

BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of:)
)
 T B)
)
 _____) OAH No. 12-0272-PER

FINAL DECISION

I. Introduction

At issue in this case is the amount of credited service to which T B is entitled during periods of time when he was employed by the Alaska Marine Highway System (AMHS) but was neither at work, on paid leave nor on a paid holiday. The Administrator contends that during those periods of time Mr. B was on authorized leave without pay.

This matter is remanded to the Division of Retirement and Benefits to recalculate Mr. B’s credited service in accordance with AS 39.35.300, AS 39.35.330(b), and 2 AAC 35.330(a).

II. Facts

T B worked as an employee of the Alaska Marine Highway System (AMHS) beginning in 1980 (as a member of PERS beginning October 1, 1983).¹ When hired, he became a member of the Inland Boatmen’s Union of the Pacific (IBU), initially working as an unassigned relief employee and after about 1989 as a regularly assigned employee.² He became a member of the International Organization of Masters, Mates and Pilots (MMP) after he obtained his master’s license and was hired into an officer’s position, beginning work as a third mate in July, 1994.³ Initially, in that capacity, he had a permanent position as unassigned relief and was assigned to vessels on an as-needed basis.⁴ Eventually, in about 1999, he obtained a permanent position on a specific vessel.⁵

Between October 1, 1983 and December 31, 1986, the terms of Mr. B’s employment were set forth in collective bargaining agreements between IBU and AMHS.⁶ The agreements covered regularly assigned employees, who were assigned to a specific vessel on a one week on-

¹ R. 71-76, 86.

² R. 67; B Tr. 305, 308-309, 314-315.

³ R. 67; Ex. V (SEA 112); B Tr. 305-306.

⁴ B Tr. 306-307, 309.

⁵ B Tr. 306.

⁶ The agreement in effect from April 1, 1985 through March 31, 1988 is in the record. Ex. 43. Neither party has asserted that the agreement in effect from October 1, 1983 through March 31, 1985 was different in any material way from the subsequent agreement.

one week off basis, and relief employees, who were assigned to work on an as-needed basis.⁷ Mr. B was a relief employee.⁸ Due to the vagaries of vessel schedules, crew changes, emergencies, illness or injury, weather, and equipment breakdowns, it was important for AMHS to maintain flexibility in staffing.⁹ Accordingly, about half of the system's IBU membership were relief employees.¹⁰ The IBU collective bargaining agreements do not contain a provision providing time off for relief employees.¹¹ However, a relief employee was permitted by AMHS to decline dispatch for one week after completing a relief work assignment of one week.¹² Once that period of time ended a relief employee was on call and was expected to be available for service when needed.¹³ In addition to programmed relief assignments, scheduled in advance,¹⁴ Mr. B was frequently called in for unscheduled assignments on short notice.¹⁵ Unless he was on authorized vacation, approved in advance,¹⁶ he was required to appear at his designated duty station at the time scheduled.¹⁷ Failure to relieve as scheduled was grounds for discipline, including discharge.¹⁸

Both regularly assigned and relief employees were paid on an hourly basis.¹⁹ A 12 hour day was the standard on-board ship work day,²⁰ so that a regularly assigned employee would work 84 hours in each one week shift. An employee could be granted a leave of absence of up to six months per year without loss of seniority.²¹ Time on a leave of absence was not counted by

⁷ Ex. 43, p. 4 (Rules 4.01(a), 4.01(b)). The agreement also covered seasonal employees, regularly assigned relief employees (limited to specified positions), and displaced regularly assigned employees (regularly assigned employees whose vessel was out of service). *Id.* (Rule 4.01(c), (d), (e)).

⁸ B Tr. 309

⁹ *See, e.g.*, B Tr. 312.

¹⁰ B Tr. 312. *See* Ex. S, p. 1.

¹¹ Ex. 43. *See* C Tr. 756-759. The agreement specifically provides that regularly assigned relief employees (RAREs) "may be required to work irregular assignments without benefit of a scheduled week off." Ex. 43, p. 18 (Rule 23.06). A RARE was an employee assigned to relieve a regularly assigned employee in certain classifications. Ex. 43, p. 4 (Rule 4.01(d)).

¹² Ex. BB, p. 3; C Tr. 720. *See also* Sutch Tr. 787 (regular one off-one on schedule does not apply to relief employee replacing a regular employee for less than the regular employee's full assignment).

¹³ B Tr. 315.

¹⁴ *See* Ex. 43, p. 18 (Rule 23.06).

¹⁵ B Tr. 315.

¹⁶ Ex. 43, p. 8 (Rule 22.03(a)).

¹⁷ B Tr. 334-335.

¹⁸ Ex. 43, p. 7 (Rule 12.02).

¹⁹ Ex. 43, p. 12.

