BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL BY THE DEPARTMENT OF ADMINISTRATION

In the Matter of:	)	
	)	
D.W.	)	OAH No. 06-0178-PER
	)	Div. R&B No. 2006-016

DECISION

I. Introduction

D.W., an employee of the Department of Corrections, filed this appeal contesting the methodology the Division of Retirement and Benefits used to calculate his occupational disability benefits. The administrator of the Public Employees Retirement System filed a motion to dismiss the appeal, asserting that under AS 39.35.410(d) and Rhines v. State,[1] the administrator is precluded from calculating Mr. W.'s benefit in the manner he has proposed. Mr. W. opposed the motion, asserting that "the State," through the actions of employees of the division and the department, deliberately kept him on the payroll after he became occupationally disabled, in order to reduce his benefit when he eventually took an occupational retirement.

By order, the administrative law judge treated the motion to dismiss as a motion for summary judgment. Based on the record, and for the reasons that follow, the administrator's motion will be granted and the case will be remanded to the division.

II. Facts[2]

D.W. was employed by the Department of Corrections as a Correctional Officer II.[3] He incurred an on-the-job injury on November 16, 2004, but continued to work until he underwent surgery in January, 2005.[4] As a result of his on-the-job injury, Mr. W. was unable to perform the essential duties of his position, beginning January 11, 2005.[5] He received

[1] Rhines v. State, 30 P.3rd 621 (Alaska 2001) *(hereinafter,* Rhines).

[2] The facts as set forward are based on the evidence in the record, taking all reasonable presumptions in favor of Mr. W.

[3] R. 19, R. 21.

[4] R. 4.

[5] R. 20.

worker's compensation benefits for temporary total disability beginning effective January 11, 2005, and was placed on unpaid leave under provisions of the Family and Medical Leave Act.[6]

During the time that Mr. W. was on leave from his job, his position was reclassified from an 84 hour work week to a 40 hour work week.[7] Mr. W. received a telephone call from an employee of the Division of Retirement and Benefits, notifying him that if he wished to apply for occupational disability benefits he needed to fill out the appropriate forms. Mr. W. contacted the Department of Corrections and was informed that the department wished him to return to work if possible. On March 17, 2005, Mr. W.'s physician notified the department that Mr. W. could return to work with limited duties.[8] The department advised Mr. W. that upon release from his physician, he would be returned to work on a temporary basis, with a 40-hour work week schedule and restricted duties.[9] Mr. W. received a lump sum worker's compensation benefit for permanent partial disability.[10] He returned to work for the department as a Correctional Officer II on March 29, 2005, but with restricted duties and no overtime.

On June 1, 2005, after continuing evaluation, Mr. W.'s physician advised the department that Mr. W.'s condition would not improve, and that he was permanently unable to perform the essential duties of his position.[11] The department investigated the possibility of accommodating Mr. W.'s disability pursuant to the Americans with Disabilities Act, but determined that no reasonable accommodation was possible, and that there were no vacant positions available that Mr. W. could fill.[12] As a result of his disability, Mr. W. was separated from service on September 30, 2005.[13]

Mr. W. applied for occupational disability benefits upon his separation.[14] His application was granted and he was placed on disability status effective October 1, 2005.[15] The division calculated Mr. W.'s disability benefit based on his hourly wage at the time he was

[6] W. Opp. at 3; R. 45

[7] R. 4. Presumably, the change was accompanied by a change in the days worked, so that rather than a work week of seven twelve hour days (working alternate weeks), the work week was five eight-hour days.

[8] W. Opp. at 3

[9] *W.* at 2.

[10] R. 31

[11] W. Opp. at 4

[12] W. Opp. at 4-12.

[13] R. 43. It appears that Mr. W. was placed on leave without pay effective August 14, 2005.

