BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of	)	
	)	OAH No. 21-2489-PER
C P	)	Agency No. 2021-104
	)	
	)	OAH No. 20-0902-PER
	)	Agency No. 2020-101

DECISION ON CROSS MOTIONS FOR SUMMARY ADJUDICATION

I. INTRODUCTION

The Division of Retirement and Benefits ("DRB") has long charged Retiree Medical Benefits Plan ("Plan") members a deductible, even when the Plan provides coverage secondary to Medicare. C P challenged that deductible for 2014. OAH found some Plan language ambiguous and ordered his deductible reimbursed for that year. DRB responded by amending the Plan to clarify its longstanding practice of charging deductibles ("Amendment"). A nonprofit representing retirees then filed a lawsuit challenging the Amendment as an unconstitutional diminution of benefits. The superior court held that the Plan Amendment was valid but mentioned in a footnote that Mr. P was exempt from the Amendment.

Both parties argue past is prologue for Mr. P's 2020 and 2021 deductibles. But they disagree on which past is relevant and the extent to which OAH can or must follow it. Mr. P argues that he is exempt from the Amendment based on the superior court's language and the earlier OAH decision. DRB argues he is not exempt based on its longstanding practice and the superior court's determination that the Amendment is valid. The import of these prior practices and decisions depends largely on the nature of administrative law, including an agency's authority to fix mistakes, to interpret and apply the constitution, and to regard prior administrative or superior court decisions as mere persuasive authority.

Ultimately, DRB had authority to Amend the Plan. That Amendment did not change the Plan; it clarified DRB's longstanding practice of charging deductibles. Thus the Amendment did not diminish benefits for the Plan members as a whole. The prior OAH decision and superior court decision do not shield Mr. P from that Amendment. Accordingly, summary adjudication is granted for DRB for both appeals.

II. BACKGROUND

As a beneficiary of a retired state employee, C P receives health care benefits from both Medicare, as a primary plan, and the Retiree Medical Benefits Plan, as a secondary plan.

Mr. P challenged DRB charging him a Plan deductible in 2014 when he had already paid a deductible with Medicare. OAH found that the Plan's Coordination of Benefits provision was ambiguous as to whether the Plan included a deductible when it was a secondary benefit plan ("OAH 2014 Deductible Decision"). Because of this ambiguity, OAH applied the interpretation that favored Mr. P, as the insured, and held that his Medicare deductible is a credit against the Plan deductible.[1]

DRB addressed the situation by amending the Plan. The Amendment, issued May 25, 2016, states that "[r]elevant deductibles, coinsurance amounts, and out-of-pocket limits continue to apply to both Medicare and the Plan."[2]

Retired Public Employees of Alaska ("RPEA") filed a lawsuit claiming the Division improperly diminished retirees' health care benefits through various changes to the Plan in 2014 and 2016, including the Amendment. On cross motions for partial summary judgment, the superior court held that the Amendment was valid and did not change the terms of the Plan and therefore RPEA had no claim related to the Amendment ("RPEA Decision").[3] No other issues related to the Amendment remain pending in RPEA's superior court case.[4]

In the RPEA Decision, the court discussed both the OAH 2014 Deductible Decision and *Duncan v. Retired Public Employees of Alaska, Inc.*, which held that courts should assess whether changes to public employee health insurance benefits are an unconstitutional diminishment by comparing benefits before and after the change for the group as a whole. The court then stated, in Footnote 46, that "[u]nder *Duncan*, [Mr. P] is protected from Amendment 2016-2 and is entitled to pay one deductible to receive both Plan and Medicare coverage."[5]

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1 *In re CP*, 15-0283-PER at 5 (2016).

2 AlaskaCare Retiree Health Plan Amendment 2016-2, available at http://doa.alaska.gov/drb/pdf/ghlb/retiree/retireePlanAmendment05252016.pdf. The Amendment is further reflected in comparison of the Plan booklets DRB attached as Exhibits A and B to Division's Cross Motion and Opposition to Appellant's Motion for Summary Adjudication on Preclusions Issues for the 2020 deductible appeal ("2020 Summary Adj. Opp.").

3 Order Denying Plaintiff's Motion for Partial Summary Judgment; and Granting Defendant's Cross Motion for Partial Summary Judgment in The Retired Public Employees of Alaska, Inc. v. State of Alaska, Department of Administrative, Division of Retirement and Benefits, 3AN-18-06722CI at 12-16 (Nov. 23 2020) ("RPEA Decision").

