

WES MOORE  
Governor

ARUNA MILLER  
Lieutenant Governor

HELENE GRADY  
Secretary

MARC L. NICOLE  
Deputy Secretary



July 31, 2023

The Honorable Wes Moore  
Governor of Maryland  
State House  
100 State Circle  
Annapolis MD 21401

Senator Guy Guzzone  
Chair  
Senate Budget and Taxation Committee  
3 West Miller Senate Office Building  
11 Bladen Street  
Annapolis MD 21401

Senator Michael Jackson  
Chair  
Joint Committee on Pensions  
3 West Miller Senate Office Building  
11 Bladen Street  
Annapolis MD 21401

Delegate Ben Barnes  
Chair  
House Appropriations Committee  
121 Taylor House Office Building  
6 Bladen Street  
Annapolis MD 21401

Delegate Catherine Forbes  
Chair  
Joint Committee on Pensions  
304 Lowe House Office Building  
6 Bladen Street  
Annapolis MD 21401

Dear Governor Moore, Senator Guzzone, Senator Jackson, Delegate Barnes, and Delegate Forbes:

Chapter 767 of 2019 (State Prescription Drug Benefits - Retiree Benefits - Revisions) requires the Department to submit quarterly reports to the Governor, House Appropriations Committee, Senate Budget and Taxation Committee, and the Joint Committee on Pensions on the:

1. status of establishing the Maryland State Retiree Prescription Drug Coverage Program, Maryland State Retiree Catastrophic Prescription Drug Assistance Program, and Maryland State Retiree Life-Sustaining Prescription Drug Assistance Program (the three programs set forth in Chapter 767), including:
  - a. the status of procuring any contracts necessary to operate the programs, and
  - b. the prescription drugs determined to qualify for reimbursement under the Maryland State Retiree Life-Sustaining Prescription Drug Assistance Program;
2. availability of one-on-one counseling services for Medicare-eligible retirees to assist retirees in selecting a Medicare prescription drug benefit plan;

3. details of the health reimbursement accounts (HRA) or other programs to help with prescription drug costs in the three prescription drug assistance programs, including:
  - a. the specific out-of-pocket costs eligible for reimbursement,
  - b. the required process for receiving reimbursement,
  - c. the method of reimbursement,
  - d. the timing of reimbursement, and
  - e. a plan to use debit cards to process reimbursements in a convenient and efficient manner, and
  
4. in total and by category for the previous quarter, the number of issues and concerns reported to the hotline.

As a reminder, the Department has been enjoined from terminating State prescription drug benefits coverage for Medicare-eligible retirees and implementing the provisions of Chapter 767 of 2019 until further order of the U.S. District Court in *Fitch v. State of Maryland, et al.* As described below, the District Court has issued a very pertinent order, but the *Fitch* case remains ongoing.

### **Litigation Update**

On September 10, 2018, the *Fitch* plaintiffs filed an action to halt the State's effort to terminate prescription drug benefit coverage for Medicare-eligible retirees. An employees' union, AFSCME, joined in the matter to protect the rights of current State employees.

The chief question before the U.S. District Court for the District of Maryland was whether State Personnel and Pensions Article ("SPP") §§ 2-508 and 2-509.1 conferred a contractual right to prescription drug benefits on any retirees or employees. On October 18, 2018, the District Court entered an order enjoining the State from terminating the prescription drug benefits to consider this question.

The State moved to dismiss the case in its entirety, contending that there is no contractual right to prescription drug benefits. After an extended period, on December 30, 2021, the District Court ruled on the motion to dismiss in a manner that split the case into two parts that proceeded simultaneously. One portion of the case - addressing employees retiring after 12/31/18 and current employees, proceeded in the appellate court, while the other portion concerning retirees who retired prior to that date, proceeded in the District Court.

### **Employees Retiring After 12/31/18 and Current Employees**

In its December 30, 2021, order, the District Court ruled that SPP §§ 2-508 and 2-509.1 *did not* confer a contractual right upon those who retired after 12/31/18 and active employees. By statute, prescription drug benefits for Medicare-eligible retirees were set to terminate on January 1, 2019. Those who continued working for the State beyond that date did so with knowledge of this circumstance but continued in the employment anyway. These individuals therefore had no right to claim such benefits beyond that date. As a result, the District Court dismissed the claims of the active employees and those who retired after 12/31/18.

Shortly after the December 31, 2021, ruling, AFSCME pursued an appeal as of right before the Court of Appeals for the Fourth Circuit regarding that dismissal. The union appealed the ruling that active employees did not have a contractual entitlement to prescription drug benefits.

On February 21, 2023, the Court of Appeals held that the two statutes at issue *do not* confer a contractual right on anyone, and no contract was formed at all. In other words, the Court of Appeals rejected the entire basis of the District Court's reasoning without respect to whether it applied to current employees or retirees. DBM has not heard from the union since the appellate ruling.

**Retirees Who Retired Prior to 12/31/18**

Although the District Court ruled that those who retired after 12/31/18 did not have a contractual right to prescription drug benefits, it ruled in the opposite way with respect to individuals who retired before that date. The District Court found that SPP §§ 2-508 and 2-509.1 *did* confer a contractual right upon those who retired on or before 12/31/18. As a result, retirees who retired on or before that date continued to pursue their breach of contract and related claims in the District Court. This litigation proceeded at the same time as the appellate litigation.

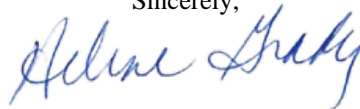
On February 27, 2023, the State filed a motion for summary judgment contending that the recent ruling of the Court of Appeals for the Fourth Circuit precluded further litigation in the District Court. The State argued that the Fourth Circuit ruling determined the *entire* case in the State's favor. Also, on February 27, 2023, the *Fitch* plaintiffs filed a motion to certify a class in order to convert the matter into a class action.

On July 19, 2023, the District Court issued an opinion applying the Fourth Circuit ruling to the case. In that opinion, the District Court (i) permitted the *Fitch* plaintiffs to file a brief concerning whether any fraud or restitution claims are available, (ii) terminated all other claims, including the contract claims, (iii) denied plaintiffs' motion to convert the case to a class action, and (iv) deferred a ruling on the State's motion for summary judgment pending the outcome of plaintiffs' pursuit of fraud or restitution claims.

Most importantly, the District Court dissolved the injunction that had been in place essentially throughout the litigation. Chapter 767 of 2019 permits the State to move forward with the three benefits plans described therein subsequent to the "final resolution of the injunction." DBM is determining whether the July 19 ruling constitutes the "final resolution of the injunction."

As it awaits the conclusion of the District Court matter, the Administration is exploring avenues as to how it will move forward and looks forward to reviewing our options with Department of Legislative Services staff in the weeks ahead.

Sincerely,



Helene Grady  
Secretary

cc: Victoria Gruber, Department of Legislative Services