[14] R. 19.

terminated ($24.47), plus his overtime compensation over the twelve-month period immediately prior to that date.[16] As calculated by the division, Mr. W.'s compensation at the time of his termination was equivalent to monthly income of $4,463.29, or annual income of $53,565.48. These amounts are somewhat less than Mr. W. had earned in 2003 and 2004, but about equal to his average compensation over the preceding five years.[17]

III. Discussion

A. Estoppel

Mr. W. initially alleged that his employer, the Department of Corrections, deliberately kept him on the payroll at reduced wages beyond the date on which he became disabled, in order to reduce his benefit for occupational disability. Mr. W. presented no evidence to support that allegation, and his claim of bad faith by his employer is outside the scope of this hearing, because the acts complained of are those of the Department of Corrections in its capacity as Mr. W.'s employer, and the Public Employees Retirement System is not in privity with a state agency acting in the capacity of Mr. W.'s employer.[18]

However, in addition to accusing the Department of Corrections of bad faith, Mr. W. also suggested that the Division of Retirement and Benefits may have led him to return to work after he became disabled in January, 2005, rather than to apply at that time for occupational disability retirement benefits. The lack of privity between the employing agency and the Division of Retirement and Benefits does not bar an Mr. W. from raising the defense of equitable estoppel in this case, because the statements on which Mr. W. claims to have relied to his detriment were not made by his employer, but by the division in its capacity as an agent of the administrator.[19]

The division moved for summary adjudication on the issue of equitable estoppel. The motion for summary judgment must be granted, for the reasons stated in the administrator's supporting memorandum: Mr. W. has failed to submit any evidence of facts sufficient to support a claim of estoppel.

[16] R. 7-9; Proposed Stipulation of Facts at 3-4 (Occupational Disability Benefit Calculation).

[17] Mr. W.'s average annual compensation over the preceding five years was $53,462.17, based on annual compensation of $46,588.47 (2000), $48,442.56 (2001), $52,712.54 (2002), $60,868.29 (2003), and $58,698.99 (2004). Proposed Stipulation of Facts at 3.

[18] *See* Holmberg v. State. Division of Risk Management, 796 P.2d 823, 827-829 (Alaska 1990) (collateral estoppel); Lopez v. Administrator. Public Employees' Retirement System. 20 P.3rd 568, 574 (Alaska 2001) (admission against interest).

[19] *See, e.g.,* Crum v. Stalnaker. 936 P.2d 1254 (Alaska 1997).

B. Calculation of Benefit

AS 39.35.410(d) provides that "[t]he monthly amount of an occupational disability benefit is 40 percent of the disabled employee's gross monthly compensation at the time of termination due to disability." The division calculated Mr. W.'s gross monthly compensation at the time of termination based on his hourly wage at the time of termination, plus his overtime compensation over the twelve month period ending on September 30, 2005.

Mr. W. had been unable to work for about two months during that twelve month period because he was recuperating from surgery necessitated by his on-the-job injury incurred on November 16, 2004. Furthermore, after he returned to work on March 29, 2005, Mr. W. was placed in a position that did not include regularly scheduled overtime, and was not given overtime work because of his physical condition. For these reasons, Mr. W.'s overtime compensation during the period that the division used to calculate his benefit was lower than his overtime compensation during the twelve month periods immediately preceding his on-the-job injury (November 16, 2004) or the date he last worked in his regular capacity (January, 2005).

In this appeal, Mr. W. contends that rather than using the twelve months ending September 30, 2005, to calculate his compensation, the division should have used the twelve months ending the date he last worked in his regular, unrestricted capacity. Using Mr. W.'s methodology, his occupational disability benefit would be about $170 to $240 per month more than he is actually receiving.[20]

1. The Date of Termination Controls

The administrator contends that for purposes of AS 39.35.410(d), the date of termination is the date on which there is a complete severance of the employment relationship, and not the date of the on-the-job injury or the date the employee last works in an unrestricted capacity.

The administrator relies on Rhines. In Rhines, an employee incurred an occupational disability in March, 1993; she left her job and did not return to work after March 16, 1993, due to her occupational disability. In July, 1993, her employer eliminated her position as a result of reorganization, and she was laid off on July 30, 1993. The employee applied for occupational disability benefits. The board determined that the employee was terminated because of the

[20] Using Mr. W.'s actual income, including all overtime, in 2003 and 2004 as the basis for calculating his disability benefit would yield a pre-COLA benefit of $2,028.94 (2003) or $1,956.63 (2004), as compared with the $1,785.32 pre-COLA benefit he is actually receiving.

elimination of her position, not because of her disability. On appeal, the employee argued that she terminated her employment due to disability in March, when she stopped working. The issue before the court was causation: was the termination of employment "because of disability? To decide that issue, the court had to determine the date on which the termination of employment had occurred. The court concluded that for purposes of AS 39.35.410(a), the date of termination is the date on which there is a complete severance of relationship of employer and employee.[21] The case does not address the date of termination of employment for purposes of AS 39.35.410(d), or the manner in which disability benefits are calculated under AS 39.35.410(d). The case concerned eligibility, not calculation of benefits.