²⁰ Ex. 43, p. 16 (Rule 18.02). During layup, the standard work day was 8.4 hours for five days, followed by two days off. *See* Ex. 43, p. 11 (Rule 16.01-16.03).

²¹ Ex. 43, p. 25 (Rule 26.16).

AMHS when computing continuous service for purposes of vacation accrual or retirement benefits.²² All leaves of absence required the mutual consent of AMHS and IBU.²³

From September 1, 1994 through September 30, 1996, the terms of Mr. B's employment were set forth in collective bargaining agreements between MMP and AMHS.²⁴ The agreement covered regularly assigned, vacation relief, and extra relief deck officers; Mr. B was an extra relief employee as defined in that agreement.²⁵ Regularly assigned employees were assigned to a specific vessel; two rotating crews were assigned to each vessel, with a standard one week on-one week off work schedule.²⁶ When a ship was laid up, the standard work week was five days on-two days off.²⁷ Regularly assigned and vacation relief officers were assigned by a scheduling committee for periods of four months at a time, but the schedule was routinely revised to accommodate unforeseen circumstances.²⁸ Extra relief officers were assigned to work on a temporary basis.²⁹ As extra relief, Mr. B was provided a tentative work schedule, but it was routinely altered to reflect the vicissitudes of AMHS's needs.³⁰ Mr. B continued to be paid on an hourly basis.³¹ As an extra relief employee, Mr. B had no minimum guaranteed wages.³² To advance in his career path as a deck officer, Mr. B needed to go when called.³³ Paid vacation was available as scheduled by consultation between AMHS and MMP,³⁴ but AMHS retained authority to recall deck officers from approved vacation.³⁵ A deck officer could be granted a leave of absence of up to six months' duration without loss of seniority.³⁶ A leave of absence to

²² *Id.* The term "continuous service" is not defined for purposes of Rule 26. For purposes of establishing the right to accrue vacation leave, continuous service for new employees was 2,184 hours of regular pay, regardless of the time taken to accrue that time, and for existing employees was 1,600 hours in any 12-month period. *See* Ex. 43, pp. 17-18 (Rules 23.01, 23.02).

²³ Ex. 43, p. 25 (Rule 26.16).

²⁴ The agreements that were in effect from 1994 through May, 31, 1999 are in the record. Ex. 44, 45. Although the 1994-1995 agreement does not include the specific dates in which it was effect, neither party has asserted that it was not in effect as of September 1, 1994.

²⁵ Ex. 44, p. 2, Ex. 45, p. 7 (Rule 4.01); B Tr. 310.

²⁶ Ex. 43, p. 16 (Rule 19.01) (IBU), Ex. 44, p. 7, Ex. 45, p. 18 (Rule 19.01) (MMP). Under the latter contract, deck officers had the option of a two week on-two week off work schedule, if agreed to by all parties.

²⁷ Ex. 44, p. 5 (Rule 16.01).

²⁸ M Tr. 876, 895-897.

²⁹ Ex. 44, p. 2, Ex. 45, p. 7.

³⁰ B Tr. 315-316; M Tr. 899-900.

³¹ *See* Ex. 44, p. 6, Ex. 45, p. 16. According to the pay schedule, masters and chief mates (not standing watch) were paid a monthly salary. Mr. B was not a master or a chief mate during this period of time.

³² *See* Ex. 45, p. 23 (Rule 26.01).

³³ Tr. 316.

³⁴ Ex. 44, p. 8, Ex. 45, p. 20 (Rule 23.03(a)).

³⁵ *See* Ex. 44, p. 3, Ex. 45, p. 11 (Rule 12.08).

³⁶ Ex. Ex. 44, p. 10, Ex. 45, p. 25 (Rule 26.09). Rule 29.10(A) references leaves of absence under Rule 26.08, and provides for maintaining sick leave for as long as 12 years during such an absence. Rule 26.08 does not

work in another industry required the consent of AMHS and MMP.³⁷ AMHS's policy was to neither grant (upon the employee's request) nor impose (for discipline or unapproved absence) leave without pay until all of an employee's paid leave was used up.³⁸

Since at least 1996,³⁹ it has been the practice of the AMHS payroll staff when preparing payroll on behalf of AMHS ship-board employees⁴⁰ to use paid leave to add compensated time to the timesheets of both IBU and MMP employees who otherwise would fall short of 84 compensated hours in a pay period (unless directed otherwise by the employee),⁴¹ a practice referred to as "making whole."⁴² The additional compensated time ensured those employees received the full 84 hours of earnings per pay period guaranteed to regularly assigned employees.⁴³ This remained AMHS payroll staff's standard practice through 2004, when the MMP collective bargaining agreement was altered to require express permission from the employee as a prerequisite to using personal leave in order to make whole.⁴⁴ In accordance with AMHS's written policy⁴⁵ Mr. B on multiple occasions provided AMHS with written directives to take enough paid leave time from his accrued leave every pay period to give him a minimum of 84 hours of compensated time.⁴⁶ AMHS payroll staff chose the days to which the paid leave was applied.

mention leaves of absence. It concerns transfers to management or appointment to a union position. Presumably, under Rule 29.10(A), those individuals are treated as if on a leave of absence from their position as a deck officer.