4 *See* Jan. 7, 2022 Order Denying Motion to Stay.

5 RPEA Decision at 10.

Mr. P appealed DRB decisions imposing a Plan deductible for 2020 and 2021. Mr. P and DRB cross-moved for summary adjudication in the 2020 appeal. After briefing was complete, the appeal was stayed pending resolution of RPEA's superior court case. In briefing a similar stay for the 2021 appeal, it came to light that no issues related to the Amendment remain pending in RPEA's case. Based on that new information, a stay was denied for the 2021 appeal and lifted for the 2020 appeal and the two appeals were consolidated. The parties then briefed cross-motions for summary adjudication again. Briefing on cross-motions from both the 2020 appeal and the consolidated appeals was considered here.

III. DISCUSSION

Summary adjudication is appropriate when there is no genuine issue of material fact in dispute.[6] The parties agree there are no factual disputes.

A. OAH Has Jurisdiction to Address All of the Issues Raised in the Parties' Cross-Motions.

The parties' cross motions largely turn on the extent to which OAH must or should follow the OAH 2014 Deductible Decision and the superior court's RPEA Decision. As discussed below, both are merely persuasive authority, including the RPEA Decision's Footnote 46, which is dicta. Some of the RPEA's Decision's statements about OAH jurisdiction are also contrary to Alaska law and therefore OAH is not persuaded to follow them.

1. The OAH 2014 Deductible Decision and RPEA Decision Are Persuasive, Not Binding, Authority.

OAH is an independent tribunal. It hears many matters on referral, issuing proposed decisions for consideration by final agency decision makers. For other matters, such as Public Employee Retirement System appeals, OAH has original jurisdiction.[7] In both instances, OAH is in the same position as any state administrative agency acting in a quasi-judicial capacity.

In general, legal authority is either binding or persuasive. Binding authority is authority an agency must follow. Persuasive authority is authority an agency decision maker may follow if persuaded by it.[8] For a state administrative agency, the Alaska Constitution, Alaska statutes, and

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6 2 AAC 64.250.

7 *In re T.N.S.*, OAH No. 09-0025-PER at 4 (2009); AS 39.35.006.

8 PRECEDENT, Black's Law Dictionary (11th ed. 2019) (defining persuasive precedent as "precedent that is not binding on a court, but that is entitled to respect and careful consideration").

the holdings of decisions by the Alaska Supreme Court are generally binding authority. Dicta from any court is merely persuasive, as are laws or judicial decisions from other jurisdictions.[9]

Superior court decisions can be binding or persuasive for an administrative decision maker. The legal holdings or factual findings from a final superior court decision may be binding under the doctrines of law of the case or res judicata.[10] The same may be binding in different matters involving the same parties under collateral estoppel.[11] But outside of the limited application of law of the case, res judicata, and collateral estoppel, superior court decisions are not binding on a state administrative agency.[12]

Quasi-judicial administrative decisions are different from superior court decisions. An agency may choose to apply res judicata or collateral against a party, but parties may not necessarily bind an agency to an earlier decision by collateral estoppel.[13] This is because agencies are free to change their minds so long as they explain the change.[14] Collateral estoppel may be appropriate when an agency is not acting in a quasi-judicial capacity or where a higher authority in the same agency imposes collateral estoppel on a subordinate division seeking to

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[9] *See*, *e.g.*, *Keeton v. State, Dep't of Transportation & Pub. Facilities*, 441 P.3d 933, 940 (Alaska 2019) ("Federal decisions construing federal laws are persuasive authority when we interpret their state law counterparts."); *Joseph v. State*, 26 P.3d 459, 468-69 (Alaska 2001) ("A case is not binding precedent if its holding is only implicit or assumed. Dictum is not holding.").

[10] *See*, *e.g.*, *Beal v. Beal*, 209 P.3d 1012, 1017 (Alaska 2009) (explaining that law of the case is a top-down discretionary basis to avoid relitigating an issue resolved in an appeal in the same case that does not apply laterally to bind a superior court judge to a ruling in the same case by a different superior court judge that has not been affirmed on appeal); *May v. State, Commercial Fisheries Entry Comm'n*, 168 P.3d 873, 884 (Alaska 2007) (law of the case refers specifically to the binding effect of a prior holding in a "former appeal *of a case*" as distinguished from holdings in other cases); *Alaska Contracting & Consulting, Inc. v. Alaska Dep't of Lab.*, 8 P.3d 340, 344 (Alaska 2000) ("Res judicata may also apply to administrative proceedings if, after a case-specific review, a court finds that the administrative decision resulted from a procedure 'that seems an adequate substitute for judicial procedure' so that according preclusive effect to the administrative decision would be fair.")

