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

In the Matter of:	)	
	)	
N. A.	)	
	)	OAH No. 06-0801-PER
	)	Div. R & B No. 2006-036

FINAL DECISION AND ORDER

I. Introduction

A. Summary

N. A. retired from state employment in 2002 after 30 years of service. At the time of his retirement, the Public Employees' Retirement System (PERS) declined to treat cashed in leave as compensation for the purposes of calculating his retirement benefit, and he brought a timely appeal of that determination. A hearing has established that, during an early portion of Mr. A.'s state career, he worked under a retirement structure in which he had a right to cash in five days of leave each year. Evidence was also presented that, during a portion of the same period, the Division of Retirement and Benefits may have had a practice of treating cashed in leave as compensation for retirement purposes. These circumstances would entitle him to have his benefit calculated in a manner that treats his cashed in leave, up to five days per year, as compensation. Because he cannot mix and match from different retirement structures, however, the earlier retirement structure would entail calculating his benefit using the percentages—two percent per year of credited service—that prevailed under that structure, rather than the more generous percentages that have been made available in more recent retirement structures. Because the earlier retirement structure would give him a benefit less favorable than the one he presently receives, Mr. A.'s benefit will not be adjusted.

B. Evidence Received

The record in this case consists of a one-day recorded hearing and the following exhibits: A. 17, 57 – 59, and 118 – 169 (admitted without objection); A. 5 – 16 and 61 – 75 (admitted over objection); Division A – H, J – L, N – Q, S, and V (admitted without objection); all exhibits to dispositive motions (admitted without objection); and Ms. Steinberger's letter of December 4,

2007 with its single-page exhibit of benefit calculations (admitted under seal without objection during oral remand proceedings). Division R was offered and rejected.

C. Alteration of Decision Based on Remand Proceedings

A proposed decision and order issued in this matter on November 9, 2007 made a finding of fact that the Division of Retirement and Benefits had a practice of treating cashed in leave as compensation for retirement purposes in early 1977. The division objected to this finding under AS 44.64.060(e), and the matter was taken back under advisement under AS 44.64.060(e)(2).[1] The division subsequently made an offer of proof to provide testimony from a retired PERS field representative that might discredit the finding about 1977 practices. Also on remand, an exchange of information between the parties (consisting of Mr. A.'s proposal for action and a responsive letter and calculations from the division) confirmed that the practical outcome of the case would be the same regardless whether the finding about 1977 practices was changed or left in place. In light of this posture, no party requested a new evidentiary proceeding to further address the issue of 1977 practices.[2] Instead, the factual finding the division challenges will be withdrawn and replaced with an assumption that permits resolution of this case but does not bind any party in collateral cases, nor prejudice any party's right to revisit the issue should this case be remanded after a court appeal under circumstances that make the factual question no longer moot.

II. Facts

N. A. was a continuous, full-time employee of the State of Alaska, Department of Transportation, from 1972 until his retirement in 2002.[3] The Division of Retirement and Benefits calculated his retirement benefit under AS 39.35.370 using his "average monthly compensation," as that phrase is used in the statute,[4] during his three highest payroll years. During each of two of those years, 2001 and 2002, he cashed in large blocks of annual leave while continuing his employment.[5]

The 2001 cash-in consisted of a little over 55 days of leave with a value of $15,034; the 2002 cash-in, occurring just weeks before his retirement, consisted of more than 162 days of

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1 AS 44.64.060(e)(2) authorizes a remand to the administrative law judge. Because the undersigned is both the administrative law judge and the final executive branch decisionmaker for this case, the order of remand did not direct the case to another person; rather, it had the effect of granting reconsideration of specified matters.

2 By oral order, the deadline for any such request was December 21, 2007.

3 Atkinson Exhibit (hereafter "Atk. Ex.") 147-153; A.testimony.

4 *See* AS 39.35.370, 39.35.680(4).

5 Division Exhibit (hereafter "Div. Ex.") Q.

leave worth $45,122.[6] The cash-ins exceeded Mr. A.'s annual leave accrual of 36 days; the leave he converted to cash would have taken more than six years to accrue at the 2001-2002 accrual rate.[7] He made these transactions "in anticipation of my August 31, 2002 retirement."[8] The cash-ins were voluntary. Mr. A.'s employer did not require him to cash in leave and did not deny him any leave for which he applied in 2001-2002.[9] Had Mr. A. not initiated the voluntary cash-ins, he would have been paid for his accrued leave at the end of his employment.