³⁷ *Id.*

³⁸ *See, e.g.*, Ex. Y, Z, AA, VV, WW. There were exceptions to this policy for maternity, collective bargaining agreements, and workers' compensation. *See* Ex. MM, pp. 4-5.

³⁹ *See* Ex. HHH (Mr. B's motion to admit this exhibit is hereby granted). *See also* C Tr. 656, Sutch Tr. 797-798.

⁴⁰ AMHS shore side employees were treated otherwise. In the remainder of this decision, references to "AMHS employees" means "AMHS ship-board employees" and excludes AMHS shore side employees.

⁴¹ A Tr. 636-637 (permission from employee requested); Burns Tr. 647, 654-655 (permission from employee not required). *See also* Sutch Tr. 798-800.

⁴² *See, e.g.*, A Tr. 633-634, Bush Tr. 654-655. Ms. Sutch testified that the make whole policy was to ensure employees remained eligible for benefits, *i.e.*, in continuous service. Sutch Tr. 797. However, the amount of time required for continuous service was only 84 hours per month, not per pay period. Ex. 43, p. 20 (Rule 26.03) (IBU), Ex. 44, p. 10, Ex. 45, p. 24 (Rule 26.01(C)) (MMP).

⁴³ Ex. 43, p. 20 (Rule 25.01) (inapplicable to extras); Ex. 44, p. 10, Ex. 45, p. 23 (Rule 25.01) (inapplicable to extras). Relief employees, under the IBU contract, were entitled to 84 hours per assignment. Ex. 43, p. 20 (Rule 25.01(b)).

⁴⁴ C Tr. 653. Capt. M testified that the change was negotiated to protect officers' entitlement to a minimum guaranteed payment of 84 hours per pay period (without use of paid leave). M Tr. 901-902.

⁴⁵ Ex. Y, Z.

⁴⁶ *See* Ex. VV. B Tr. 340-344. Mr. B testified that the purpose of his request was to ensure that he remained in continuous service. B Tr. 343-344. As noted above, however, only 84 hours per month were required for continuous services. *See* note 42, *supra*. Nonetheless, the record reflects that Mr. B requested 84 hours per pay period.

During the periods of time at issue in this case, payroll staff treated AMHS ship-board employees (both regularly assigned and relief) as entitled to time off after completing a regular assignment. If assigned to work five days on a laid up ship, or one or two weeks on a working ship, payroll staff treated them as entitled to two days, or one or two weeks off, respectively, after completion of the assignment⁴⁷ (but only one week off after one or more successive work assignments on different ships).⁴⁸ Because of changing schedules, it was common for AMHS ship-board employees, particularly for relief employees but also on occasion for regularly assigned employees, to not be dispatched for work on the day after payroll considered them to no longer be entitled to days off. When that occurred, at least since the AKPAY system was implemented in 1991, AMHS payroll staff recorded in the AKPAY system a period of leave without pay for the employee until the employee was dispatched and returned to work.⁴⁹ Payroll staff was not authorized to place an employee on leave without pay status at the time payroll was prepared if the employee had accrued leave at that time.⁵⁰

Mr. B's work schedule was erratic.⁵¹ He typically worked for three, five (*i.e.*, layup) or eight (*i.e.*, a one week assignment) days in a row, with gaps between assignments typically lasting for two, six or eight days,⁵² with occasional gaps of from two weeks to one month.⁵³ After he became a member of PERS on October 1, 1983, Mr. B worked 217.2 hours in October and 116.2 hours in November; he did not work, and was not on paid leave or paid holiday, after November 24, 1983 until returning to work on board a vessel on April 27, 1984.⁵⁴ Mr. B was at

⁴⁷ C Tr. 608-609, 652, 711-715. *See* Ex. 43, p. 11 (Rule 16.03); Ex. 44, p. 5, Ex. 45, p. 15 (Rule 16.01); Ex. UU.

⁴⁸ A Tr. 624-625.

⁴⁹ *See, e.g.*, C Tr. 659-660, 721-722.

⁵⁰ *See supra*, note 38. *See also* Ex. MM, p. 4; C Tr. 658-659, 661-662, Sutch Tr. 817-818, 824. The evidence in this case indicates that payroll staff and others, including Mr. B, routinely did not distinguish between using paid leave to make whole, and using it to avoid leave without pay status. *See supra*, note 46. These are, however, quite different matters.

⁵¹ B Tr. 323; Lea Tr. 100-101, 121.