[11] *See*, *e.g.*, *Briggs v. State, Dep't of Public Safety, Div. of Motor Vehicles*, 732 P.2d 1078, 1081-82 (Alaska 1987) (applying collateral estoppel in administrative proceeding for claim previously resolved in separate superior court proceeding).

[12] *See*, *e.g.*, *In re BQ*, OAH No. 14-1115-APA at 4, n. 25 (Health and Social Services 2014) (superior court decision not subject to collateral estopped is persuasive authority and had been followed in some OAH proceedings and not in others); *In re Martin Ferrell*, OAH No. 06-0582-COL at 5 (Commerce, Community and Economic Development 2007) ("a superior [court] decision is not a binding precedent, it is persuasive authority"); *cf.* Alaska R. App. Proc. 214(d)(1) (unpublished decisions not precedential, but may be persuasive authority).

[13] *Jeffries v. Glacier State Tel. Co.*, 604 P.3d 4, 8 (Alaska 1979) ("the doctrine of res judicata may be applied to adjudicative determinations made by administrative agencies" but cautioning against "rigid application of the rules" in an administrative proceeding); *May v. State*, 168 P.3d 873, 883 (Alaska 2007) 883 ("[C]ollateral estoppel against an agency acting in a quasi-judicial capacity is inappropriate, particularly in cases where, as here, the agency is correcting its prior action in order to conform to the law.").

[14] *May v. State*, 168 P.3d at 884 ("[C]onsistent with Alaska law and decisions of the United States Supreme Court, agencies may overrule a prior decision if convinced it was wrongly decided. When overruling a prior decision, the agency must provide a reasoned analysis that explains why the change is being made.").

relitigate matters already decided at the higher level.[15] And it may be appropriate when an agency has no reason to change a prior finding, legal interpretation, or policy. But when there is a reason to deviate from a prior decision, "collateral estoppel against an agency acting in a quasi-judicial capacity is inappropriate."[16] Thus even in situations where an agency revisits similar issues for the same party in different years, the agency decision maker is not necessarily bound by that agency's prior conclusions.[17]

i. The RPEA Decision is Persuasive Authority

Here, the RPEA Decision is an interlocutory superior court decision in an ongoing matter. It is a different case from Mr. P's appeal, so law of the case does not apply.[18] It is not a final decision, so regardless if Mr. P could be considered in privity with RPEA, res judicata and collateral estoppel could not apply.[19] And even if it was a final decision and collateral estoppel applied, it would apply only to the decision's findings, not dicta. For purposes of these appeals, therefore, the RPEA Decision is persuasive authority.

ii. The OAH 2014 Deductible Decision is Persuasive Authority That Resolved Only Mr. P's 2014 Deductible.

As a quasi-judicial administrative decision, the OAH 2014 Deductible is also persuasive authority.

Mr. P argues that it is binding under the doctrines of res judicata, collateral estoppel, and law of the case and therefore DRB should be prohibited from charging him a Plan deductible in perpetuity.[20] These arguments imbue the OAH 2014 Deductible Decision with far greater reach and impact than it has.

The OAH 2014 Deductible Decision resolved only Mr. P's claims regarding his Plan deductible for 2014.[21] It did not amend the Plan for all members. It did not amend the Plan for

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[15] *See*, *e.g.*, State v. United Cook Inlet Drift Ass'n, 895 P.2d 947, (Alaska 1995) (non-mutual offensive collateral estoppel may be asserted against the State in civil action against the State).

[16] *May v. State*, 168 P.3d at 883.

[17] *See*, *e.g.*, *Black v. Municipality of Anchorage, Bd. of Equalization*, 187 P.3d 1096, 1103 (Alaska 2008) (Board of Equalization could assess value of land it assigned no value to in the prior year's assessment because "administrative agencies like the Board of Equalization can change their rulings from prior years if they first provide a reasoned and supportable basis for reaching a different result.") (cleaned up); *Alaska Contracting & Consulting, Inc. v. Alaska Dep't of Lab.*, 8 P.3d at 345 (agency's 1990 determination that party was not a liable employer did not collaterally estop agency from relitigating that issue for a 1994).