The division did not use the cashed in annual leave in calculating his "average monthly compensation" during the three highest payroll years. At the same time, when determining Mr. A.'s benefit the division used the percentages in AS 39.35.370(c) as they have existed since 1986. In Mr. A.'s case, those percentages would have been two percent of his "average monthly compensation" times his years of service before July 1, 1986; 2.25 of his "average monthly compensation" times his years of service between that date and the date he accrued twenty years of total service; and 2.5 percent of his "average monthly compensation" times his years of service thereafter.[10]

Shortly before his retirement, Mr. A. asked that his benefit be recalculated to include the leave cash-ins from 2001 and 2002 in his "average monthly compensation."[11] Following a delay to await the outcome of litigation before the Supreme Court that might affect his claim, the PERS Administrator denied Mr. A.'s request on November 6, 2006. This appeal followed.

To evaluate this appeal, it is necessary to return to the circumstances of Mr. A.'s employment in the 1970s.

Beginning in 1974 or earlier and continuing to his retirement, Mr. A. was placed in the General Government bargaining unit ("GGU") of the Alaska Public Employees Association (APEA). On May 2, 1977 (but with an effective date retroactive to January 1, 1977), the GGU obtained, for the first time, a contract permitting members to cash in up to five days (37.5 hours) of accumulated annual leave each year.[12] The entitlement to cash in leave persisted until Mr.

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6 *Id.*; A. Ex. 140.

7 Div. Ex. S. This finding credits A. with the 36 days (270 hours) of leave accrual per year recorded on page 4 of the exhibit. A. himself testified on cross-examination to an accrual rate of 225 hours per year, but he appears to have been mistaken with respect to the final two years of his employment.

8 A. Ex. 140.

9 ALJ exam and division re-cross of A. To some degree, A. chose not to apply for leave because of his sense of responsibility to get his work done.

10 *See* A. Ex. 147-148 ("normal benefit" of $4730 on average monthly earnings of $7096 confirms use of the higher post-1986 percentages in calculating basic benefit before conversion to level income option).

11 A. Ex. 140.

12 The relevant provision is at A. Ex. 17, p. 56. *See also* cross-exam of Alex Viteri, Jr., lead APEA negotiator for the 1977 agreement.

A.'s retirement. The five-day cap was lifted in 2000 under a new collective bargaining agreement. When the right to cash in leave was first obtained in the first half of 1977, PERS contributions were, for a time, apparently deducted from the payment for the cashed-in leave.[13]

Let us now turn more particularly to the question of whether PERS, as an entity distinct in some ways from Mr. A.'s employer,[14] ever had a practice of treating cashed in leave as compensation for purposes of retirement. In 1976, a different bargaining unit of APEA, the Supervisory Employees unit or "SU," obtained the right to limited voluntary cash-ins of leave.[15] On November 15, 1976, the Director of the Division of Retirement and Benefits (the Administrator of PERS) wrote a memo to the Director of the Division of Finance (the primary financial officer of Mr. A.'s employer) on the subject of "Payoff for accrued annual leave under collective bargaining agreements."[16] He wrote:

> It has just come to my attention that it is the current practice in the Division of Finance to withhold PERS contributions when and active employee is paid in cash for accrued annual leave. These deductions must be discontinued immediately.

Finance Director Mullin wrote back two days later emphatically disagreeing. He argued that leave cash-in was part of bargained-for remuneration, potentially accepted in collective bargaining in place of additional salary or other concessions, and he contended that "[i]ncluding . . . cash-in of annual leave as part of gross pay for retirement purposes has a long history in our state."[17]

The PERS Administrator apparently requested an Attorney General opinion to resolve the difference of opinion. On April 7, 1977, the Attorney General's office responded:

> In our view, annual lump sum payments of accrued leave under the provisions of various collective bargaining agreements . . . are "compensation" as that term is used in AS 39.35. . . . This situation could be remedied either by statutory amendment or re-negotiation of collective bargaining agreements. In the meantime, however, . . . lump sum payoffs for annual leave . . . must be considered part of the "compensation" paid employees who are members of PERS.[18]

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[13] The admitted evidence of these deductions in this particular case is limited to testimony of Alex Viteri, Jr. *prior* to his testimony about A. Ex. 156 , and to Atk. Ex. 164-167. The finding does not rely on A. Ex. 156 or testimony related to that exhibit.