Because in Rhines the court inteipreted AS 39.35.410(a), and not AS 39.35.410(d), that case does not directly control. However, because statutory provisions are interpreted *in pari materia,*[22] it is appropriate to read the date of termination of employment consistently throughout AS 39.35.410.[23] Thus, Mr. W.'s benefit must be calculated based on his compensation at the time of termination on September 30, 2005.

2. Calculation of Benefits Must Conform With AS 39.35.410(d)

The methodology the division employs to calculate disability retirement benefits must be within the permissible scope of AS 39.35.410(d). Determining whether the division has employed the sole correct methodology, or whether the methodology it has employed is but one of a number of permissible alternatives, is a matter of statutory construction, governed by the normal principles of statutory construction:

> The purpose of statutory construction is "to give effect to the intent of the legislature, with due regard for the meaning that the statutory language conveys to others." Statutory construction begins with the language of the statute construed in light of the purpose of its enactment. If the statute is unambiguous and expresses the legislature's intent, statutes will not be modified or extended by judicial construction. If we find a statute ambiguous, we apply a sliding scale of interpretation, where "the plainer the language, the more convincing contrary legislative history must be."[24]

[21] 30 P. 3rd at 626.

[22] *See, e.g.,* Keane v. Local Boundary Commission, 893 P.2d 1239, 1247 (Alaska 1995); State v. Bingaman, 991 P.2d 227, 229 n. 6 (Alaska App. 1999).

[23] *See* AS 39.35.410(a) (causation); AS 39.35.410(d) (calculation of benefits); AS 39.35.410(f) (application date).

[24] Tesoro Petroleum Corporation v. State, 42 P.3d 531, 537 (Alaska 2002) (internal citations omitted).

The legislative intent may be derived from consideration of the statutory provisions and the legislative history,[25] including the broad structure of the applicable statutes,[26] legislative changes to the relevant statutes over time,[27] and any express indications of legislative intent.[28]

In addition to considering the legislative history, an ambiguous statute should be construed in light of any applicable administrative interpretations. When construction of the statute does not involve agency expertise, an agency interpretation, particularly if long-standing, provides useful guidance as to the meaning.[29] When construction of the statute involves agency expertise, the agency interpretation will be adopted unless it is unreasonable or there are weighty reasons to disregard the agency's inteipretation.[30] The proper construction of AS 39.35.410(d) does not involve agency expertise,[31] and therefore the agency's interpretation provides useful guidance, but is not owed any special deference.

A. PURPOSE AND LANGUAGE

The division's initial letter to Mr. W. describing his disability benefit, the memorandum supporting the administrator's motion for summary judgment, and the affidavit submitted in support of the motion all state that Mr. W.'s benefit is based upon his average monthly compensation. In fact, the division did not calculate Mr. W.'s benefit based upon his average monthly compensation: it calculated his benefit based upon his hourly wage at the time of termination, plus his overtime compensation during the preceding twelve months.

[25] Newmont Alaska Ltd. v. McDowell. 22 P.3d 881, 884 at n. 14 (Alaska 2001).

[26] *See, e.g.,* State v. Alex. 646 P.2d 203, 208 (Alaska 1982); Millman v. State, 841 P.2d 190, 194 (Alaska App. 1992).

[27] *See, e.g.,* North Slope Borough v. Sohio Petroluem Corporation, 585 P.2d 534, 541-543 (Alaska 1978); Lagos v. City & Borough of Sitka. 823 P.2d 641, 643 at n. 3 (Alaska 1991).

[28] *See generally,* Interior Cabaret. Hotel. Restaurant & Retailers Association v. Fairbanks North Slope Borough, 135 P. 3d 1000, 1010-1011 (Alaska 2006) (Matthews, J., concurring); Cook Schuhmann & Groseclose. Inc. v. Brown & Root. Inc., 116 P.3d 592, 600-601 (Alaska 2005) (Bryner, C.J., dissenting in part).