[18] *May v. State, Commercial Fisheries Entry Comm'n*, 168 P.3d at 884 (law of the case refers specifically to the binding effect of a prior holding in a "former appeal *of a case*" as distinguished from holdings in other cases);

[19] *See*, *e.g.*, *Murray v. Feight*, 741 P.2d 1148, 1153 (Alaska 1987) (elements of collateral estoppel).

[20] 2021 SJM at 6-7.

[21] *In re CP*, 15-0283-PER at 7.

Mr. P. It did not hold that DRB could not charge Mr. P a deductible in subsequent years. The decision is limited to Mr. P and his 2014 deductible. His appeals here concern 2020 and 2021 deductibles. While the parties' arguments are similar, these are different appeals with different claims. Thus law of the case and res judicata would not apply.

Nor does collateral estoppel apply. Collateral estoppel limits relitigation of the same issues. While Mr. P raises similar concerns regarding his deductibles for 2020 and 2021, those concerns arose for different years, after DRB amended the Plan. These appeals therefore do not involve the same issues as the OAH 2014 Deductible Decision and collateral estoppel does not apply.[22] And, as discussed above, collateral estoppel has limited application with administrative decisions.

Though not binding for any other member, or for Mr. P in subsequent years, the OAH 2014 Deductible Decision did address language that applied to all members. If DRB did nothing, it could face repeated appeals raising the same arguments and citing the OAH 2014 Deductible Decision — with the potential to create a whole body of decisions finding the Plan ambiguous. It is not surprising therefore that DRB acted. It could have appealed to superior court. But as the court explained in RPEA, DRB was not compelled to do so.[23] Indeed a successful appeal by DRB would likely have produced merely a superior court decision resolving Mr. P's 2014 deductible. DRB would have that superior court decision to cite as persuasive authority in future challenges by Mr. P or other members, but the decision would not preclude such challenges. In keeping with basic agency powers to change policy or fix problems, DRB instead addressed the situation by adopting a clarifying Amendment.

2. OAH Has Jurisdiction to Review the Constitutionality of the Amendment and DRB's Application of the Amendment.

DRB argues that OAH cannot address constitutional arguments regarding the Amendment or DRB's application of the Amendment, citing the RPEA Decision. There, the superior court opined that RPEA could have appealed the Amendment to OAH, but that it could not have raised its constitutional challenges in such an appeal. According to the court, "OAH does not have the authority to resolve that assertion because '[a]dministrative agencies do not have the jurisdiction

[22] *See Alaska Contracting & Consulting, Inc. v. Alaska Dep't of Lab.*, 8 P.3d at 345 (agency's 1990 determination that party was not a liable employer did not collaterally estop agency from relitigating that issue for a 1994).

[23] RPEA Decision at 9-10.

to decide issues of constitutional law.'"[24] These statements are dicta. They are also contrary general administrative law and Alaska Supreme Court precedent.

Dicta are "opinions of a judge which do not embody the resolution or determination of the specific case before the court. Expressions in the court's opinion which go beyond the facts before court and therefore are individual views of author of opinion and not binding in subsequent cases as legal precedent."[25]

Whether or not RPEA, as an organization, could have appealed to OAH was not before the superior court, so the court's speculation that RPEA could have appealed is dicta. It is also mistaken. By statute, only "[a]n employer, member, annuitant, or beneficiary may appeal."[26] And appeals are from "a decision made by the administrator" concerning a specific claim.[27] Thus Mr. P's appeals here concern DRB charging him a deductible in specific years under the Amendment, not DRB's mere act of adopting the Amendment. RPEA, on the other hand, is a nonprofit organization. It is not one of the entities permitted to appeal. And its lawsuit challenges the adoption of the Amendment itself, not individual deductibles charged under the Amendment or administrator decisions regarding such deductibles. RPEA thus could not have filed its lawsuit as an appeal to OAH.

The superior court's speculation that OAH could not have addressed RPEA's constitutional arguments is also dicta. There was no such appeal or OAH decision addressing the Amendment before the court, so the court's opinion of OAH jurisdiction is not essential to its holdings.