[14] Mr. A.'s employer was the State of Alaska. The State of Alaska accounts for the majority, but not all, of the employees in PERS, which services about 215 smaller employers as well. Testimony of Lea.

[15] *E.g.*, Div. Ex. V at 13.

[16] Div. Ex. D.

[17] Div. Ex. E.

[18] A. Ex. 160.

As it happens, the Administrator was already seeking such legislation.[19] The legislation passed shortly after the Attorney General's opinion; it was signed into law on June 14, 1977; and it became effective on July 1, 1977.[20] Section 54 of the bill changed the definition of "compensation," providing that it "does not include . . . annual leave not used by the employee." This provision was interpreted as an express exclusion of cashed in leave payments from compensation.[21] With some adjustments in phraseology, this has been the law ever since.[22]

Mr. A. contends that the April 7, 1977 Attorney General opinion is evidence that, in administering PERS between that date and the statutory change, the division had a practice of treating cashed in leave as compensation as directed in the opinion. The Administrator argues that it is not, because an agency head is not legally required to follow the Attorney General's direction is such circumstances. Mr. A. is correct that the opinion is, in fact, evidence of the division's practice. Evidence for a proposition is anything that raises the probability of the truthfulness of the proposition. The existence of the memorandum raises the probability (which would otherwise be low) that the Administrator thereafter began treating cashed in leave as compensation. It is not, however, conclusive evidence. Also somewhat probative on this issue is the fact that PERS contributions were taken, and apparently not refunded, for cash-ins during this early period; this suggests acceptance of the April 7, 1977 opinion by the division.[23] Finally, insofar as the April 7, 1977 opinion was a correct statement of the law at the time, the "presumption of regularity"[24] requires, in the absence of a contrary showing, that the administrative law judge presume the Administrator followed the law as it existed prior to July 1, 1977, regardless of whether the Administrator agreed with it.

In post-hearing proceedings, the Administrator initially made an offer of proof that proffered testimony of Paul Arnold, who in 1977 was the deputy director of the Division of Retirement and Benefits. An affidavit suggested that Mr. Arnold would testify to his belief that the April 7, 1977 opinion was not followed. Mr. Arnold subsequently refused to submit to cross-

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19 Div. Ex. F (Administrator's memo summarizing proposed legislation), G, H.

20 Div. Ex. K.

21 A.. Ex. 167, an informal opinion of the Attorney General, records this interpretation at the bottom of its first page.

22 *See* AS 39.35.680(9).

23 In *Flisock v. State, Div. of Retirement and Benefits*, 818 P.2d 640, 644 (Alaska 1991), the Supreme Court mentioned—and therefore apparently thought it relevant for establishing division practice—that retirement contributions had been deducted when the member cashed in leave.

24 *See, e.g., Jerrel v. State*, 851 P.2d 1365, 1371-72 (Alaska App. 1993); *Gallego v. United States*, 276 F.2d 914, 917 (9th Cir. 1960) ("Where no evidence indicating otherwise is produced, the presumption of regularity supports the official acts of public officers, and courts presume that they have properly discharged their official duties"), *quoted with approval in Wright v. State*, 501 P.2d 1360, 1372 (Alaska 1972).

examination, however, and the Administrator correctly acknowledged that under the circumstances the affidavit could not be treated as evidence.[25] The Administrator then made a less specific offer of the live testimony of Chuck Elrod, a division field representative from the 1977 period, to the effect that cash-ins were not treated as compensation.[26] If received, the Elrod testimony might conceivably prevent a finding that the division ever had a practice of treating cashed in leave as compensation for retirement purposes.

