

IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE

RISEDELAWARE INC., *et al.*, )  
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 Plaintiffs, )  
 )  
 v. ) C.A. No. N22C-09-526-CLS  
 )  
 SECRETARY CLAIRE DEMATTEIS in her )  
 official capacity as Secretary of the Delaware )  
 Department of Human Resources and Co- )  
 Chair of the State Employee Benefits )  
 Committee, *et al.*, )  
 )  
 Defendants. )

**PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY JUDGMENT  
ON THEIR COMMUNICATIONS CLAIM**

Pursuant to Rule 56 of the Superior Court Rules of Civil Procedure, Plaintiffs respectfully submit this Motion for Partial Summary Judgment against Secretary Claire DeMatteis and Director Cerron Cade (“Defendants”) on Paragraphs 102-104 of Count III of their Complaint filed September 25, 2022 (the “Communications Claim”).

**PRELIMINARY STATEMENT**

For the reasons set forth below, there are no genuine issues of material fact in dispute and Plaintiffs are entitled to judgment as a matter of law on the Communications Claim.

In the seven-month period between adoption of Medicare Advantage on February 28, 2022 and the start of open enrollment on October 3, the Department of Human Resources (“DHR”) under Secretary DeMatteis decided not to communicate at all with State retirees about the change for the first three months. When DHR did finally begin, its mailings were individually inaccurate in various ways and, in totality, painted a misleading, rosy picture of the new healthcare plan as purportedly having the same benefits as the current traditional Medicare plan. Contrary to this picture, the plans are “substantially different,” as this Court has found. By communicating incomplete and misleading information, DHR left retirees in the untenable position of not realizing they should consider whether to opt out. And, when and if they did realize it, they had not been given sufficient and accurate information to make a well-reasoned decision.

This claim as pled names as defendant Secretary DeMatteis. To the extent that the Director of the Office of Management and Budget (“OMB”), Cerron Cade, bears responsibility for accurate communications with State retirees about their healthcare benefits because his office undertook that duty, Plaintiffs ask to have their Communications Claim deemed amended to include Director Cade for violation of that duty.

## STATEMENT OF FACTS

1. The Court's Order of October 19, 2022 granting Plaintiffs' Motion to Stay ("Decision") and the parties' Stipulation filed November 7 as to the mailings to State retirees about the State's change to a Medicare Advantage Plan effectively establish the material facts for this Motion, as supplemented with any additional indisputable facts noted below. Accordingly, there are no genuine issues of material fact in dispute.

### **The State's Restructuring Of Retiree Healthcare**

2. As established in the earlier proceedings on the Motion to Stay, the SEBC decided at its February 28, 2022 meeting to change the fundamental nature of State retirees' healthcare plan by switching from traditional Medicare to Group Medicare Advantage effective January 1, 2023. Minutes at 8.<sup>1</sup> The SEBC at that meeting also approved Highmark to "administer[]" the new Medicare Advantage plan ("HMAP"). *Id.* The Agenda<sup>2</sup> for that meeting did not give notice to the public of the major decision being voted on to restructure retirees' healthcare. *See Decision* at 3. It appears from the record and minutes that the SEBC was also not informed of the significance of the decision it was being asked to make. *See Decision* at 10.

3. Such a restructuring would result in major impacts on State retirees'

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<sup>1</sup> <https://dhr.delaware.gov/benefits/sebc/documents/2022/0228-minutes.pdf>

<sup>2</sup> <https://dhr.delaware.gov/benefits/sebc/documents/2022/0228-agenda.pdf>

healthcare. *Decision* at 6. “It is undisputed that the Medicare Advantage Plan is substantially different from retirees current State-funded health insurance as the Medicare Advantage plan will require prior authorizations for significantly more procedures and will require retirees to find in-network doctors to avoid paying out-of-pocket costs for care.” *Decision* at 6.

4. As found by this Court, the SEBC’s decision constituted the adoption of a regulation. *Decision* at 8-9. That regulation placed State retirees in the position of needing to make a critically important decision for their own healthcare: whether to keep their well-earned state benefits and enroll in HMAP or opt out and forego their State benefits so as to maintain all the benefits of traditional Medicare. State retirees could not make a well-reasoned decision without being informed by DHR of the change and without being given full and accurate information about the implications of the change.

5. DHR set open enrollment for the HMAP for October 4-23, 2022, some seven months after the restructured design was approved on February 28, 2022.

