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

In the Matter of:	)	
	)	
F. N.	)	
	)	OAH No. 07-0012-PER
	)	Div. R & B No. 2007-001

FINAL DECISION AND ORDER

I. Introduction

A. Summary

F. N. is a retired civil engineer who worked for the State of Alaska for 31 years. He has brought a Public Employees' Retirement System (PERS) appeal asserting that cashed in leave should be treated as compensation for the purposes of calculating his retirement benefit. A hearing has established that, during an early portion of Mr. N.'s state career, he worked under a retirement structure in which he had a right to, and did, cash in eight 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 eight days per year, as compensation. Because he cannot mix and match from different retirement structures, however, an election to use 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, his benefit will not be adjusted.

B. Alteration of Decision Based on Remand Proceedings

A proposed decision and order issued in this matter on October 30, 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] At an oral proceeding scheduled thereafter, the division made an offer of proof to provide testimony from a retired PERS executive that might discredit the finding about 1977 practices. At the same time, the division reported the completion of new calculations that it had been directed to make in the proposed decision. These new calculations 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. Under the circumstances, it did not make sense to conduct a new evidentiary proceeding; 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.

II. Facts[2]

F. N. worked for the State of Alaska for 33.6 years, including continuous full-time work from 1966 to 1997. He retired in 1997.[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, 1995 and 1996, he cashed in at least eight days of annual leave while continuing his employment.[5] The division did not use the cashed in annual leave in calculating his "average monthly compensation."

In determining Mr. N.'s benefit, the division used the percentages in AS 39.35.370(c) as they have existed since 1986. In Mr. N.'s case, those percentages were apparently two percent of his "average monthly compensation" times his years of service before July 1, 1986 and 2.5 percent of his "average monthly compensation" times his years of service after that date.[6]

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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] There are few disputes as to basic facts in this case, although there are disagreements about the proper factual inference to draw from undisputed facts. Evidentiary citations have been omitted for most facts the parties readily agreed upon in their briefing and oral argument. The ultimate source of most background facts is the direct testimony of F. N..

[3] Administrator's Exhibit (hereafter "Ex.") Y.

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

[5] Ex. Z. He also received a terminal leave payment in 1997 equal to more that eight days' salary, but he concedes that the terminal leave is not "compensation" for purposes of calculating retirement benefits.

[6] *See* Ex. Y. Mr. N. apparently had more than 20 years of credited service by July 1, 1986, so that the intermediate percentage in AS 39.35.370(c)(2) would not apply.

In early 2002, Mr. N. asked that his benefit be recalculated to include leave cash-ins from 1995 and 1996 in his "average monthly compensation."[7] Following a delay to await the outcome of litigation before the Supreme Court that might affect his claim, the PERS Administrator denied Mr. N.'s request on November 6, 2006. This appeal followed.

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

Beginning in 1973 and continuing to his retirement, Mr. N. was placed in the Supervisory Employees bargaining unit ("SU") of the Alaska Public Employees Association. In April of 1976, following an eight-day strike, the SU obtained a contract permitting members to cash in up to eight days (60 hours) of accumulated annual leave each year.[8] This entitlement persisted until Mr. N.'s retirement.

Mr. N. cashed in eight days of leave in 1976 and in each subsequent year through 1996. His employer deducted PERS contributions from these payments in 1976, 1977, 1978, and 1979; no contributions were deducted thereafter.[9] In 1979, his PERS contributions for the 1978 and 1979 cash-ins were refunded.[10] The 1976 and 1977 contributions were never refunded.[11]

Let us now turn more particularly to the question of whether PERS, as an entity distinct in some ways from Mr. N.'s employer,[12] ever had a practice of treating cashed in leave as compensation for purposes of retirement. 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. N.'s employer) on the subject of "Payoff for accrued annual leave under collective bargaining agreements."[13] He wrote:

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[7] A.R. 12. The initial request asked that cashed-in leave for more than eight days be included for 1996, but Mr. N. has since reduced his claim to the value of only eight days of leave for each year.

[8] The relevant provision is at Ex. E, p. 2. In its initial year, part of the rationale for this provision was apparently to enable members to substitute a leave cash-in for the wages they had lost during the strike.

[9] Exhibit A to the N. Affidavit illustrates these deductions; for example, the deduction of $40.29 in the Retirement column of his Payroll Warrant Register for 1977 (page 4 of the exhibit) is a PERS deduction for a leave cash-in.