As will be shown in the discussion below, the outcome of this case will be the same regardless of what finding is made as to the division's practice just prior to the statutory change in mid-1977. For that reason, evidentiary proceedings have not been reopened to admit and weigh Mr. Elrod's testimony, and no finding of fact will be made. This decision will assume, *without deciding,* that for a short time prior to July 1, 1977 the division had a practice of treating cashed in leave as compensation for retirement purposes, the assumption most favorable to Mr. A.'s appeal.

A final historical artifact bears on the legal arguments of the parties. Until about 1986, it was possible for employees who had large leave balances as they approached retirement to take extended leaves just prior to the retirement date. This practice was problematic, in that it kept the position filled so that no replacement could be hired and yet no work was being accomplished. By the time Mr. A. retired, this kind of extended leave at the end of service was no longer permitted.[27]

III. Discussion

A. *A. is Entitled to Use a Retirement Structure from Before July 1, 1977*

As a threshold matter, this case turns on a narrow legal question set up by the Alaska Supreme Court's recent decision in *McMullen v. State*.[28] In general, a retiring PERS employee "who was hired before 1996 receives a percentage of his average monthly compensation for the three payroll years that yield the highest average, multiplied by the number of years of service."[29] Since July 1, 1977, cashed in leave has been excluded from the definition of "compensation." The *McMullen* case confirmed, however, that an employee who enrolled in

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25 Letter of Toby Steinberger, December 18, 2007.
26 *Id.*
27 Direct and cross-exam of Heinrich Springer.
28 128 P.3d 186 (Alaska 2006).
29 *Id.* at 187.

PERS before that date can elect to have retirement benefits calculated under an earlier retirement structure.[30]

McMullen ostensibly held only that an employee could choose to eschew the current retirement structure in favor of the one "in effect at the time of his enrollment."[31] It is probably more precise to say, however, that an employee can elect any structure available to that employee during the course of the employee's career if that structure is superior, for him, to the one in effect at retirement.[32] This is because *McMullen* and similar cases are founded on the anti-diminution principle enshrined in the Alaska Constitution: accrued benefits in public retirement systems "shall not be diminished or impaired."[33] Thus, even if a system was not available at the time the employee first enrolled, if the employee later acquired rights in that system the rights would be protected from being "diminished or impaired" and the principles of *McMullen* would apply. Illustrating this point is *State v. Allen,*[34] in which employees who had first entered public employment under the PERS system were given anti-diminution rights to elect benefits under the short-lived Elected Public Officers' Retirement System, a structure that was both created and then repealed later in the course of their employment. *Allen* found rights and expectations developed during the course of employment to be protected in part because a purpose of retirement systems is "'to induce persons to . . . *continue* in public service.'"[35]

In *McMullen,* the Alaska Supreme Court evaluated the claim of Michael McMullen, who like Mr. A. was enrolled in the PERS system prior to July 1, 1977. Just before he retired in 1999, Mr. McMullen cashed in substantial amounts of annual leave, and he maintained that the Division of Retirement and Benefits should include those cash-ins as part of his "compensation" for purposes of calculating his retirement benefit.[36]

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30 *Id.* at 190-91.

31 *Id.* at 191.

32 The Administrator has not disputed this proposition.

33 Alaska Const., art. XII, sec. 7.

34 625 P.2d 844 (Alaska 1981).

35 *Id.* at 846 (emphasis added) (quoting prior authority). Moreover, note that in *McMullen*, notwithstanding its initial reference to "the system in effect at the time of his enrollment," the Supreme Court went on to spend several paragraphs evaluating division practices and McMullen's expectations as they may have developed under changed circumstances between 1976 and 1977, long after he was hired in 1969. 128 P.3d at 192-93. This evaluation would have been unnecessary had the court genuinely meant that only circumstances at the time of enrollment were relevant to a retiree's constitutionally protected entitlement. *See also In re Alford,* [cont. on p. 7] Decision 04-016 (PERS Board 2004), slip op. at 4 ("A corollary of this [anti-diminution] principle is that an employee/retiree is entitled to the best benefits under PERS that arise during an employee's career following the initial hire."), *aff'd sub nom Alford v. State, Dep't of Administration,* 3AN-05-11441 (Order, Feb. 2, 2007) (Alaska Superior Court) (Ex. FF). *But cf. Sheffield v. Alaska Public Employees' Association,* 732 P.2d 1083, 1089 n.15 (Alaska 1987) (stating in *dicta* that expectations created by a 1980 PERS booklet "would have no relevance to the expectations of employees who joined the PERS system prior to the booklet's publication in 1980").