The superior court's opinion of OAH jurisdiction is also contrary to administrative and Alaska law. The court quoted from *Alaska Public Interest Research Group v. State*, where the Supreme Court illustrated the limited jurisdiction of administrative agencies by pointing out that agencies "do not have jurisdiction to decide issues of constitutional law."[28] But the Court made that comment in the context of a facial challenge of a statute creating the Workers' Compensations Appeals Commission. Since *Marbury v. Madison*, it has been the purview of the

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[24] RPEA Decision at 10.

[25] *VECO, Inc. v. Rosebrock*, 970 P.2d 906, 922 (Alaska 1999) (cleaned up). *See also Johnson v. Municipality of Anchorage*, 475 P.3d 1128, 1131 (Alaska 2020) (discussion in a prior decision "contained in a footnote and not essential to the decision in the case — appear to be dictum"); *Joseph v. State*, 26 P.3d at 468-69 (Alaska 2001) ("A case is not binding precedent if its holding is only implicit or assumed. Dictum is not holding."); *Scheele v. City of Anchorage*, 385 P.2d 582, 583 (Alaska 1963) (language is dicta "since it was not necessary to the decision in the case").

[26] AS 39.35.006.

[27] *Id.*

[28] 167 P.3d 27, 36 (2007).

judicial branch to determine when the legislature has run afoul of the constitution.[29] The executive branch implements the legislature's statutes — theirs not to reason why.[30] But administrative law has long distinguished between facial challenges, which may be outside executive branch powers, and other constitutional challenges that an administrative adjudicator may address, including as-applied challenges and direct application of constitutional provisions.[31]

OAH and other Alaska administrative decision makers regularly address constitutional issues.[32] Indeed, just two months after its *Alaska Public Interest Research Group* decision, the Alaska Supreme Court held that not only can administrative agencies address constitutional issues, but constitutional interpretations within an agency's expertise are entitled to deference. In *State v. Jeffrey*, the Division of Elections interpreted and applied a constitutional provision requiring a declaration of candidacy for judicial retention. The court held that "because the [agency's] determination was supported by the facts and had a reasonable basis in law, the division is entitled to deference for both its interpretation of the constitution and the applicable statutes and for its application of the law to the circumstances presented in this case."[33]

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[29] 5 U.S. 137 (1803).

[30] There are exceptions. For instance, "[T]he executive branch may abrogate a statute which is clearly unconstitutional under a United States Supreme Court decision dealing with a similar law, without having to wait for another court decision specifically declaring the statute unconstitutional." *O'Callaghan v. Coghill*, 888 P.2d 1302, 1304 (Alaska 1995). And, at least for federal administrative law, though, "[t]his rule is not mandatory, however, and is perhaps of less consequence where . . . the reviewing body is not the agency itself but an independent commission established exclusively to adjudicate [certain statutory] disputes." *Thunder Basin Coal Co., v. Reich*, 510 U.S. 200, 2015 (1994). At a minimum, an administrative adjudicator like OAH may create a factual record and make factual findings that will be pertinent to a subsequent facial challenge to a statute. *In re Holiday Alaska, Inc.*, OAH No. 09-0245-TOB at 5 (Commissioner of Commerce, Comm. & Econ. Dev. 2009).

[31] *See*, *e.g.*, *McBryde v. Comm. to Rev. Cir. Council Conduct & Disability Ords. of Jud. Conf. of U.S.*, 264 F.3d 52, 62 (D.C. Cir. 2001) ("To be sure, agencies ordinarily lack jurisdiction to adjudicate the constitutionality of congressional enactments . . . . But agencies do have an obligation to address properly presented constitutional claims which do not challenge agency actions mandated by Congress.") (cleaned up); *Graceba Total Communications, Inc. v. F.C.C.*, 115 F.3d 1038, 1042 (D.C. Cir. 1997) (agencies have "an obligation to address properly presented constitutional claims which . . . do not challenge agency actions mandated by Congress"); *United Space Alliance, LLC v. Solis*, 824 F. Supp. 2d 68, 97 n.10 (D. D.C. 2011) ("Although government agencies may not entertain a constitutional challenge to authorizing statutes they *must* decide constitutional challenges to their own policies whether embodied in generic rules or as applied in an individual case."); *see also* § 8439 Review of Agency Constitutional Interpretations, 33 Fed. Prac. & Proc. Judicial Review § 8439 (2d ed.) ("Agencies often make determinations regarding the constitutionality of their actions. Such constitutional decisions can have beneficial consequences, such as administrative correction of constitutional error, developing a record for review, and giving the court the benefit of the agency's reasoning.")