The exhibits to the N. Affidavit, along with the exhibits to the parties' summary judgment briefs, have all been admitted as hearing exhibits without objection. The affidavit itself has not been admitted, but Mr. N. testified essentially verbatim to its contents at the hearing.

[10] *See* Ex. HH. Mr. N. stipulated at the hearing that his 1978 and 1979 deductions, but not the prior deductions, were subsequently refunded.

[11] This finding, which may go beyond what the division would affirmatively concede, is based on Mr. N.'s testimony. There was no contrary evidence. Mr. N.'s interpretation of the records carries some weight since he has a sophisticated knowledge of the PERS system, having served on the PERS Board in the past.

[12] Mr. N.'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 220 smaller employers as well. Testimony of N. and Lea.

[13] Ex. F.

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

The Finance Director wrote back two days later emphatically disagreeing. He argued that the up to eight days a year of 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."[14]

The PERS Administrator apparently requested an Attorney General opinion to resolve the difference of views. 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.[15]

As it happens, the Administrator was already seeking such legislation.[16] 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.[17] 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.[18] With some adjustments in phraseology, this has been the law ever since.[19]

Mr. N. 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. N. 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

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14 Ex. G.
15 Ex. K.
16 Ex. H (Administrator's memo summarizing proposed legislation).
17 Ex. L.
18 "Compensation Under the Public Employees Retirement Act" (Inf. Op. Att'y Gen'l, July 24, 1979), at 1.
19 *See* AS 39.35.680(9).

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 retained, and has never refunded, Mr. N.'s PERS contributions for his 1976 and 1977 cash-ins, even though the division eventually became aware that such contributions had been made; this suggests acceptance of the April 7, 1977 opinion by the division.[20] Finally, insofar as the April 7, 1977 opinion was a correct statement of the law at the time, the "presumption of regularity"[21] 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 has made an offer of proof, proffering testimony of Paul Arnold, who in 1977 was apparently the deputy director of the Division of Retirement and Benefits. Mr. Arnold would testify to his contemporaneous disagreement with the April 7, 1977 opinion and his belief that it was not followed. If received, the Arnold testimony might prevent a finding that the division ever had a practice of treating cashed in leave as compensation for retirement purposes.[22]

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. Arnold'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. N.'s appeal.

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[20] I note that 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.

[21] *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).

[22] Other evidence offered by the division on this point had almost no probative value. Retirement Manager Kathy Lea testified to having pulled a random sample of actual retirements over a three-year period between 1976 and 1978, and finding no instances in which cashed in leave appeared to have been included in compensation for the benefit calculation. She did not testify that she had found any instances where cashed in leave had been available but had been excluded from the calculation, however. Moreover, the sample did not focus on the smaller subset of employees who had a right to cash in leave, nor on the brief period between the Attorney General's opinion and the effective date of the new statute.

III. Discussion

A. *N. 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*.[23] 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."[24] 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 PERS before that date can elect to have retirement benefits calculated under an earlier retirement structure.[25]

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."[26] 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. 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."[27] 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*,[28] 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.'"[29]

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23 128 P.3d 186 (Alaska 2006).

24 *Id.* at 187.

25 *Id*. at 190-91.

26 *Id*. at 191.

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

28 625 P.2d 844 (Alaska 1981).

29 *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]

In *McMullen,* the Alaska Supreme Court evaluated the claim of Michael McMullen, who like Mr. N. 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.[30]

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.[31]

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 any of his cashed in leave as part of compensation used toward retirement. He lost his case.[32]

Mr. N. is in a different situation. To establish that he was once in a retirement structure that treated cashed in leave as compensation, he needs to show that, at some time in the past, he was eligible to cash in leave and, at the same time, his retirement system had a practice of treating such cash-ins as compensation.[33] This decision assumes that he has done this. First, from 1976 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

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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").

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

31 *Id.* at 192.

32 *Id.* at 192-93.

33 *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

whose practice was to treat leave cash-ins by continuing employees as compensation for purposes of retirement. These periods overlap.

Mr. N. does not contest that his right to have leave cash-ins treated as compensation is limited to the amount of leave he was allowed to cash in when the pre-July 1, 1977 structure was in place. At that time, he could cash in no more than eight days (60 hours) per year.

B. *N. 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.[34]

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.[35] 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."[36] 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

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wished to use had a "practice" to use cashed-in leave "when calculating base compensation"); *Flisock,* 818 P.2d at 644-45 & n.7.

[34] 128 P.3d at 190-91 (italics added).

[35] *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).