[29] Grimm v. Wagoner. 77 P.3d 423, 433 (Alaska 2003).

[30] Lopez v. Administrator, Public Employees Retirement System. 20 P.3d 568, 570 (Alaska 2001); Bartlev v. State. Department of Administration, Teachers' Retirement Board, I10P.3d 1254, 1261 (Alaska 2005) [hereinafter, Bartlev1, *citing* Kelly v. Zamarello. 486 P.2d 906, 910-911 (Alaska 1971); *see* Whalev v. State. 438 P.2d 718 P.2d 722 (Alaska 1968).

[31] *See* Bartlev, 110 P.3d 1254, 1263 (interpretation of arrearage indebtedness under AS 15.25.060). The administrator's proposal for action argued that the administrative law judge should defer to the agency's interpretation, asserting that the interpretation of AS 39.35.410(d) calls for the exercise of agency expertise. That argument was rejected by the administrative law judge. Memorandum and Order at 2-3 (January 25, 2007). *See, e.g.,* McMullen v. Bell. 128 P.3d 186, 190 (Alaska 2006); State, Public Employees' Retirement Board v. Morton, 123 P.3d 986, 988 (Alaska 2005); Rhines v. State. Public Employees' Retirement Board, 30 P.3d 621, 624 (Alaska 2001); Flisock v. State. Division of Retirement and Benefits, 818 P.2d 640, 643 n. 4 (Alaska 1991).

The division's actual methodology was consistent with the plain language of AS 39.35.410(d).

B. LEGISLATIVE HISTORY

AS 39.35.410(d) was enacted in its current form in 1976.[32] Prior to the 1976 amendment, disability benefits were calculated under a formula that was based on the employee's average monthly compensation, adjusted to reflect the number of years of service that the employee would have had if the employee worked until the normal retirement age. The 1976 amendment changed the basis of calculating the benefit from average monthly compensation to compensation at the time of termination.

The division's actual methodology was consistent with this legislative history.

c. PRIOR ADMINISTRATIVE PRACTICE

According to the administrator's memorandum in support of summary judgment and an affidavit submitted with the motion, from 1988 through 2004 the division calculated disability benefits based on average compensation over a twelve-month period.[33] During that time, according to those materials, the division gave employees the benefit of the better of, potentially, three different twelve-month periods as the basis for the calculation: (1) the twelve-month period preceding the date of termination, defined as either (a) the last day the employee performed work for the employer, or (b) the date on which the employment relationship ended; or (2) the twelve-month period preceding the date of the last significant injury.

The memorandum in support of summary judgment suggests that the methodology described in the memorandum and affidavit (average monthly compensation) should be adopted as the correct interpretation of AS 39.35.410(d). However, that methodology, so far as the record reveals, existed solely as a matter of administrative practice, not as a regulation or as a written policy interpreting AS 39.35.410(d). A written policy or administrative practice that has not been promulgated as a regulation does not constitute a binding rule of law.[34] Indeed, the administrative law judge may not rely upon the division's written policies or administrative

[32] §11 ch. 123 SLA 1976.

[33] Administrator's Supplemental Brief at 6-9, Affidavit of Bernadette Blankenship.

[34] Wickersham v. State, Commercial Fisheries Entry Commission, 680 P.2d 1135, 1140 (Alaska 1984); Flanigin v. State, Department of Revenue, 946 P.2d 446,450 (Alaska 1997).

practices as the sole legal basis for this decision: the normal rules of statutory construction must be applied.[35]

Furthermore, an administrative practice may exist for no reason other than to provide for administrative efficiency, without limiting the agency's discretion to take other action consistent with its statutory authority, based on the circumstances of a particular case.[36] In this particular case, the division's administrative practice, as described in the memorandum and affidavit, should not be viewed as an interpretation of AS 39.35.410(d): it describes one methodology to calculate benefits, but does not purport to define the statutory language ("compensation at the time of termination").