⁵² *See* Ex. 1-40. A standard "one-week" shift actually called for compensation on eight days, with the first and last days paid for six hours regardless of the time actually worked, in order to facilitate accounting. Ex. 43, p. 20 (Rule 25.04). *See, e.g.*, Ex. 6, 15, 26, 27, 30, 31, 33, 35-40.

⁵³ According to the time slips in the record, these extended periods overlapped (but were not always precisely the same as) similarly extended periods of leave without pay. *See* Ex. 1-40. During one of these periods of time, Mr. B had been approved in advance for paid leave. *See* Ex. XX (November 15-28, 1997). It appears that during that period of time he was not placed on paid leave status, and was instead placed on leave without pay status, because there was no work available. *Id.* There may have been other occasions when this occurred, as well. *See* Ex. 24, 25.

⁵⁴ Testimony suggests that during this period of time, Mr. B may not have had sufficient seniority to qualify for dispatch, given the limited work available during the winter. *See* C Tr. 719.

work, or on paid leave or paid holiday, for at least 1417.4 hours in 1983⁵⁵ and for about 1472 (1984, all after April 26), 2389 (1985), 2243 (1986), 2576.4 (1987), 2369 (1988), 2367.2 (1989), 2179 (1990), 2408.4 (1991), 2274.2 (1992), 2041 (1993), 1913.6 (1994), 2177 (1995), 2122.8 (1996), 2420.4 (1997), and 2181.6 (1998) hours in 1985-1998.⁵⁶ From 1985-1998, he was compensated for an average of 43.49 hours per week.

During the course of his employment, Mr. B received regular annual retirement benefit projections⁵⁷ and, in addition, on several occasions he received projections in response to his own inquiries.⁵⁸ All the projections were prepared by Division of Retirement and Benefits staff based on information provided by AMHS payroll staff. Beginning with the implementation of the AKPAY system in 1991, these retirement benefit projections were generated based on credited service as displayed in the AKPAY system. The AKPAY system did not capture multiple periods of leave without pay, and as a result benefit projections for AMHS ship-based employees were routinely inconsistent with AMHS employees' accrued leave without pay status as reported to AKPAY by AMHS payroll staff.⁵⁹

In addition to annual benefit projections and projections in response to an employee's inquiries, the Division of Retirement and Benefits also prepares an accounting of benefits after an employee selects a retirement date. This accounting is based in part on the employing agency's verification of service. For AMHS employees, verifications of service performed at the time of retirement are prepared following a manual review of an employee's accumulated timesheets from their entire period of employment.

In about 1998, the Division of Retirement and Benefits began noticing that verifications of service performed for retiring AMHS employees frequently resulted in substantially less credited service than their projections had indicated.⁶⁰ Division of Retirement and Benefits staff determined that the reductions were occurring because AMHS payroll staff (at the time

⁵⁵ See Ex. V (SEA 64); Ex. 1-5. Mr. B's sea hours (Exhibit V) do not include hours when Mr. B was on paid leave, yard duty, training, some paid holidays (*i.e.*, a paid holiday when he was not on board a vessel), or any other non-ship board work.

⁵⁶ R. 196-234.

⁵⁷ See R. 157 (19.82 years of credited service as of 6/30/2003), R. 155 (20.82, 6/30/2004), R. 153 (21.82, 6/30/2005), R. 151 (22.82033, 6/30/2006), R. 149 (23.82192, 6/30/2007), R. 147 (25.85754, 6/30/2008), R. 145 (27.87398, 6/30/2009). The latter projections show more than one year of additional credited service over the prior year due to an increased amount of claimed service (that is, credited service purchased from a prior period of employment, rather than earned through work for AMHS during the prior calendar year)..

⁵⁸ R. 102-138 (1997, 1998, 2003, 2009). Mr. B may also have received a projection in 2002. See SEA 40-41.

⁵⁹ Sutch Tr. 795. See A Tr. 605, 632; C Tr. 661-662, 778-783.

⁶⁰ Lea Tr. 90-91, 108, 112.

administratively located within the Department of Transportation),⁶¹ in performing verifications of service, had been applying 2 AAC 35.330(a) to AMHS employees. That regulation allows credited service for regularly scheduled days off only if the employee is held in pay status on the day before and the day after the days off. As 2 AAC 35.330(a) was interpreted and applied by the division and AMHS, if an AMHS employee did not return to work on the day after a week off, the employee was considered to be ineligible for credited service during the entire week off.⁶² However, in calculating credited service for AMHS employees the Division of Retirement and Benefits followed a purported agreement with AMHS rather than 2 AAC 35.330(a), and it provided service credit for a week off after a week of service regardless of whether the employee was placed in pay status on the day following the week off.⁶³ Division of Retirement and Benefits staff trained AMHS payroll staff to calculate service credit according to the division's purported agreement with AMHS, rather than in accordance with 2 AAC 35.330(a), and this particular problem, which had persisted for three or four years, was resolved.⁶⁴ Other than that specific issue, the Division of Retirement and Benefits accepted AMHS's payroll staff's attribution of leave without pay to employees, based on what AMHS informed the division was called for in the applicable collective bargaining agreements.⁶⁵ AMHS's policy in that regard, as understood by the division,⁶⁶ is that in addition to not placing AMHS ship-based employees on leave without pay status for a week after a week of service even if not on pay status the following day, AMHS payroll staff provides an additional three days as a grace period before placing the employee on leave without pay status.⁶⁷ That policy was not part of the Division of

⁶¹ Lea Tr. 111.