[32] *See*, *e.g.*, *State v. North Pacific Fishing, Inc.*, 485 P.3d 1040, 1046 (Alaska 2021) (appeal from an OAH decision in which OAH, acting as final decision maker, determined whether imposing a landing tax on the appellants violated the Import-Export Clause of the U.S. Constitution); *In re Holiday Alaska, Inc.*, OAH No. 09-0245-TOB at 8-9 (as-applied constitutional challenges are "an issue the Commissioner, as an agency head sworn to uphold the constitution, can and should evaluate."); *In re T.N.S.*, OAH No. 09-0025-PER at 5 (2009) ("OAH judges frequently are called upon to address purely legal issues, including some raising constitutional questions and many requiring interpretation of statues or regulations.").

[33] *State v. Jeffrey*, 170 P.3d 226, 231 (Alaska 2007).

Not only may an agency address constitutional issues, an appellant may be required to raise such issues as an administrative appeal. In *Owsicheck v. State, Guide Licensing and Control Board*, an unsuccessful permit applicant filed a lawsuit seeking declaratory judgment that the statute at issue was unconstitutional, injunctive relief compelling issuance of the permit, and damages. The Alaska Supreme Court held that declaratory judgment claim was properly brought as a civil action because it challenged the statute on its face, not the Board's decision.[34] But the other claims, even though based on constitutional arguments, involved review of the Board's decision and therefore were properly converted to an administrative appeal, subject to court rules on deadlines for filing an appeal.[35]

The constitutional issues P raised in his appeals are well within the jurisdiction of OAH. DRB applies the constitution's diminution provision directly, rather than through the lens of the legislature's interpretation of the provision in statute, much like the constitutional election provision in *Jeffrey*. Like the Division of Elections in *Jeffrey*, DRB — and on appeal, OAH — may interpret and apply the diminution provision in the context of Mr. P's appeals. Indeed, OAH has been addressing constitutional anti-diminution claims for many years, often at request of DRB or the Department of Law.[36]

The RPEA Decision is persuasive authority. But in light of contrary legal authority, OAH is not persuaded to follow the court's opinions on OAH jurisdiction.

3. Footnote 46 is Dicta.

Mr. P argues that the RPEA Decision held, in Footnote 46, that the Amendment does not apply to him, and that OAH must follow this holding. DRB argues that the court's language is dicta.

DRB is correct. Footnote 46 states that "[u]nder *Duncan*, [Mr. P] is protected from Amendment 2016-2 and is entitled to pay one deductible to receive both Plan and Medicare coverage."[37] But the particulars of Mr. P's situation were not before the superior court. Mr. P is not a named party to the RPEA lawsuit, nor has he participated in his own right, such as by filing an amicus brief. The cross-motions for partial summary judgment resolved in the RPEA Decision

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34 627 P.2d 616, 619 (Alaska 1981)

35 *Id.* at 619-20.

36 *See*, *e.g.*, *Matter of F F. C*, OAH No. 13-0162-PER (2014); *Matter of N.A.*, OAH No. 06-0801-PER (2007).

37 RPEA Decision at 10, n.46. The court also stated at page 16 that "[b]efore Amendment 2016-2, with the exception of [Mr. P], members were responsible for both the Plan and Medicare deductibles."

do not seek resolution of whether DRB may apply the Amendment to Mr. P.[38] Nor is the court's resolution of these claims dependent on Mr. P's situation. Mr. P is mentioned only because RPEA argued DRB should have appealed the OAH 2014 Deductible Decision rather than adopt the Amendment. That argument relates to the validity of the Amendment in general, not Mr. P's rights. The court included its opinion on Mr. P in Footnote 46 as an aside, not an integral or necessary element to its holding. It is dicta and it is not binding here.[39]

The extent to which OAH is persuaded by Footnote 46 is discussed below.