But the division's prior policy and administrative practices are not at issue in this case: the division did not calculate Mr. W.'s benefit in the manner described in the legal memorandum and in the affidavit, but rather in conformity with a formal policy adopted effective February 25, 2005, under which benefits are calculated based upon the employee's hourly wage at the time of termination, plus the employee's overtime earnings over the immediately preceding twelve month period.[37]

As a formal interpretation of AS 39.35.410(d), the division's written policy provides useful guidance regarding the proper inteipretation of the statute, but is not owed any special deference.[38] The policy adopts a methodology that as applied to Mr. W. is reasonable and within the scope of permissible interpretations of AS 39.35.410(d). However, there are alternative methodologies, at least with respect to the calculation of overtime compensation, that are also within the scope of permissible interpretations of AS 39.35.410(d), some of which would be more favorable to Mr. W. In particular, it would not be unreasonable to inteipret AS 39.35.410(d) as permitting the calculation of overtime compensation based on the amount of overtime received during the months actually worked in the prior twelve months. Indeed, the

[35] *See, e.g.,* Jerrel v. State, Department of Natural Resources. 999 P.2d 138 (Alaska 2000); Gilbert v. State, Department of Fish and Game. Board of Fisheries, 803 P.2d 391, 397, *citing* Kenai Peninsula Fisherman's Coop, v. State, 628 P.2d 897, 906 (Alaska 1981).

[36] *Cf.* Flanigan v. Child Support Enforcement Division, 946 P.2d 446, 450 (Alaska 1997) (rejecting agency's argument that "rather than an interpretation of the meaning of the applicable statutes, the [agency's formal, written] policy merely reflects [the agency's] choice [among alternative possible courses of action.").

[37] R. 9.

[38] *Supra,* notes 28-30. The administrator's proposal for action argued that because the commissioner may adopt regulations governing the retirement system without following the Administrative Procedure Act, policies concerning the retirement system that have not been adopted as regulations should be afforded deference. The administrative law judge has rejected that argument. Memorandum and Order at 3 (January 25, 2007).

policy adopted by the division does not preclude that methodology. Mr. W. was on leave without pay for 386.45 hours during the twelve months prior to his termination,[39] which was 18.6% of his normal work year, so he worked 81.4% of a normal work year during that period. Adjusting Mr. W.'s total overtime earnings over the twelve months prior to his termination to reflect his leave without pay status would increase his occupational disability benefit by $50.70 per month,[40] is permissible under AS 39.35.410(d), and would not be contrary to the division's written policy. The methodology proposed by Mr. W. however, was to calculate benefits based on gross compensation during a period prior to the date of termination. Because that methodology is contrary to the plain language of AS 39.35.410(d), it must be rejected.

IV. Conclusion

Where a statute is amenable to multiple interpretations, the administrator has the authority to further clarify or make it more precise by regulation. In the absence of a regulation, the administrative law judge is not bound to any particular interpretation. In this particular case, the employee has not shown that his preferred methodology should have been used, rather than the methodology that was actually used.

Under similar circumstances in a prior case, the administrative law judge affirmed the division's action.[41] In that case, the administrative law judge had posited an interpretation of a statute that neither of the parties had advocated, and that was less favorable to the employee than the interpretations advocated by the parties to the case. In this case, by contrast, the administrative law judge has interpreted AS 39.35.410(d), as it applies to this case,[42] as allowing

[39] [Proposed] Stipulation of Facts, No. 2; R. 45.

[40] Mr. W. earned $2,622.89 in overtime during the twelve months prior to his termination. He earned that amount in 9.768 months (81.4% of 12 months), for average monthly overtime compensation of $272.61, $50.71 more than the division attributed to him.

[41] In re Levy, OAH No. 05-0735-PER (April 26, 2006).

[42] This decision interprets AS 39.35.410(d) as authorizing the methodology that the division actually utilized, for purposes of an employee in Mr. W.'s situation: a full-time, non-seasonal, permanent employee returns to work full-time in a non-seasonal, permanent capacity after an on-the-job injury, but with restricted duties. The decision does not address whether the methodology utilized by the division may be utilized for employees who may not be similarly situated. In particular, this decision does not consider whether the division's methodology may, or should, be applied to a full time, non-seasonal, permanent employee who returns to work part-time, with or without restricted duties, because the on-the-job injury precluded full time employment. Whether AS 39.35.410(d) may be interpreted, under the latter circumstances, as permitting a benefit based the employee's hourly wage at the time of termination, extrapolated to full-time work, rather than limited to the actual hours worked at the time of termination, need not be addressed at this time. It suffices to note that if the employee's hourly wage at the time of termination (or when last employed prior to termination) is used as the fundamental basis for calculating the occupational disability benefit, AS 39.35.410(d) affords the administrator with substantial discretion to use a methodology that best meets the intent of the legislature.