### **The Delay In Communication Of The Restructuring**

6. The Defendants, at least Secretary DeMatteis, and personnel responsible to and taking direction from her, nonetheless decided to delay informing retirees about the adoption of Medicare Advantage. *Rentz Aff* ¶¶26-27.<sup>3</sup> Their

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<sup>3</sup> Citations to *Rentz Aff* are to the Affidavit of Faith Rentz filed October 11, 2022.

paternalistic concern was that retirees would be “confus[ed]” if they learned of the new plan before open enrollment for vision and dental plans in May 2022. *Id.*

7. In keeping with DHR’s plan to tell retirees nothing about the significant change to their benefits for three months, the State Pensions Office, part of OMB under Director Cerron Cade, mailed its semi-annual newsletter in March 2022 to retirees. This newsletter was silent about the healthcare regulation that had been promulgated on February 28. A001-002.<sup>4</sup>

### **DHR And OMB’s Inaccurate And Incomplete Communications Regarding The Restructuring Of State Retiree Health Benefits**

8. Only on June 1, 2022, at the start of the summer vacation period with people’s attention likely elsewhere, did DHR undertake a “[n]otification and introductory mailing to [State retirees] about the transition to a Medicare Advantage Plan beginning January 1, 2023.” Rentz Aff ¶25, p. 9. At that point, however, rather than informing retirees of the significant change to their benefits and the need for them to carefully consider and research their options, DHR and the Pensions Office mailed a letter saying how “EXCITED” they were about the upcoming switch to

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<sup>4</sup> Citations in the form of A\_\_ are to bates-numbered pages of the Appendix of State Mailings being filed herewith. Defendants’ counsel provided the Appendix as the mailings referred to in the table in ¶25 of the Rentz Affidavit, as supplemented with two Pensions Office newsletters. Defendants’ counsel has provided their understanding that the Prior Authorization Overview was only put up online and not mailed out. The document was, however, mailed out to at least one State retiree on October 12, 2022. *See* Appendix Tab 2 that includes the post-marked envelope.

Medicare Advantage – a change the letter uncritically presented and characterized as “positive.” A003.

9. That letter, jointly signed by Faith Rentz and Joanna Adams in their official capacities overseeing State benefits,<sup>5</sup> further stated that, “The primary purpose of this letter is to inform you of the upcoming change *and reassure you that we have your best interest in mind.*” A003 (emphasis added). They represented that the new plan would “provide the same level of medical plan benefits as the Special Medicfill Plan it replaces.” A003. That statement was not accurate.

10. The letter did not convey the significant restrictions on healthcare benefits imposed by the HMAP’s prior authorization requirements and network restrictions.<sup>6</sup> As the Decision already found, “This Court cannot agree with the sentiment that the need for prior authorizations for over 1,000 procedures and the use of only in-network doctors is the same level of benefits retirees obtained with the current policy.” *Decision* at 10.<sup>7</sup>

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<sup>5</sup> Faith Rentz signed as Director of the State Benefits Office, which is under DHR; Joanna Adams signed as Pension Administrator of the Pensions Office, which is under OMB. A004.

<sup>6</sup> Indisputably, original Medicare “has virtually no prior authorizations today,” as the Delaware representative for Highmark at Middletown Town Hall acknowledged (video clip).

<sup>7</sup> The 41 pages with a highly condensed table of contractual Prior Authorizations for procedures and the 8 pages of condensed Prior Authorizations for drugs are in contract Exhibit 3 at <https://dhr.delaware.gov/benefits/medicare/documents/ma-delaware-contract.pdf?ver=1010>.

11. The Pensions Office summer newsletter in July, unlike the one in March, did mention the change to Medicare Advantage. A0042. But like the June 1 letter, it too spoke glowingly about the “positive change.” And it represented, contrary to fact, that the new plan “provid[ed] the same benefits” and “provider network” as the current traditional Medicare plan.

12. Over the summer, DHR mailed out two glossy marketing brochures prepared by Highmark. Rentz Aff. ¶25. The later of the two made what appears to be the first, albeit vague, mention to retirees about prior authorizations: “In some cases, you may need approval for care. Your doctor can help with any prior authorization necessary.” A0027. But that seemingly innocuous phrase – “in some cases” – did not accurately reflect the full extent of procedures requiring Highmark’s prior authorization. It also did not correct the earlier misrepresentation that the new plan provided the same level of benefits.