36 *McMullen,* 128 P.3d at 187-88.

The Supreme Court agreed with McMullen that prior to July 1, 1977 state law did not rule out the use of cashed in leave as part of "compensation" for purposes of calculating the retirement benefit, and it agreed that McMullen could choose to have his benefits calculated under a pre-July 1, 1977 retirement system that applied to him. The Court went on to observe, however, that

> the bare fact that the statute did not expressly exclude cashed-in leave from the definition of compensation is not enough to support McMullen's argument. . . . [T]he employee must actually have been entitled to the benefit that the state's subsequent action allegedly diminished. As a result, McMullen must show not only that the original statute did not exclude cashed-in leave from the definition of compensation, but also that . . . he actually was entitled to cash in accrued leave.[37]

McMullen, it turned out, had not been a member of one of the bargaining units that had a right to cash in leave prior to July 1, 1977. Since he had had no right to cash in leave before the law changed in 1977, he had never been in a retirement system that treated his cashed-in leave as part of compensation used toward retirement. He lost his case.[38]

Mr. A. is in a different situation. To establish that he was once in a retirement structure that treated cashed-in leave as compensation, the Supreme Court precedents suggest that he need only show that, at some time in the past, he was eligible to cash in leave and, at the same time, his retirement system treated such cash-ins as compensation.[39] This decision assumes that he has done this. First, from early 1977 onward he had the right to cash in leave. Second, for some period prior to July 1, 1977, the findings above assume (without deciding) that he was enrolled in a retirement system whose practice was to treat leave cash-ins by continuing employees as compensation for purposes of retirement. These periods overlap.

To be sure, GGU employees met this combination of prerequisites for at most only the briefest of periods. The period started on May 2, 1977, when the contract allowing cash-ins was achieved.[40] At that time, the division is assumed to have had, at least since the previous month and perhaps for longer, a practice of treating cashed in leave as compensation. The period ended on July 1, 1977, when the law changed to exclude cash-ins from treatment as compensation.

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[37] *Id.* at 192.

[38] *Id.* at 192-93.

[39] *See id*. at 191-92 (requiring McMullen to prove that he was entitled to cash in leave prior to 1977 statutory change; also observing that the court had required, in a similar case (*Flisock*), evidence that the retirement system he wished to use had a "practice" to use cashed-in leave "when calculating base compensation"); *Flisock,* 818 P.2d at 644-45 & n.7.

[40] This is the date the contract was signed, and presumably would be the inception of any reasonable expectation by employees that they could cash in leave. The contract was effective retroactively to January 1, 1977, but it is not clear that the retroactivity would have had any significance in the area of leave cash-ins.

Indeed, by the time GGU employees may have achieved a retirement structure that allowed cash-ins to be treated as compensation, the legislature was well on its way to withdrawing the benefit through a statutory change. The division argues implicitly that the anti-diminution principle should not be applied so mechanically as to protect so fleeting an expectation—an expectation that arrived accompanied by the near certainty that it would be taken away eight weeks later.

It would be with some trepidation, however, that an administrative law judge would invent an exception to a constitutional principle the Supreme Court has applied literally and uniformly in every context it has yet encountered. In this case, I decline to do so, both because I am unconvinced it is appropriate and because, as will be seen in Part E, the question is a moot one under the facts of this case: Mr. A.'s retirement benefit will not change regardless of whether the anti-diminution principle is applied.

B. *The Pre-July 1, 1977 Structure Encompassed Only Cash-Ins of Up to Five Days*

Because he has met the *McMullen* prerequisites, Mr. A. in entitled to the reasonable expectation the pre-July 1, 1977 system gave him regarding the retirement treatment of voluntary cash-ins. The division contends that the reasonable expectation was limited to the extent of his cash-in right in the old structure, which was five days per year. Only that amount of voluntarily cashed-in leave would be eligible for treatment as compensation. A., on the other hand, argues that as of May 2, 1977 his protected expectation became that any leave he was voluntarily able to cash in—including larger amounts, should the limit change—would be treated as compensation, since the division's practice of treating cashed in leave as compensation went beyond five days for employees who, at that time, had cash-in rights in excess of five days.

