precluded under Appellate Rule 203, violate the Separation of Powers Doctrine, and would only serve to hamper and impede the State's efforts to fully and expeditiously implement this Court's order.

For the foregoing reasons, the State respectfully requests RPEA's motion be denied.

DATED October 7, 2019.

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

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THE RETIRED PUBLIC EMPLOYEES OF ALASKA, INC.,	)	
Plaintiff,	)	
v.	)	
	)	Case No. 3AN-16-04537 CI
KELLY TSHIBAKA, COMMISSIONER OF THE ALASKA DEPARTMENT OF ADMINISTRATION,	)	
Defendant.	)	

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REPLY IN SUPPORT OF RPEA'S MOTION TO ENFORCE COURT ORDER AND FOR RELATED RELIEF

INTRODUCTION

RPEA commenced this case more than three years ago, alleging that the State's adoption of a new retiree dental plan in 2014 violated retirees' rights under the non-diminishment clause of the Alaska Constitution. This court agreed and, in April 2019, directed the State to begin providing retirees with a constitutionally acceptable dental plan. The court gave the State options on how to do that; one was to offer participants a choice between returning to the constitutional 2013 plan or continuing with the unconstitutional (but likely less expensive) 2014 plan. This is the option the State selected, preferring it over alternatives that would have guaranteed a constitutional non-diminished plan for all retirees.

The State now contends that, having chosen to implement one of the options this

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court offered, it may implement it however it chooses and may not be subject to any oversight by RPEA or the court. The State is incorrect.

When the government violates citizens' constitutional rights and the court directs an equitable remedy, the court retains jurisdiction to ensure that the government does in fact remedy the violation and does not merely give lip service to its constitutional obligations to the citizens affected by its actions. It is not true, as the State contends, that RPEA's only option – if it fears the State is continuing to act unconstitutionally regarding the subject matter of the suit – is to file a new suit.

The facts are changing, because the State finally is taking some action, so RPEA necessarily is seeking some specific relief that was not expressly articulated in the complaint. But that does not mean a remedy based on the implementation of a new plan cannot be granted within this lawsuit. The State may not evade its constitutional obligations so easily, postponing a fully constitutional remedy for more years while another suit wends its way through the court system.

ARGUMENTS

I. THE COURT RETAINS BROAD EQUITABLE JURISDICTION TO ENFORCE ITS JUDGMENT.

Alaska Statute 22.10.020(c) grants the superior court authority to issue injunctions "and all other writs necessary or proper to the complete exercise of its jurisdiction." When the court declares the rights of parties under AS 22.10.020(g), as the court did in this case, it has the authority to grant such "[f]urther necessary or proper relief based on

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a declaratory judgment . . . after reasonable notice and hearing, against an adverse party whose rights have been determined by the judgment."

These broad grants of authority allow the court to issue all "necessary or proper" orders to enforce compliance with its judgment. The State's proposed narrow reading of the court's authority would make the court's authority to issue a declaratory judgment almost meaningless. A losing party could ignore the judgment and assert that the court has no power to force it to do anything, since the post-judgment requests for a specific remedy might be different from – or somewhat less than – the broad relief sought in the complaint or enunciated in the judgment.[1]

Here, one of the specific requests for relief that RPEA has sought is partial, short-term relief from the unconstitutional retiree dental plan, during the interim time period that the State says it needs to implement full, long-term relief.[2] Contrary to the State's claim, this court did not surrender its power to compel partial, short-term relief when it issued a judgment requiring comprehensive, long-term relief.

Courts around the country have made clear that they retain jurisdiction to order

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[1] The State's view that the court's power is limited because RPEA did not previously request precisely what it seeks post-judgment is like the losing parent in a custody dispute insisting that the court cannot order that Mom allow Dad to pick up the kids on Friday evening, because all that Dad sought in the complaint was custody and all that the court ordered was joint custody, not specific custody on a particular Friday evening. This court's power to enforce a judgment on a specific basis is not limited by the fact that it previously ordered more broadly-worded relief.

[2] *See* RPEA's proposed order at (1).

specific relief after issuing a judgment requiring broad relief that compels other branches of government to abide by the constitution. The school desegregation cases are an obvious example. In a follow-up to the first *Brown v. Board of Education* case, the U.S. Supreme Court addressed the continuing jurisdiction of the district courts to ensure that executive branch officials (people running school systems) took steps to comply with the constitution as interpreted by the courts:

> School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. . . .
>
> In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. . . .
>
> While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. . . . [The courts] will also consider the adequacy of any plans the defendants may propose to meet these [practical] problems and to effectuate a transition to a racially nondiscriminatory school system. During the period of transition, the courts will retain jurisdiction of these cases.[3]

Just as the U.S. Supreme Court stated, this court retains jurisdiction to ensure that the State acts in good faith and transitions efficiently to a fully constitutional retiree dental

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[3] *Brown v. Board of Education*, 349 U.S. 294, 299-301 (1955).

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plan. That jurisdiction includes full authority to require short-term steps toward the long-term goal.

On the merits, RPEA's request for short-term relief, such as it requested in paragraph (1) of its proposed order, should be granted. The State has provided no practical argument for why it could not provide even partial relief within 2019; it is clear only that the State does not want to do this. Because the State has shown no willingness to take any good faith steps toward complying with the court's order in any way before 2020, this court should impose the short-term remedy that RPEA proposed.