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

> Appellants are incorrect to "mix and match" from different structures in order to reach a different result.[37]

An employee who has been employed as long as Mr. N. 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 choose one structure.

C. *The Pre-1977 System Would Yield a Lower Benefit for Mr. N.*

If Mr. N.'s benefit were calculated under the pre-1977 retirement system defined by the facts found and assumed above, he would apparently increase his average monthly compensation used for calculating his retirement benefit by approximately $128 over what would be calculated under AS 39.35.370 in its more recent form. [38] On the other hand, the percentage to be multiplied by the average monthly compensation would fall from about 72% to about 67%, a drop of more than five percentage points. Unless $128 represented more than a five percent increase in his average monthly compensation in the years used to calculate his retirement benefit, Mr. N. would not want to elect the pre-1977 system over the one he presently enjoys. $128 is, in fact, only two percent of the average monthly compensation that was used to calculate his benefit in 1997,[39] far short of the level necessary to make the pre-1977 system superior for him. In a post-remand oral proceeding held December 4, 2007, the Administrator confirmed that exact calculations have been completed and the pre-1977 structure, as framed in Part III-A above, is less favorable to Mr. N. than the present structure.

D. *Difficult Statute of Limitations Issues Will Be Deferred*

The Administrator asserts that Mr. N.'s claim is wholly barred by application of AS 09.10.070(a)(5), a two-year limitation on "civil actions" based on a liability created by statute.[40] The administrator would count the two years from the date of Mr. N.'s appointment to

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

[38] All calculations in this section are estimates and should not be regarded as precise. They are based on an increase in annual compensation of $2307 in two of the three high years used to calculate the benefit, if eight days of cashed in leave were counted in each of those years, and on an estimate that Mr. N. had about 11 years of credited service after July 1, 1986, when retirement percentages for those electing the later retirement system went up.

The calculations do not take into account any uncollected PERS contributions Mr. N. would owe if he elected the pre-1977 system. Mr. N. stipulated at the close of his direct testimony that contributions for cashed in leave would have to be deducted from 1978 onward. This liability would further worsen his situation under the pre-1977 system.

[39] Ex. Y.

[40] The Administrator also sought to apply the equitable doctrine of laches, which can bar claims when a claimant has unreasonably delayed bringing them *and* the delay has prejudiced the other party. For reasons explained in an earlier order, the Administrator did not meet her burden of showing prejudice sufficient to support laches.

retirement. There is some basis for this position: the PERS Board apparently applied AS 09.10.070(a)(5) to administrative claims for retirement benefits, in contexts quite different from this one, in two minimally-reasoned decisions from years past. Nonetheless, the question of whether this or any other statute of limitations applies to PERS claims of this kind, and, if so, the manner in which it would apply, is a difficult one that has potentially far-reaching consequences for many retirees. Arguably, these administrative claims are not "civil actions" within the meaning of the statute.[41] Moreover, if the statute does apply, it may well apply only to demands for retroactive adjustment reaching back more than two years, leaving claimants with their entitlement under AS 39.35.520 to adjustment of their benefits *going forward* insofar as they may have been computed erroneously. Because Mr. N.'s case had so many issues, the briefing on limitations did not explore the question in much depth.

For the reasons explained in Parts III-B and III-C above, to resolve the statute of limitations question in this case would be a purely academic exercise. Because Mr. N. would not benefit from a shift to the pre-1977 system, the question of whether the statute of limitations applies as a partial or complete bar to his doing so will be left for another day, when more extensive research and briefing can be brought to bear.

IV. Conclusion and Order

At retirement, F. N. 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 eight 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. N. 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. N.'s benefit is affirmed.

[41] *Cf., e.g., Toner v. Comm'r of Internal Revenue*, 629 F.2d 899, 900-01 (3d Cir. 1980) (administrative proceeding not a "civil action" within meaning of 42 U.S.C. § 1988).

This ruling is without prejudice to any rights Mr. N. *may* have to reimbursement of the PERS contributions withheld from his 1976 and 1977 leave cash-ins, plus any applicable interest.

DATED this 5th day of December, 2007.

By: _____*Signed*_____
Christopher Kennedy
Administrative Law Judge

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 October 30, 2007. By means of a notice that accompanied the proposed document, the parties were given until November 23, 2007, to submit proposals for action under AS 44.64.060(e). The Administrator 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 November 26, 2007. After an oral argument held on December 4, 2207, the proposal for action has 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 5th day of December, 2007.

By: _____*Signed*_____
Christopher Kennedy
Administrative Law Judge

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