BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

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

ORDER DENYING MOTION TO DISMISS

I. Introduction

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

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

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

II. Facts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[13] January 28, 2009 Case Planning Order at 1.

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

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

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

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

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

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

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

III. Discussion

A. NATURE OF THE OFFICE OF ADMINISTRATIVE HEARINGS

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

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

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

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19 *Id*. at 16.

20 *Id*. at 17.

21 AS 44.64.010(a).

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

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

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

25 AS 44.64.060(c)-(e).

judge applies laws made by others and policy drawn from law. OAH judges are generalists who may have developed expertise in some areas of law but whose decisions are not meant to make new law.[27]

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

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

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

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

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

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

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

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

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

B. OAH'S PERS JURISDICTION INCLUDES COVERAGE APPEALS.

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

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

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

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

[32] S.'s Memorandum at 6.

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

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

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

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

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

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

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

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

[34] AS 39.35.040(4) (2004).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Conclusion

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

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

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

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

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

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

DATED this 9th day of June, 2009.

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

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