McMullen itself effectively resolves this question. Were the amount of leave McMullen could treat as compensation governed, not by the extent of his own right, but rather by the size of cash-in PERS might have allowed someone *else* to treat as compensation in the old structure—in other words, were it enough simply to prove that PERS treated cashed in leave, when it occurred, as compensation—*McMullen* would have to have been reasoned quite differently. A.'s situation is analogous to McMullen's in all respects but one; although both A. and McMullen were later to acquire greatly expanded cash-in rights, A. differs from McMullen in that instead of zero days of cash-in rights in 1977, he had five days. The consequence of this single difference is that, if A. chooses the 1977 retirement structure, instead of being able to treat zero days of cashed in leave

as compensation, he can treat five days of cashed in leave as compensation. This is the extent of the reasonable expectation for which he had a basis prior to July 1, 1977.[41]

In general, it seems fair to say that the reasonable expectation a retirement structure creates is the expectation to be treated the same as those who retired within that structure when it was in effect.[42] A.'s reasonable expectation regarding cashed-in leave is equivalent to what a retirement-eligible GGU employee, retiring just before July 1, 1977, would then have been able to treat as compensation: up to five days of leave.

C. The Right to Run Out Accrued Leave at Retirement Was Not Part of the Pre-July 1, 1977 Structure

Mr. A.'s counsel contended in final argument that the ability to run out a large balance of accrued leave just prior to retirement was part of the retirement structure of which Mr. A. was a beneficiary at one time, and when this right was taken away the right to take that leave in cash and still have it count toward PERS is the appropriate substitute.

It is true, as noted in the facts section above, that a GGU retiree in 1977 could apparently spend several months on leave just before his or her retirement date, and the leave time would have counted toward PERS service (these leaves were not unlimited, since employees in those days could not carry more than 60 work days of leave from year to year[43]). If this were deemed a feature of the retirement system, however, the anti-diminution principle would require, at most, only that Mr. A.'s years of PERS service be augmented by the duration of some or all of the leave he had left at the end of his career, since this would duplicate his financial situation had he been permitted by his employer to run it out. This is an adjustment that in Mr. A.'s case would augment one of the two factors used to calculate his retirement benefit by no more than two or three percent.[44] More fundamentally, the right to go on leave instead of working is a feature of a leave structure, not a retirement structure. It does not implicate the definition of "compensation" in the retirement statute or any other integral feature of a retirement system's administration.

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[41] To hold otherwise would create an enormous disincentive for the kind of liberalization and addition of flexibility for the benefit of employees that took place in 2000, when the ceiling on cash-ins was lifted. Such a disincentive would not be to the long-term benefit of the employee population.

[42] *See Flisock*, 818 P.2d at 644 (focusing on how retirement benefits were calculated for those retiring in 1969 to establish method for calculating benefit for member seeking to use the 1969 system).

[43] A.. Ex. 17 at 56; A.. Ex. 59 at 35.

[44] It might increase his PERS service from 30 years to between 30.3 and 31 years, or a maximum of about three percent. Because such an adjustment would, as shown in Part D and E below, be accompanied by a larger reduction in the percentage multiplier used to calculate his benefit, the ultimate net result would surely be a lower benefit than he receives today.

D. *Mr. A. Can Use Only One Retirement Structure at a Time*

In *McMullen*, the Supreme Court held:

> Where the state has changed the benefits system after an employee's enrollment in the system, the employee may choose to accept the new system or may opt to keep the benefits in effect at enrollment. McMullen is therefore entitled, if he chooses, to have his benefits calculated according to *the system* that was in effect at the time of his enrollment. This *system* was governed by the statutes in effect at that time, the regulations that were then applicable, and the division's practices as of 1969.[45]

All that the court's precedents have offered members is the right to choose one "system" or another; nothing in its holdings or language suggests a right to select one feature of one system and pair it with other components from another system.[46] This makes sense: *McMullen* and like cases, as has been noted previously, spring exclusively from the anti-diminution principle in the Alaska Constitution, whereby accrued benefits in public retirement systems "shall not be diminished or impaired."[47] An employee who has been allowed to preserve the array of features available in an earlier system has been fully protected from diminution. Later systems may devalue some features and enhance others. To allow the employee to cherry-pick features of different systems would go beyond guarding against diminution, and would risk creating a hybrid structure superior to any in which the employee was ever actually enrolled.