⁶² R. 113. Lea Tr. 244.

⁶³ Lea Tr. 113, 182, 246-247. Ms. Lea testified that AMHS employees are "not subject to [2 AAC 35.330] because of the agreement that they came into PERS on." Lea Tr. 209, 1001, 1005. According to Ms. Lea, the agreement was "because he's on the ship for 24 hours, that for every day he is working on the ship, he has an additional day of credit[ed] service." Lea Tr. 160-161. She testified this agreement "dictated how IBU would come into PERS and how we would credit the service." It is not clear from Ms. Lea's testimony whether the agreement pertained to how pre-PERS service would be credited, or if it applied also to how post-PERS service would be credited. At one point, she testified that the agreement was regarding "how to handle their previous time", which would suggest the agreement was not prospective. Lea Tr. 207, 218-219. In any event, to the extent the agreement included the future calculation of credited service, it is inconsistent with 2 AAC 35.330(a). Moreover, Ms. Lea testified that she did not know if the agreement included relief employees. Lea Tr. 163. Ms. Lea testified that the original agreement was in writing, but no copy of it has been found to exist. Lea Tr. 1005-1006.

⁶⁴ Lea Tr. 126, 128-129. The problem may have been limited to IBU employees. See Ex. HH, SS.

⁶⁵ Lea Tr. 149-150, 156. See also Lea Tr. 165.

⁶⁶ R. 6-7. See Lea Tr. 149.

⁶⁷ See Lea Tr. 169-170; Burn Tr. 760-761.

Retirement and Benefits' purported agreement with AMHS.⁶⁸ The policy was implemented around 2000 and remains in effect.⁶⁹

In 1998 or 1999, in light of the discrepancies in credited service that were showing up, for a period of about four years the Division of Retirement and Benefits on a trial basis implemented a different methodology for calculating credited service, called positive time accounting.⁷⁰ This methodology provided credited service based on the number of hours worked each pay period, based on whether in any given pay period an employee had 84 hours of paid time.⁷¹ The division determined that using this methodology did not result in more accurate calculations of credited service, and by mutual agreement with AMHS the division returned to its prior methodology, event based accounting (*i.e.*, service credit based on the events of going on and off leave without pay), which it continues to apply.⁷²

On August 23, 2010, Mr. B submitted an application for retirement benefits, effective September 1, 2010.⁷³ At that time, the division's records, which accurately reflected the employment status displayed in AKPAY, showed that Mr. B had accumulated service of 28.95892 years, as of August 1, 2010.⁷⁴ Through the date of his retirement, the Division's records and all of its projections showed that Mr. B had accrued service credit from October 1-November 18, 1983, and from January 1, 1984-December 31, 1996 (as well as thereafter).

In conjunction with Mr. B's application, the Division of Retirement and Benefits submitted a request for a verification of service to AMHS payroll staff. AMHS staff prepared the verification of service following a review of all of Mr. B's timesheets. Payroll staff identified periods of leave without pay for Mr. B consistent with the methodology the Division of Retirement and Benefits had trained it to use, except that it added the three day grace periods that AMHS had agreed with IBU and MMP (without the participation of the Division of Retirement and Benefits) to provide, noting on the timesheets the dates on which Mr. B was

⁶⁸ Lea Tr. 170.

⁶⁹ See Ogden Tr. 996, C Tr. 646-647, 721-722, 763, 769-770, 772-773. Ms. C testified regarding discussions she had when the policy was implemented; she began working for as payroll staff for AMHS in about 1999. Ms. Lea described the purpose of the grace period as accommodating employees who did not return to work as scheduled because of the vagaries of vessel schedules and availability. Lea Tr. 210, 218.

⁷⁰ See, *e.g.*, Lea Tr. 275-278; Ex. HH.

⁷¹ See Lea Tr. 276-277, 998-999; Arreola Tr. 942, 976. This was twice the number of hours that bargaining agreements treated as "continuous service" (84 hours per month), and which AMHS considered eligible for PERS credited service. It was substantially in excess of the compensated time required for status as a full time employee (30 hours per week, or 60 hours per pay period) during a period of credited service.

⁷² Lea Tr. 999; Arreola Tr. 942-943.

⁷³ R. 71-76.