but not requiring the methodology that was used by the division, and has identified an alternative methodology that is also permissible under both AS 39.35.410(d) and the division's written policy, but that is more favorable to the employee than methodology actually employed by the division.[43]

Under these circumstances, the proposed decision concluded that it would be inappropriate to simply affirm the division's action, and that the appropriate course was to remand this case to the division for reconsideration in light of any alternative methodologies that are consistent with AS 39.35.410(d).[44]

The administrator filed a proposal for action opposing the proposal for remand, asserting that she had considered the alternative methodology identified in the proposed decision and had rejected it on the ground that it cannot be universally applied. Subsequently, the administrator filed a supplemental decision asserting that for reasons of compliance with federal tax law, the division cannot determine the methodology to be applied on the basis of the specific facts of each individual case. But nothing in the supplemental decision suggests that the administrator must have a single, universally-applicable methodology: all that is required is that the benefit be "definitely determinable" according to a pre-established formula. It appears that the formula for calculating benefits may have multiple methodologies, so long as each of those methodologies is consistently applied "to all similarly situated beneficiaries."[45]

In this case, the administrator has not yet considered whether to adopt more than one methodology for calculating benefits, each to be equally and consistently applied to all similarly situated beneficiaries.[46] The division's practice for many years prior to 2005 was, it appears, to

[43] Other methodologies that are less favorable to Mr. W. may also be permissible under AS 39.35.410(d). For example, the divsion might have calculated Mr. W.'s overtime based on the overtime he earned on his last day of work, or by the amount of overtime to which he was entitled under the work week schedule that applied to his position at the time of termination. Mr. W. would have received no credit for overtime had those methodologies been applied.

[44] The administrative law judge expresses no opinion as to whether under the circumstances of this case it would be permissible, under AS 39.35.410(d), to calculate overtime compensation for purposes of the occupational disability benefit based on overtime compensation earned in the twelve months (or another considered period) prior to the date on which the employee last worked in an unrestricted capacity. Such an interpretation would not be consistent with the division's policy, but the policy has not been adopted as a regulation and was only recently adopted.

[45] Supplemental Decision at 4 (emphasis added).

[46] The administrator's failure to consider this approach is apparently the result of the use of unduly restrictive language in the administrative law judge's Memorandum and Order of January 25, 2007, and in the subsequent status conference. On both occasions, the administrative law judge mistakenly conveyed the impression that the choice for the administrator was to either have a single methodology of general application, or to consider each case on its specific facts.

allow the retiree to elect the more favorable of at least three potential periods for purposes of calculating benefits that the administrator deemed to be within the scope of her statutory authority.[47] Furthermore, the administrator's proposal for action indicated that determining whether more than one methodology should be employed will require a comprehensive review, which may be undertaken independently of this particular case and can be completed by the division before it renders a decision on remand. The administrator did not assert that administrative convenience warrants the use of a single methodology (indeed, she suggested that no single methodology could be devised that would appropriately govern in every case),[48] and did not establish that adoption of multiple methodologies, each limited to similarly situated employees, would jeopardize the plan's tax-exempt status. For these reasons, remand to the administrator remains appropriate.

V. Order

1. The administrator's motion for summary adjudication is GRANTED.

2. This case is REMANDED to the division for reconsideration in light of this decision.

3. The Office of Administrative Hearings does not retain jurisdiction, and Mr. W. retains the right to appeal to the administrator he is dissatisfied with the division's actions on remand.

DATED: March 9, 2007. By: Andrew M. Hemenway, Administrative Law Judge

Adoption

This Decision and Order 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 R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED March 9, 2007. By: Andrew M. Hemenway, Administrative Law Judge

[47] Page 7, *supra.* The division terminated this apparent practice because, after Rhines, the administrator concluded that the previously-identified options were not consistent with AS 39.35.410(d). As described in this decision, however, other options consistent with AS 39.35.410(d) remain available. Eliminating the division's apparent prior practice of providing multiple methodologies to similarly situated employees, to the extent permitted by law, may be viewed as a diminution of constitutionally-protected rights,

[48] Proposal for Action at 8.