**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS**

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| In the Matter of | ) | |
| | ) | |
| K H | ) | OAH No. 18-0350-PER |
| | ) | Agency No. 2018-002 |

# FINAL DECISION ON MOTION AND CROSS-MOTION FOR SUMMARY ADJUDICATION

## I. Introduction

After winning a lawsuit and an award of damages for both past and future lost wages and benefits from an employer who participates in the Public Employees' Retirement System, K H asked the Division of Retirement and Benefits to credit his retirement account with the compensation he received for lost wages. Citing a lack of information, the Division refused. Mr. H appealed.

The Division is correct that Mr. H's award for future lost wages and benefits cannot be credited to his retirement account. The definition of "compensation" that governs whether payments from the employer can be credited to the employee's retirement account specifically prohibits credit for prepayment of wages for services expected to be rendered in the future.

The Division is incorrect, however, regarding whether the award for past lost wages can be credited to Mr. H's account. If the award meets all requirements of AS 39.35, it can be credited to Mr. H's account.

This means that all contributions required under AS 39.35 must be paid in full. The only source for these payments appears to be Mr. H's award for lost benefits.

In addition, all accounting requirements of AS 39.35 will have to be met. This will include a requirement that the past lost wages be allocated to the pay period in which the wages were earned. The accounting can be done retroactively, however, by making adjusting entries so that the award is brought into compliance with AS 39.35. Even though the employer has the ultimate responsibility for the accounting, the Division, not Mr. H, is responsible for ensuring that the accounting is properly completed.

## II. Facts and Proceedings

K H is a 54-year-old resident of City A, where he has lived since 1975.[1] In 1995, he was hired as a mechanic by the City A Department.[2] In 2003, he took a pay cut to work as an entry-

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1 H Aff. ¶2.

2 *Id.*

level position A.[3] Given his experience in maintaining and operating equipment, he expected to be promoted to engineer, but he was not.[4] When he was denied promotion again in 2012, he sued the City A for breach of contract. After a trial, a jury found in his favor, and awarded contract damages of $100,000 for past lost wages and benefits.[5] It also awarded $450,000 for future lost wages and benefits.[6] The total court-ordered award, which also included an award for increased income taxes, past emotional distress, partial attorney's fees, and partial costs, was $778,951.69.[7]

One of the disputes between the parties in this administrative hearing relates to what was covered by the jury award for lost wages and benefits with regard to Mr. H's retirement under the Public Employees' Retirement System. Mr. H is a member of the System because City A, as a political subdivision of the state, is a participating employer.

The Public Employees' Retirement System has several different tiers. Mr. H's tier (which is determined by when he first was employed) provides a defined-benefit pension. The pension is supported by contributions made by employers and employees.[8] A member's pension is determined based on the member's highest three consecutive payroll years.[9] The System credits all eligible earnings paid to the member's retirement account so that it can track employee earnings and contributions.[10]

Two experts (one for each party) testified at the trial regarding the calculation of damages. Although the experts reached different conclusions, both calculated his lost wages from the time he should have been promoted in 2012 until the date of trial.[11] Both also included in future benefits an award based on the difference between the pension benefit that Mr. H will receive based on his current pay, and the benefit that he would have received in the future if he had been promoted and received the higher pay that he was due under the contract.[12]

The City A did not appeal the verdict. Before paying the award, the City A asked the Division whether the payment should be credited to the Retirement System.[13] After reviewing the

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3 *Id.* ¶4.
4 *Id.*
5 Record on Appeal at 12.
6 *Id.*
7 H Aff. ¶6; Record on Appeal at 13.
8 AS 39.35.160; 39.35.170; 29.25.255.
9 *See* AS 39.39.680(4) (1995).
10 AS 39.35.070; 39.35.100; AS 39.35.680(4).
11 *See* Division Exhibit E at 18; Exhibit F at 13. The experts used different start dates for computing his damages.
12 *See* Division Exhibit E at 17-18; Exhibit F at 19.
13 Record on Appeal at 18.

documentation regarding the award, the Division concluded that it was not retirement-eligible.[14] On December 1, 2017, the City A paid the award.[15] The City A treated $550,000 of the payment as wages subject to taxation and withholdings other than public employees retirement.[16] It did not deduct employee contributions or otherwise treat the payment as retirement-eligible under the Public Employees' Retirement System.

