

MEMORANDUM

State of Alaska Department of Law

TO: Bill Church, Benefits Supervisor
Division of Retirement and Benefits
Department of Administration

DATE: September 12, 1999
FILE NO: 663-00-0090
TEL. NO: 465-3600
SUBJECT: Calculation of Benefits
on Re-Retirement under
AS 39.35.150

FROM: Kathleen Strasbaugh
Assistant Attorney General
Governmental Affairs Section

I. Introduction and Short Answer

You have received inquiries concerning the calculation of benefits under AS 39.35.150 to which the commissioner of the Department of Administration responded in writing. We gave you oral advice confirming that the commissioner's response was correct: that the division's practice of calculating the benefits of members of the Public Employee Retirement System (PERS) who retire, return to work, and retire again is consistent with the applicable statute, AS 39.35.150. We added that if a person became a PERS member before July 1, 1977, an earlier statute, which provided that the additional contributions and credited service would be added rather than treated separately, would control. We now reiterate that advice in writing. As we note below, we have previously written comprehensively on this issue, and for that reason, we write only briefly here.

II. Analysis

Alaska Statute 39.35.150 clearly requires separate calculation of benefits for a first and a subsequent retirement:

Sec. 39.35.150. Re-employment of retired employees. If a retired employee subsequently becomes an active member, benefit payments may not be made during the period of re-employment. During the period of re-employment, deductions from the employee's salary shall be made in accordance with AS 39.35.160. *Upon subsequent retirement, the retired employee is entitled to receive an additional*

pension based on the credited service and the average monthly compensation earned during the period of re-employment in accordance with AS 39.35.370.

(Emphasis supplied.) Because this language is not ambiguous, there is little reason to resort to extrinsic aids to determine its meaning. *Konecky v. Camco Wireline, Inc.*, 920 P.2d 277, 281 (Alaska 1996). However, to the extent that there is any room for interpretation, the division is entitled to some deference for longstanding interpretation if it is consistent with the statute. *Irby-Northface v. Commonwealth Electric Co.*, 664 P.2d 557, 560 (Alaska 1983).

In short, there is no doubt that for any PERS member who became a member after the effective date of the above-cited version of AS 39.35.150, July 1, 1977, the two retirement periods must be calculated in the manner specified therein. Secs. 20 and 57, ch. 128, SLA 1977.

However, the situation is different for members who joined PERS for the first time before July 1, 1977. This office concluded in 1980 and 1981 opinions that, although the pre-1977 law may have been interpreted to require separate calculations as AS 39.35.150 is now, that interpretation was not consistent with the former wording of the statute, which provided:

. . . If a previously retired employee makes contributions to the fund during his re-employment, his additional credited service and compensation during the period of re-employment shall be included to determine his final retirement benefit.

We opined that the present wording is substantially different than the prior wording, and that for members who retired and were re-employed prior to the effective date of the amendment, article XII, section 7 of the Alaska Constitution, which prohibits the diminishment of accrued benefits, required the application of the prior statute to the extent it was more favorable. 1980 Inf. Op. Att'y Gen. at 4-6 (Oct. 24; J-88-642-80), *supplemented by* 1981 Inf. Op. Att'y Gen. at 1-2 (Jan. 29; J-66-642-81).

Our supplemental opinion was issued just a few months before the Alaska Supreme Court decided *Hammond v. Hoffbeck*, 627 P.2d 1652 (Alaska 1981). In that case, the court held that a person's constitutionally protected interest inheres when the person becomes employed rather than on eligibility for benefits. 627 P.2d at 1057. Accordingly,

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you should apply former AS 39.35.150 in the manner prescribed in our prior opinions to any member who became a member of the system before July 1, 1977.

Please let us know if you have any further questions. We understand that you have copies of our earlier opinions.

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