13. The next broad mailing to retirees was on September 15, 2022. Rentz Aff. ¶25 p. 10. That mailing (A0052-68), containing information relevant for enrollment, included an 8-page FAQ’s document. A0052-59 (dated 8/31/22). The answer to FAQ-22 said again that “prior authorization from Highmark” would be needed for services “[i]n *some* cases” but “[y]our enrollment materials coming this fall will further explain services that need prior approval.” A0056-57 (emphasis added).

14. On September 26, the Rentz Affidavit states that DHR mailed out a 38-page Medical Benefits Chart. Rentz Aff ¶25 p.11. That Chart for the first time gave some details about various procedures requiring prior authorization from Highmark. A0069-107. This was far more than the “some services” previously represented.

15. But even that 38-page Chart did not have the complete prior authorizations included in the Contract that was finally signed on September 28, 2022 and posted on the DHR website the next day. This was only a few days before open enrollment was set to open on October 3. As the Decision noted, “It is unclear to this Court how accurate information may be given to retirees about their new medical benefits without a contract in place.” *Decision* at 5.

### **ARGUMENT**

16. The SEBC enabling statute provides that one of the duties of the Secretary of DHR is “Communication to State employees of all State employee benefits coverages and any additions or changes of benefits affecting State employees.” 29 *Del. C.* § 9604(8). Based on the facts above, it is clear that Secretary DeMatteis did not fulfill this duty.

17. In addition, even if no specific statutory section made the Secretary of DHR responsible for full and accurate communications about healthcare benefits with retired employees, the Secretary took on that duty by virtue of DHR’s joint



letter of June 1 with OMB and all DHR's later mailings, including those at DHR's behest from Highmark.

18. The office of OMB under Cerron Cade, which oversees the State Pensions Office, also took on that duty. The Pensions Office was a signatory on several mailings, including the June 1 letter that represented it had retirees' "best interest in mind" (A003). A004, 22, 24, 69, 71. This made Director Cade liable for those inaccurate and incomplete mailings. "A duty to speak can be created by a pre-existing relationship between the parties or a partial disclosure of facts that requires the disclosure of additional facts to prevent a misleading impression." *Mentis v. Delaware Am. Life Ins. Co.*, 1999 WL 744430, at \*7 (Del. Super.) (citing *Stephenson v. Capano Development, Inc.*, 462 A.2d 1069, 1074 (Del. 1983)); cf. *Zirn v. VLI Corp.*, 681 A.2d 1050, 1056 (Del. 1996) (quoting *Arnold v. Society for Sav. Bancorp.*, 650 A.2d 1270, 1280 (Del. 1994)) ("The law of partial disclosure is likewise clear: '[O]nce defendants travel[ ] down the road of partial disclosure ... they ... [have] an obligation to provide the stockholders with an accurate, full, and fair characterization of those historic events.'").

19. DHR's and OMB's mailings were inaccurate, misleading and incomplete. Such communications gave little reason for anyone even to think of opting out of HMAP and losing their State healthcare benefit. But if State retirees

got that far in their thinking, they had not received complete and accurate information to inform their making of the better choice for themselves.

20. A declaratory judgment from this Court in favor of Plaintiffs on the Communications Claim will be of value in the public and political discourse about what happened and what should happen going forward. And it would provide a deterrence to such inaccurate and incomplete communications about retiree health benefit plans in the future.

21. A retiree's decision about a healthcare plan should only be made with complete and accurate information, and with ample time to consider research options (e.g., for the cost of Medicare supplement plans if the retiree decides to opt out). *"It's a very consequential decision, and the most important thing is to be informed."* (emphasis added)<sup>8</sup> Here, State retirees were not able to make their "very consequential decision" with full information because the Secretary and Director failed to give them that information.

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<sup>8</sup> Jeannie Fuglestein Biniek, Senior Policy Analyst, Kaiser Family Foundation, as quoted in NY Times article "*Medicare Advantage or Just Medicare?*" (online Nov. 5, 2022).

## CONCLUSION

For the reasons stated above, Plaintiffs submit that there are no genuine issues of material fact in dispute and that Plaintiffs are entitled as a matter of law to summary judgment in their favor on the Communications Claim.

Dated: November 9, 2022

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**CERTIFICATE OF SERVICE**

I, David A. Felice, hereby certify that on November 9, 2022, I caused a true and correct copy of *Plaintiff's Motion for Partial Summary Judgment* to be served via File& ServeXpress upon the parties listed below:

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