B. The Amendment Did Not Change the Terms of the Plan or Diminish Benefits for Plan Members as a Whole.

As the Plan administrator, DRB has authority to make "reasonable modifications" to the Plan that do not, on balance, diminish members' benefits as a whole.[40]

While the Amendment modified some language, it did not change the terms of the Plan itself. Both before and after the Amendment, the Plan stated members "must first meet the annual deductible of $150 per person, before the medical plan starts to pay benefits."[41] Both before and after the Amendment, the Plan stated that when it provides secondary coverage, "[n]either plan pays more than it would without coordination of benefits."[42] And both before and after the amendment, the Plan included an example illustrating the coordination of primary and secondary plans. The example before the Amendment gave an example where a retiree's Plan pays first.[43] The Amendment modified the example to illustrate a retiree on Medicare with Medicare paying first.[44] While the examples are slightly different, both denote the retiree paying a deductible for the Plan when more than one plan applies.[45] The Amendment further added the language "[r]elevant deductibles, coinsurance amounts and out-of-pocket limits continue to apply to both Medicare and the Plan."

Stating explicitly that Plan deductibles apply when a member is covered by multiple plans and modifying the coordination example to specifically illustrate benefits coordinated with

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38 *See id.* at 1-2 (summarizing parties' basis for partial summary judgment).

39 Even if was a holding, Footnote 46 could not give rise to collateral estoppel because it is not a final decision. *See*, *e.g.*, *Murray v. Feight*, 741 P.2d 1153 (before collateral estoppel can apply to an issue, it "must have been resolved by a final judgment on the merits").

40 *Duncan v. Retired Public Employees of Alaska, Inc.*, 71 P.3d at 886; 2 AAC 39.390 ("If necessary, the administrator may change the premiums and the terms of major medical insurance coverage.").

41 2020 Summary Adj. Opp., Ex. A at 31 (January 2020 Booklet), Ex. B at 77 (May 2003 Booklet).

42 2020 Summary Adj. Opp., Ex. A at 163 (January 2020 Booklet), Ex. B at 168 (May 2003 Booklet).

43 2020 Summary Adj. Opp., Ex. B at 169 (May 2003 Booklet).

44 2020 Summary Adj. Opp., Ex. A at 164 (January 2020 Booklet).

45 2020 Summary Adj. Opp., Ex. A at 164 (January 2020 Booklet), Ex. B at 169 (May 2003 Booklet).

Medicare makes it clear that Medicare-eligible members pay a Plan deductible. But the pre-Amendment Plan's language requiring a deductible, specifying that the Plan will not pay more when coordinated with another plan, and the example illustrating a retiree paying a Plan deductible when coordinated with another plan all demonstrate that the Amendment provided clarification, not a change to the benefits provided under the Plan.

DRB's longstanding practice also demonstrates that the Amendment provided clarification, not a change. According to DRB, it has required deductibles from Medicare-eligible members since the inception of the Plan.[46] The RPEA Decision similarly found that, based on a DRB employee affidavit and various Plan supplements, that "DRB has required both Medicare and Plan deductibles since before [the OAH 2014 Deductible Decision]."[47] Mr. P did not dispute that this has been DRB's practice.[48]

Instead, Mr. P argues that DRB should not be able to use its past practice to justify a Plan interpretation that is not supported by the language of the Plan.[49] Mr. P is correct that neither DRB nor its members may take advantage of a practice based on "a misinterpretation of unambiguous language" simply because the practice is longstanding.[50] But DRB's practice is not a misinterpretation of unambiguous language. As discussed above, pre-Amendment Plan language supported DRB's practice. Even the OAH 2014 Deductible Decision found the Plan's Coordination of Benefits language to be merely ambiguous.[51] "[A]n ambiguity exists only when the contract, taken as a whole, is reasonably subject to differing interpretations."[52] Thus implicit in OAH's ambiguity finding was a finding that DRB's interpretation of the Coordination of Benefits language was not inconsistent with its language. DRB's history of charging deductibles is therefore relevant to the benefits available prior to the Amendment.

To the extent the Amendment changed the Plan, DRB's longstanding practice demonstrates that the change did not diminish benefits for members.[53] The Alaska Constitution protects Plan members' vested benefits from being "diminished or impaired."[54] DRB may

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46 2020 Summary Adj. Opp. at 11-12.
47 RPEA Decision at 13-14.
48 Appellant's Reply Brief for 2020 deductible appeal at 3.
49 *Id.*
50 *Flisock v. State, Div. of Retirement and Benefits*, 818 P.2d 640, 644, n.5 (Alaska 1991).
51 *In re CP*, 15-0283-PER at 5.
52 *Modern Constr., Inc. v. Barce, Inc.*, 556 P.2d 528, 529 (Alaska 1976).
53 Whether continuing to charge a deductible after a member becomes Medicare eligible and subject to Medicare deductibles is itself a diminution is not before OAH on this motion. This issue here is whether the Amendment diminished benefits that existed prior to the Amendment.
54 Alaska Const. Art. XII § 7.