RPEA's third request is a first step toward another possible request for short-term, partial relief from the unconstitutional retiree dental plan the State has forced on participants for years. This court told the State in April that the 2014 plan is not constitutional, but the State continues to rely solely on that plan; even after the order, the State has continued to deny coverage for services that would have been covered under the 2013 plan. At this point, it may be reasonable for RPEA to ask the court to require the State to compensate retirees for the ongoing diminishment of coverage – at minimum for the months since the decision was announced. Ms. Ricci, the State's representative, said in August that the information about such denials would not be hard to develop. The request for the information about the denial of coverage should be granted so RPEA can explore whether to follow up and ask for a remedy for people who have wrongfully been denied coverage after this court issued its judgment.

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II. THE STATE'S NOTICE OF APPEAL DID NOT DEPRIVE THIS COURT OF JURISDICTION TO ENFORCE ITS ORDER.

The State also is mistaken that its notice of appeal deprived this court of authority to grant RPEA's motion. As this court will recall, RPEA initially opposed entry of final judgment, because it feared that the State would argue that the appeal divested this court of jurisdiction over post-judgment enforcement, and RPEA would be forced to file a motion with the Supreme Court to stay the appeal and return jurisdiction to the superior court whenever post-judgment enforcement action was required. RPEA withdrew its objection to entry of judgment – so that the State could move forward with filing its notice of appeal – only after this court asserted that it believed it would retain jurisdiction to enforce its order even after the appeal was filed. The State did not disagree at that time.

The enforcement actions that RPEA has requested do not implicate the issues that will be presented in the appeal. The pending appeal does not deprive this court of jurisdiction to grant any of the relief that RPEA has sought.

III. RPEA'S REQUESTED REMEDIES DO NOT IMPLICATE THE DOCTRINE OF SEPARATION OF POWERS.

There is equally no merit to the State's invocation of separation of powers as a reason for denying any of RPEA's requested relief. The judicial branch unquestionably had authority to hear and to rule on RPEA's allegations that the State adopted an unconstitutional retiree dental plan in 2014. After a court properly declares the law, separation of powers does not suddenly deprive the court of jurisdiction to compel a

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recalcitrant litigant to take specific steps to comply with the court's judgment.

Only one of RPEA's specific requests for action by this court even comes close to asking this court to tell the State how to implement the new two-plan system it has decided to use. That is RPEA's second request: that the court prohibit the State from designating the 2014 plan the "default" plan. This request is proper and does not involve the court in infringing on prerogatives of the executive branch.

This court ruled that the 2014 plan represents an unconstitutional diminishment. This court's April 2019 order allows the State to offer this plan to retirees who *choose* it, but the court order does not allow the State to *impose* the 2014 plan on any retiree in 2020. Such a reading would be fundamentally inconsistent with the court's order. Yet that is exactly what the State is proposing to do in designating the 2014 plan as the default: Anyone who does not affirmatively choose to have his or her constitutional rights protected will automatically be placed into an unconstitutional plan. It is entirely appropriate and not a violation of separation of powers for this court to tell the State it may not *require* any retiree to participate in an unconstitutional plan simply because the retiree fails to take specific action within a narrow window of time.

RPEA's requests for information – paragraphs 4 and 5 of its proposed order – do not in any way involve the court in telling the State how to administer its dental plans. These requests for information should be granted because the information sought will enable RPEA and the court to know whether the implementation that the State adopts is or is not constitutional. RPEA is concerned that the State's implementation will

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improperly burden those who wish to exercise their constitutional right to a non-diminished dental plan. This court already voiced a concern that requiring only those who choose a constitutional plan to pay for it seems to shift the entire burden onto retirees, when arguably the State alone should be paying for the mistake it made in implementing an unconstitutional plan.

The State, as administrator of a dental plan that is funded entirely by participants, has a fiduciary duty to use participants' funds in the participants' best interest. Retirees therefore should not have to shoulder any extra expenses that the State incurs in belatedly rectifying the unconstitutional situation it created. Information establishing how the State calculated the differential premiums is essential so that RPEA can evaluate whether it has a claim to present to the court about the State's misuse of retirees' money in remedying the unconstitutional situation the State created. The requests for information are appropriate and do not violate the separation of powers doctrine.

Respectfully submitted, this 14 day of October, 2019.

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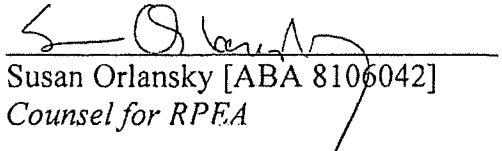

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IN THE SUPREME COURT FOR THE STATE OF ALASKA

KELLY TSHIBAKA, COMMISSIONER OF THE DEPARTMENT OF ADMINISTRATION, Appellant,	)	
v.	)	No. S-17577
THE RETIRED PUBLIC EMPLOYEES OF ALASKA, INC., Appellee.	)	

Superior court: 3AN-16-04537 CI

CERTIFICATE OF TYPEFACE AND SERVICE

I certify, pursuant to Appellate Rule 513.5, that the Appellee's Brief was prepared in 13-point proportionately spaced Times New Roman typeface.

I certify that on this 28th day of September, 2020, a true and correct copy of the Brief of Appellee, the Appellee's Excerpt of Record, and this Certificate of Typeface and Service were served via email upon the following:

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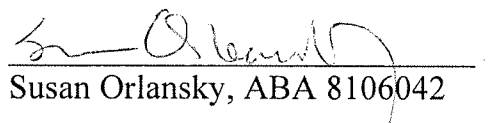
Respectfully submitted, this 28th day of September, 2020.



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