

# MEMORANDUM

# STATE OF ALASKA DEPARTMENT OF LAW

**TO:** John K. Norman, Chairman  
Alaska Oil & Gas Conservation  
Commission

**DATE:** March 21, 2006

**TEL. NO.:** (907) 269-5178

**FILE NO.:** 661-06-0348

**FROM:** Toby N. Steinberger  
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Labor and State Affairs Section  
Civil Division, Anchorage

**SUBJECT:** The Effect of Compensatory  
Time Agreements on PERS  
Retirement Benefits

You have asked for our opinion concerning an aspect of the retirement benefits due to petroleum inspectors employed with the Alaska Oil and Gas Conservation Commission (“AOGCC”). Under the Public Employees’ Retirement System (“PERS”) Act, an employee’s retirement benefit is partly based on the amount of “compensation” that the employee has earned. When the division of retirement and benefits calculates this amount, it includes the employee’s overtime wages. In lieu of receiving overtime wages, AOGCC petroleum inspectors accrue compensatory leave. They can cash-in unused compensatory leave under specified circumstances. Although the division includes payment of overtime, it excludes payment for unused compensatory time when it calculates the amount of compensation for purposes of determining retirement benefits. Your specific inquiry is whether the division of retirement and benefits should include in this calculation the payments for unused compensatory time.

Our opinion is that the division should not include payments for unused compensatory time. We base our opinion on the definition of “compensation” under the PERS Act, its legislative history, and the division’s longstanding interpretation.

## BACKGROUND

This office previously issued an opinion that petroleum inspectors are eligible to receive overtime wages under the federal Fair Labor Standards Act (“FLSA”).<sup>1</sup> In lieu of

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<sup>1</sup> 1998 Inf. Op. Att’y Gen. (Oct. 15; 221-98-0763).

paying overtime wages, the FLSA permits state and local governments to enter into compensatory time agreements with overtime eligible employees. 29 U.S.C. § 207(o). Under such agreements, the FLSA requires that, for each overtime hour that an employee works, the employee is entitled to one and one-half hours of compensatory time. The FLSA limits the number of compensatory hours that an employee may accrue<sup>2</sup> and if the employee accrues compensatory hours that exceed the limit, the employee must receive a payment for the excess hours at the employee's regular hourly rate. It also requires at termination of employment that the employee be paid for any unused compensatory time.<sup>3</sup>

At the request of the petroleum inspectors, since January 1999, the AOGCC and the petroleum inspectors have had a compensatory leave agreement. The agreement provides that each inspector is entitled to compensatory time for all overtime worked in excess of 40 hours per week. According to the agreement, an inspector normally works eight consecutive days, during which the inspector works a substantial amount of overtime hours. The inspector is then off duty for approximately the next two weeks. When the inspector is off duty, the inspector uses compensatory leave, receiving wages for the leave used.

An inspector may not have an opportunity to use all compensatory time that accumulates. The AOGCC may deny the use of compensatory leave when the inspector's absence would unduly disrupt the operations of the AOGCC. Under the agreement, an inspector cannot accumulate more than 150 hours of compensatory time. When an inspector reaches the cap set in the agreement or terminates employment, the inspector is paid for any remaining compensatory hours.

## LEGAL ANALYSIS

Because an inspector probably will cash in significant compensatory leave during a career, whether the division includes those amounts when calculating the employee's compensation will affect the inspector's retirement benefit. Retirement benefits are based partly on the "compensation" that the employee has earned. More precisely, under

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<sup>2</sup> 29 U.S.C. § 207(o)(3)(A) provides that employees engaged in "public safety," "emergency response," or "seasonal activity" cannot accumulate more than 480 hours of compensatory time; all other employees cannot accumulate more than 240 hours of compensatory time.

<sup>3</sup> See generally 29 C.F.R. § 553.20 – 29 C.F.R. § 553.51.

AS 39.35.370(c), the amount that an employee receives in monthly retirement benefits is based on the employee's years of service and an applicable percentage<sup>4</sup> of the employee's average monthly compensation.

Alaska Statute 39.35.680(9) defines the term "compensation" to mean "the remuneration earned by an employee for personal services rendered to an employer, including . . . payments for leave that is actually used by the employee, . . . but does not include . . . payments for leave not used by the employee. . . ."<sup>5</sup> Consequently, if payments for unused compensatory time are "payments for leave not used," AS 39.35.680(9) excludes them from "compensation."

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<sup>4</sup> Except for peace officers or fire fighters, the applicable percentage is

- (1) two percent of the of the average monthly compensation times all years of service before July 1, 1986, and for years of service through a total of 10 years; plus
- (2) two and one-quarter percent of the average monthly compensation times all years of service after June 30, 1986, over 10 years of total service through 20 years; plus
- (3) two and one-half percent of the average monthly compensation times all years of service after June 30, 1986, over 20 years of total service.