modify the Plan, but disadvantageous changes must be offset by beneficial ones so that members' benefits on balance are not diminished.[55] In *Duncan*, the Court held that for health insurance, this equivalency analysis should be based on the member group as a whole, not individual members.[56] As a group, Medicare-eligible Plan members paid Plan deductibles before the Amendment. Thus when DRB required this same group to pay the same deductibles after the Amendment, there was no diminishment in benefits.[57]

The RPEA Decision nonetheless states, in Footnote 46, that "[u]nder *Duncan*, [Mr. P] is protected from Amendment 2016-2 and is entitled to pay one deductible to receive both Plan and Medicare coverage."[58] Mr. P urges OAH to follow this language, even if dicta.[59] The court's statement, however, is at odds with *Duncan*. Under *Duncan*, we look at diminishment of health care benefits for the group as a whole. A particular member might be disadvantaged by changes based on their individual health care needs, but if the group as a whole gains advantages equivalent to any disadvantages, there is no constitutionally prohibited diminution.[60]

Duncan did note a potential exception for "an individual showing that substantial detriments were not offset by comparable advantages and that this resulted in a serious hardship."[61] But the Court also stated that examples resulting in "detriments of at most several hundred dollars a year" did not constitute a serious hardship.[62] By that standard, the $150 deductible at issue here — while not negligible, depending on a person's circumstances — would similarly fall short of being a "serious hardship." Because the Amendment here did not diminish benefits for Medicare-eligible members as a whole, or create a substantial hardship for Mr. P as an individual, *Duncan* does not exempt Mr. P or any other member from the Amendment.

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

56 *Duncan v. Retired Public Employees of Alaska, Inc.*, 71 P.3d at 889-92. Mr. P argues that *Duncan* requires DRB to conduct an equivalency analysis when it modifies the Plan. 2021 SJM at 8-9. But *Duncan* describes an equivalency analysis for courts to conduct when reviewing a Plan modification, not a procedure DRB itself must follow. In general, courts do no prescribe procedures for an executive branch agency; the legislature either adopts procedures by statute or confers authority on an agency to do so by regulation.

57 The Court in *Duncan* emphasized the need for "solid, statistical data drawn from actual experience" to support a finding of equivalent value. *Id.* at 892. Here, where the issue is a factually simple question of deductible or no deductible, that type of evidence is unnecessary.

58 RPEA Decision at 10.

59 Mr. P's Motion for Summary Adjudication for the appeal of the 2021 deductible at 4.

60 *Duncan*, 71 P.3d at 891-92.

61 *Id.* at 892.

62 *Id.*

IV. CONCLUSION

Mr. P's obligation to pay a Plan deductible for 2020 and 2021 is not so simple as pointing to the OAH 2014 Deductible Decision or the RPEA Decision. The OAH 2014 Deductible Decision resolved only Mr. P's 2014 deductible. It did not alter the Plan for Mr. P or members as a whole, nor did it restrict DRB from amending the Plan. The decision did, in finding Plan language to be ambiguous, acknowledge that DRB's interpretation of Plan language was reasonable. That reasonable interpretation is supported by other language in the Plan. And because it was reasonable, it supports DRB's longstanding practice of charging Medicare-eligible members a Plan deductible. The fact that Medicare-eligible members paid a Plan deductible prior to the Amendment demonstrates that the Amendment did not change or diminish these members' benefits as a whole. Mr. P is part of that group and subject to an anti-diminishment analysis on a group basis. Accordingly, Mr. P is subject to the Amendment and his benefits were not unconstitutionally diminished by it. Summary adjudication is granted for DRB and denied for Mr. P. The underlying administrator decisions are affirmed.

DATED: March 31, 2022.

By: *Signed*
Rebecca Kruse
Administrative Law Judge

Adoption

This Decision is issued under the authority of AS 39.35.006. The undersigned, in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this Decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days of the date of this decision.

DATED: April 26, 2022.

By: *Signed*
Signature
Rebecca Kruse
Name
Administrative Law Judge
Title

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]