⁷⁴ See R. 143 (2010 Annual Benefit Statement).

considered by AMHS payroll staff to be “on” or “off” leave without pay status for purposes of a verification of service.⁷⁵ AMHS payroll staff did not consider whether he had accrued leave before recording him as on leave without pay status for a given period of time.⁷⁶ The resulting verification of service identified fourteen separate periods of time during which Mr. B had not returned to duty within the time after a prior assignment that payroll staff treated as his days off, plus three additional days’ grace. Payroll staff reported those dates to the Department of Retirement and Benefits, consistent with its training, as days of leave without pay. Based on payroll staff’s report, the division denied credited service for those dates.

Mr. B filed an appeal, asserting that he is entitled to credited service for each of those periods of time.

III. Discussion

At issue in this matter is the proper calculation of Mr. B’s credited service. Credited service is “the number of years, including fractional years, recognized for computing benefits that may be due from the plan.”⁷⁷ The starting point in determining the proper calculation of credited service is AS 39.35.300(a), which provides that “[a]n active employee is entitled to credited service for periods of employment with the state...” However, as stated in AS 39.35.330(b), “[a] leave or leaves of absence without pay exceeding 10 accumulated working days in any calendar year... authorized by an employer shall be considered as an interruption of employment and credited service may not be granted.”

Under AS 39.35.300(a), Mr. B is entitled to credited service for “periods of employment with the state.” Mr. B had one period of employment with the state: it began in 1980 (under PERS beginning in 1983), and it terminated upon his retirement in 2010. Within that single period of employment he is not entitled to credited service, according to AS 39.35.330(b), for any “leaves of absence without pay exceeding 10 accumulated working days in any calendar year...authorized by an employer[.]”

To calculate the number of days that an employee is on authorized leave without pay in excess of ten working days in a calendar year, one must first identify the employee’s “working days.” A working day, within the meaning of AS 39.35.330(b), is a day on which an employee

⁷⁵ Arreola Tr. 930-934, 951-953. Ms. Arreola testified that prior to 2009, payroll staff did not identify periods of leave without pay on timesheets in the payroll process. Arreola Tr. 952-953. Other payroll staff testified that timesheets were marked as “on” and “off” leave without pay status as part of the payroll process. See note 50, *supra*.

⁷⁶ See, e.g., Arreola Tr. 944.

⁷⁷ AS 39.35.680(10).

is required to work: a day other than a day off or a holiday. Most employees are regularly scheduled to a five day on-two day off work schedule: their working days are every Monday through Friday. Some other employees, such as AMHS's regularly assigned employees under the IBU contract and regularly assigned deck officers under the MMP contract, are regularly scheduled to work a one week on-one week off work schedule: their working days are a full week every other week. Mr. B, of course, was not like those employees. He did not have a regularly-assigned work schedule. His working days, within the meaning of AS 39.35.330(b), were whatever days he was dispatched.

After identifying the employee's working days, one must next identify on which of those days the employee was on an authorized leave of absence (either with pay or without).⁷⁸ For most state employees, by statute a leave day is a day (other than a holiday) "upon which an...employee would otherwise work and receive pay."⁷⁹ Under this statute, a day off (regularly scheduled or otherwise) is not a day of leave. Under the Personnel Rules, a leave of absence without pay (that is, permission not to show up for work, even though it is a working day) may be imposed or granted for discipline, family leave, inability to work, or at the request of an employee as authorized by the principal executive officer of a department or agency for specified reasons.⁸⁰ While these provisions of law do not apply to AMHS's IBU and MMP employees,⁸¹ nonetheless AS 39.35.330(b) should be interpreted in a manner that is consistent with them, in order to avoid creating unnecessary conflicts between AS 39.35.330(b) and provisions of state law applicable to other state employees. Moreover, to the extent possible, AS 39.35.330(b) should be interpreted in a manner that is consistent with the collective bargaining agreements between AMHS and its employees, to avoid creating unnecessary conflicts between AS 39.35.330(b) and the collective bargaining agreements applicable to those employees.

Applying AS 39.35.330(b) to an employee of AMHS in a manner consistent with the manner in which it applies to other state employees, a leave of absence without pay would be a period of time in which an AMHS employee who would otherwise be required to report to work for duty is nonetheless excused from the obligation to report to work and is not paid. It would not include a period of time during which the employee would not have been required to work,

⁷⁸ An unauthorized leave is an absence that occurs when a worker is absent on a working day without approval. *See, e.g.,* Ex. LL.

⁷⁹ AS 39.20.290. This provision does not apply to AMHS IBU and MMP employees. AS 39.20.310(7).

⁸⁰ *See* 2 AAC 07.500; 2 AAC 08.095; AAM 280.200; Ex. LL (1985).