<sup>5</sup> Alaska Statute 39.35.680(9) currently reads:

(9) "compensation" means the remuneration earned by an employee for personal services rendered to an employer, including employee contributions under AS 39.35.160, cost-of-living differentials only as provided in AS 39.35.675, payments for leave that is actually used by the employee, the amount by which the employee's wages are reduced under AS 39.30.150(c), and any amount deferred under an employer-sponsored deferred compensation plan, but does not include retirement benefits, severance pay or other separation bonuses, welfare benefits, per diem, expense allowances, workers' compensation payments, or payments for leave not used by the employee whether those leave payments are scheduled payments, lump-sum payments, donations, or cash-ins; for a member first hired on or after July 1, 1996, compensation does not include remuneration in excess of the limitations set out in 26 U.S.C. 401(a)(17) (Internal Revenue Code).

The starting point in interpreting a statute is the statute's language. When the language includes a term that the statute does not define, the court considers the common meaning of the term.<sup>6</sup> The PERS Act does not define the term "leave." The word "leave" is defined as "authorized esp. [especially] extended absence from duty or employment." Merriam Webster's Collegiate Dictionary.<sup>7</sup> Black's Law Dictionary<sup>8</sup> defines "leave of absence" as "A worker's temporary absence from employment or duty with the intention to return."

Applying either definition of "leave," an inspector is on "leave" when the inspector takes compensatory time since the inspector is taking an authorized absence from duty. The payment that the inspector receives for using compensatory time is "compensation" under the PERS Act since it is a payment for leave that is actually used by the employee.<sup>9</sup> However, when the inspector receives a payment for unused compensatory time, the inspector is receiving a payment for leave not used and that payment is excluded from "compensation" for PERS purposes.

In addition to the statute's language, the court considers its legislative history.<sup>10</sup> The legislative history of the definition of "compensation" demonstrates that the legislature intended to exclude any kind of cashed-in leave. Prior to 1982, the legislature excluded from the definition of "compensation" payments for leave only when it was for medical leave or annual leave. In 1982, the legislature amended the definition of compensation to exclude payments for any type of "leave not used."<sup>11</sup> Sec. 67, ch. 137, SLA 1982. The amendment reads:

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<sup>6</sup> *Alaskans for Efficient Gov't. v. Knowles*, 91 P.3d 273, 276 (Alaska 2004). Alaska Statute 01.10.040(a) additionally provides that words and phrases shall be construed according to their common and approved usage.

<sup>7</sup> MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 663 (10th ed. 1966).

<sup>8</sup> BLACK'S LAW DICTIONARY 901 (7th ed. 1999).

<sup>9</sup> Under AS 39.35.330(a), employees who are on authorized leave of absence with pay receive credited service while on leave. Consequently, the inspectors are on authorized leave with pay when they take compensatory time, and they receive credited service while on compensatory leave.

<sup>10</sup> *Ranney v. Whitewater Eng'g*, 122 P.3d 214, 217 (Alaska 2005).

<sup>11</sup> The legislature also provided that payments for leave that is actually used by the employees is considered "compensation." Sec. 67, ch. 137, SLA 1982.

(8) “compensation” means the total remuneration earned by an employee for personal services rendered, including cost-of-living differentials, payments for leave that is actually used by the employee, the amount by which the employee’s wages are reduced under AS 39.30.–150(c), and any amount deferred under an employer-sponsored deferred compensation plan, but does not include retirement benefits, welfare benefits, per diem, expense allowances, workers’ compensation payments or payments for [MEDICAL LEAVE OR ANNUAL] leave not used by the employee whether those leave payments are scheduled payments, lump-sum payments, donations, or cash-ins;

Sec. 67, ch. 137, SLA 1982 (new language underlined, deleted language capitalized and bracketed).<sup>12</sup> Consistent with the statute, the division does not include payments for any type of unused leave that an employer offers.

Last, when interpreting a statute, the court will also consider an agency’s interpretation of a statute within its area of jurisdiction. In *Bartley v. State, Department of Administration*, the court stated:

Although we generally rely on our independent judgment when we decide questions involving pure statutory interpretation, we have recognized that an agency’s interpretation of a law within its area of jurisdiction can help resolve lingering ambiguity, particularly when the agency’s interpretation is longstanding.<sup>13</sup>

The division of retirement and benefits historically has not included payments for unused compensatory time when calculating how much compensation the employee has earned. Consistent with this practice, the division has not assessed contributions against employers and employees for compensatory leave that an employee cashes in. Employees and their employers pay contributions on all “compensation” earned. AS 39.35.160 and AS 39.35.250. If cashed-in compensatory leave had been treated as “compensation,” all employees and their employers would have paid contributions for the cashed-in leave that has been paid.

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<sup>12</sup> In 2005, the definition of “compensation” was renumbered as AS 39.35.680(9).

<sup>13</sup> 110 P.3d 1254, 1261 (Alaska 2005).

In summary, based on the language contained in the definition of “compensation,” the legislative history of the definition and the division’s longstanding interpretation, we conclude that payments for unused compensatory time is not “compensation” for purposes of calculating an employee’s retirement benefit.

If you have any questions regarding this opinion, please feel free to contact me.

TNS/kmh

cc: Melanie Millhorn, Director  
Division of Retirement & Benefits