One Superior Court judge has explicitly recognized the principle that an employee may not cherry-pick, writing:

> The heart of Appellant[s'] argument is that they may "pick and choose" between sections within sections over different periods to determine the best result for their benefit. While in every instance, the retirement system must provide the best outcome under the statutory structure, the Appellants are incorrect to "mix and match" from different structures in order to reach a different result.[48]

An employee who has been employed as long as Mr. A. has a menu from which to choose, but it is a menu of complete meals, not a smorgasbord. The number of choices is exactly equal to the number of retirement structures in which the employee has been enrolled. At retirement, the employee may use one structure.

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[45] 128 P.3d at 190-91 (italics added).

[46] *See, e.g., Hammond v. Hoffbeck*, 627 P.2d 1052, 1059-60 & n.13 (Alaska 1981) (employees to be allowed to "exercise their right to choose which system they desire to come under," not which provisions of a system).

[47] Alaska Const., art. XII, sec. 7.

[48] *Alford v. State, Department of Administration,* No. 3AN-05-11441 CI (Order, Feb. 22, 2007) (Ex. FF).

E. *The Pre-1977 System Would Yield a Lower Benefit for Mr. A.*

If Mr. A.'s benefit were calculated under the pre-1977 retirement system defined by the facts found and assumed above, he would increase his average monthly compensation used for calculating his retirement benefit by $85.80 over what would be calculated under AS 39.35.370 in its more recent form. [49] On the other hand, the percentage to be multiplied by the average monthly compensation would fall from about 66.5% to about 60%, a drop of 6.5 percentage points.[50] The drop in percentage multiplier greatly outweighs the small gain in average monthly compensation, with the net result that his monthly benefit would be several hundred dollars smaller than the one he presently enjoys.[51] Since the pre-1977 structure would be less favorable to Mr. A. than the present structure, there is no reason to adjust his benefit.

IV. Conclusion and Order

At retirement, N. A. was entitled to have his retirement benefit calculated under any PERS retirement structure in which he previously had been enrolled, including the one in effect just prior to July 1, 1977. Under the facts found and assumed herein, the structure in effect just prior to July 1, 1977 permitted up to five days of cashed in leave each year to be treated as compensation for purposes of calculating a retirement benefit. Nonetheless, the benefit payable to Mr. A. under that earlier structure would be lower than the benefit he now receives. Accordingly, although the reasoning expressed in the Administrator's decision of November 6, 2006 is not adopted herein, the Administrator's decision not to adjust Mr. A.'s benefit is affirmed.

DATED this 26th day of December, 2007.

By: *Signed*
Christopher Kennedy
Administrative Law Judge

[49] Exhibit 1 to letter of Toby Steinberger, December 4, 2007 (filed as a pleading under seal).

[50] *Id.*

[51] *Id.* The calculations do not take into account any uncollected PERS contributions Mr. A. would owe if he used the pre-1977 system. This liability would further worsen his situation under the pre-1977 system.

Adoption

This Order is issued under the authority of AS 39.35.006.

The Office of Administrative Hearings transmitted to the parties a proposed decision and order on November 9, 2007. By means of a notice that accompanied the proposed document, the parties were given until December 3, 2007, to submit proposals for action under AS 44.64.060(e). Both the Administrator and Mr. A. submitted a proposal for action, requesting the revision of certain findings of fact and interpretations of law. Pursuant to AS 44.64.030(e)(2), the undersigned took the matter back under advisement by order dated December 6, 2007. After an oral argument held on December 17, 2207, the proposals for action have been granted in part. The revisions are incorporated in the text above.

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 Rule of Appellate Procedure 602(a)(2) within 30 days of the date of this decision.

DATED this 26th day of December, 2007.

By: *Signed*
Signature
Christopher Kennedy
Name
Administrative Law Judge
Title

[This document has been modified to conform to technical standards for publication.]