⁸¹ 2 AAC 08.010(a)(7).

even if he were not on leave. In particular, it would not include days off, regularly scheduled or otherwise. Mr. B was only required to work when he was dispatched: he had no regularly assigned work schedule, and when he was scheduled that schedule was routinely disrupted. Mr. B never requested and was never granted leave without pay in the manner contemplated by the Personnel Rules or the IBU and MMP collective bargaining agreements. He was not on leave without pay, within the meaning of AS 39.35.330(b), during periods of time when he was not dispatched to work and had not requested or been granted leave in the manner contemplated by state law⁸² or the applicable collective bargaining agreements.⁸³ Rather, on those occasions the employer gave him the day off.

The primary limiting factor on Mr. B's accumulation of credited service, under a construction of AS 39.35.330(b) that limits periods of leave without pay to dates on which the employee was otherwise required to work, would not be the number of days he was between assignments. Rather, it would be the number of hours that he regularly was required to work, since in order to be considered a part time or full time employee he needed to be in a position that regularly required working at least 15 or 30 hours per week.⁸⁴ Absent any showing that Mr. B was ever anything other than a permanent full-time employee, this construction of AS 39.35.330(b) means that he is entitled to credited service as a full time employee from October 1, 1983 through the end of his continuous period of employment. That he would qualify for a full year of credited service for each year from 1984-1999 is unremarkable, in light of his work history during those years, which except for 1984 and 1994 was well in excess of the typical full-time state employee's 1,950 hours per calendar year, and beginning on April 27, 1984 was, on average, far in excess of the 30 hour per week threshold for full time credited service.⁸⁵

The complexity regarding the calculation of Mr. B's credited service does not come from AS 39.35.330(b), which, as just explained, can easily be construed in a common sense fashion,

⁸² 2 AAC 07.500 (leave of absence may be granted to permit classified employee to accept exempt of partially exempt position, or upon application of employee for disability, for travel or study to benefit work, or to replace employee n military leave).

⁸³ See *supra*, notes 21-23, 35-37.

⁸⁴ AS 39.35.300(b) (part-time employee receives pro-rata credit); AS 39.35.680(32), (33) (full-time employee occupies "a permanent position that regularly requires working 30 or more hours a week", part-time employee occupies "a permanent position that regularly requires working at least 15 hours but less than 30 hours a week.").

⁸⁵ It appears that Mr. B did not work from November 25, 1983 until April 26, 1984. It is possible that Mr. B was placed on layoff or furlough status for all or a portion of this period of time or was otherwise ineligible for credited service. Moreover, the fact that AMHS characterized his position during that time as a permanent full time position does not preclude the division from adjusting his credited service during that period of time, if under applicable law he did not qualify for status as at least a part-time employee. See *In Re K.H.*, OAH No. 07-0306-PER (Office of Administrative Hearings 2009).

consistent with other provisions of state law and AMHS's collective bargaining agreements, to accommodate Mr. B's circumstances. Rather, the complexity in this case arises from a regulation, 2 AAC 35.330(a),⁸⁶ which states:

Service credit for permanent full-time employees is granted on the basis of one calendar day of service for each day in pay status. Regularly scheduled days off and holidays are allowed as credited service, provided that the employee was held in pay status on the regularly scheduled workdays immediately preceding and following the holiday or regularly scheduled days off.

This regulation introduces a new factor into the determination of credited service that is not mentioned in AS 39.35.330(b): pay status. An employee is on pay status when at work, on holiday, or on paid leave.⁸⁷ Thus, an employee is not on pay status on days off. By identifying pay status as a limiting factor in the determination of credited service, the regulation potentially conflicts with AS 39.35.330(b), since the only limiting criterion identified in the statute is authorized leave without pay, and on days off (regularly scheduled or otherwise) a state employee is neither in pay status nor on leave without pay.⁸⁸

In order to avoid a conflict between AS 39.35.330(b) and 2 AAC 35.330(a), the regulation must be read in a manner that treats days off as qualifying for credited service, even though on those days the employee is not in pay status. The regulation does this reasonably well for most employees with a Monday through Friday, or a week on-week off work schedule. For most employees, their regularly scheduled days off (weekends or week off) are allowed as credited service because they are on pay status on the day before and after their regularly scheduled days off.

AMHS ship-board employees, however, are quite unlike most employees. Both regularly assigned and relief workers routinely do not return to work on the day after their specified days

⁸⁶ Another regulation, 2 AAC 35.340, clarifies that if an employee does not return to work, the entire time off is disallowed, not just the time in excess of the initial ten days of leave without pay.

⁸⁷ See, e.g., AAM 270.010 ("The standard work week consists of 37.5 hours in pay status (hours of work, paid leave, and paid holidays.)).

⁸⁸ The personnel rules, which do not apply to AMHS employees, identify two additional periods of time, other than days off, during which an employee is not in pay status (that is, is not at work, on paid leave, or on paid holiday) and is not on a leave of absence: furlough and suspension for misconduct. See 2 AAC 07.407 ("A furlough shall be treated *as if* the employee were in pay status in its effects on the probationary period, leave accrual, and merit anniversary dates.") (emphasis added); 2 AAC 07.400(c) (suspension without pay for misconduct may be treated as leave of absence without pay for purposes of 2 AAC 07, but is not identified as a period of leave without pay for purposes of credited service). A third such period, it appears, is a layoff, unless the employee resigns or retires while laid off, although it is possible to read the applicable regulation as denying credited service even to an employee who is reinstated prior to resignation or retirement. See 2 AAC 07.405(a) ("If an employee [who has been laid off] resigns or retires, the laid-off former employee is considered to have separated without prejudice at the time

off. For regularly assigned workers, this occurs because the vagaries of the system frequently mean that their assigned ship is not available when it was scheduled to be available. For relief workers, it occurs for the same reason but in addition is inherent in the nature of relief work, as relief schedules are variable to begin with. In order to avoid a conflict between AS 39.35.330(b) and 2 AAC 35.330(a) (as the division would apply it to AMHS employees) the division disregards the regulation, treating it as inapplicable to AMHS employees. Rather than determining the credited service of AMHS employees in the manner the division believes is dictated by 2 AAC 35.330(a), the division calculates credited service according to an alleged prior agreement (which is nowhere to be found) with AMHS, reached at the time AMHS employees entered into PERS. Under that alleged agreement, the division disregards the fact that AMHS employees commonly do not return to work as scheduled, and provides them credited service for a full week in which they did not work, even if they do not return to work on the day following. Moreover, and in addition to that alleged agreement, the division has acquiesced in AMHS's unilateral decision to grant its workers an additional three day grace period beyond their regular days off.

But, as the division has strenuously argued in this case, the division is not at liberty to disregard applicable law in the administration of the PERS system. Moreover, even if AMHS's entry into the PERS system was contingent upon approval of a special formula for determining credited service, and even if such a prior agreement would supercede the application of state law to AMHS workers, at a minimum it is incumbent on the division to provide the written agreement to ensure it has been followed. Nor has the division explained why, if there was such a prior agreement with AMHS, the division had authority to try out, on an ad hoc basis, an alternative methodology for determining credited service (positive time accounting) that was neither authorized by law nor established by that agreement.

Rather than disregarding 2 AAC 35.330(a), it will be interpreted and applied to AMHS employees in a manner consistent with its plain language that fits the circumstances of those workers. For AMHS employees, "regularly scheduled days off", within the meaning of 2 AAC 35.330(a), are construed to include not only specified days off (*i.e.*, two days after a five day shift, one week after a one week shift, and two weeks after a two week shift), but also an indeterminate number of additional days: for regular workers, the number of additional days off

of layoff."'). A fourth such period of time, it appears, is a strike. *Cf. In Re C.C.*, at 1, OAH No. 08-0010-PER (Office of Administrative Hearings 2008) (noting a five week break in service resulting from a strike).

until the employee is dispatched to the regularly assigned ship, and for relief employees, the number of additional days off until the relief employee is dispatched to any ship. All AMHS employees have regularly scheduled days off after an assignment.⁸⁹ Only the number of days off is not predetermined, and all of the days off after an assignment are part of the period of time that constitutes an AMHS's ship-board employee's "regularly scheduled days off" within the meaning of 2 AAC 35.330(a). Reading 2 AAC 35.330(a) in this fashion, rather than disregarding it entirely, is consistent with AS 39.35.330(b), limits credited service appropriately, and treats regularly assigned and relief employees identically. It has the added benefit of not treating unanticipated days off as if they were days of leave without pay, based on payroll accounting procedures that have nothing to do with what leave without pay is under state law and the applicable collective bargaining agreements and which the division did not prove were authorized by the appropriate officials in AMHS.⁹⁰ "Regularly scheduled days off", within the meaning of 2 AAC 35.330(a) as applied to AMHS shipboard employees, is construed to mean (for both regular and unassigned workers) two days off after a five day shore-side assignment, seven days or fourteen days after a one or two week shipboard assignment, plus any additional days off that are granted by the employer following an assignment of any length.

IV. Conclusion

Construed properly, neither AS 39.35.330(b) nor 2 AAC 35.330(a) limits Mr. B's credited service for two independent reasons: first, he was never on a leave of absence from a "working day", within the meaning of AS 39.35.330(b); and second, his regularly scheduled days off within the meaning of 2 AAC 35.330(a) included an indeterminate number of days beyond his specified days off. The administrator's determination to accept the credited service as calculated by AMHS is reversed. Mr. B's credited service shall be calculated in accordance with this decision.

DATED September 9, 2014.

Signed

Andrew M. Hemenway
Administrative Law Judge

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

⁸⁹ Regularly scheduled employees under their collective bargaining agreements; relief and extra relief workers by the employer's policy permitting relief employees to decline dispatch for that period of time.

⁹⁰ See Ex. DD.