Mr. H contacted the Division about its decision that the payment was not eligible for inclusion in the Retirement System.[17] He expressed his disagreement with that conclusion.[18] He asked about the availability of administrative review.[19] He specifically inquired about how to ensure that payment of the employee's contributions (which would have been made through the withholding process but for the Division's determination) could be made.[20]

On January 2, 2018, the Division issued a final agency determination that Mr. H's award was not a "make-whole award," which, in the Division's view, made it ineligible for consideration under the Retirement System.[21] Mr. H appealed the decision to the Office of Administrative Hearings.[22] Mr. H filed a motion for summary adjudication and the Division filed a cross-motion for summary adjudication. After the Division amended its cross-motion on July 3, 2018, the record was held open until July 16, 2018, for Mr. H to file a response. Mr. H did not file a response and affirmed that he would not be filing a response. Mr. H did, however, file two additional requests for immediate entry of OAH decision. These motions were denied at a status conference on July 19, 2018.[23] At the status conference, both parties affirmed that they were not

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14 *Id.* at 31-36.

15 *Id.* at 44.

16 *Id*. at 29-30

17 *Id.* at 40-41.

18 *Id.* at 41.

19 *Id.*

20 *Id.*

21 *Id.* at 4. Although the Division treats the phrase "make-whole award" as a term of art, "make-whole award" is not defined in statute or regulation.

22 *Id.* at 3. Although Mr. H filed his appeal on February 2, 2018, the Division did not refer the appeal to the Office of Administrative Hearings until March 14, 2018. Under statute, the referral was due within 10 days of the Division's receipt of the notice, February 14th. *See* AS 44.64.060(b). Mr. H strongly objected to the Division's unnecessarily delay, and moved to have the administrative hearing dismissed so that he could pursue a civil action in court. H Motion for Immediate Advancement of Appeal to Superior Court. The motion was denied because the referral deadline is directory and the remedy for failure to comply with a referral deadline would not be dismissal of the hearing. Mr. H's point that the Division was flouting the administrative process by ignoring deadlines, however, is well taken.

23 Summary adjudication in an administrative proceeding is similar to summary judgment in court. *See, e.g., Alaska Public Offices Comm'n v. Gillam,* OAH No. 11-0328-APO at 1-2 (Oct. 19, 2011 Alaska Public Offices Commission) (citing *Samaniego v. City of Kodiak*, 2 P.3d 78, 82-83 (Alaska 2000). The Alaska Supreme Court has advised that it "will uphold a summary judgment only if the record presents no genuine issues of material fact and 'the moving party was entitled to judgment on the law applicable to the established facts.'" *Newton v. Magill*, 872

arguing that issues of material fact precluded entry of summary adjudication. This clarification allowed for this decision on summary adjudication.

## III. Discussion

The first issue in this case is whether a jury award for breach of contract damages is "compensation," as that term is defined under the applicable statutes governing the Public Employee's Retirement System. If the award meets the definition of "compensation," then it is includable as part of Mr. H's retirement-eligible compensation benefits used for computing his average-monthly compensation.[24]

The jury award for foregone earnings was divided into two parts: "past lost wages and benefits" and "future lost wages and benefits."[25] The analysis of whether the jury award is compensation is different for the two parts. Below, this decision will first analyze the future damages, and then turn to past damages. If either of these two inquiries results in a decision that an award is compensation, then this decision will have to address the following additional questions:

(1) Who pays the employer's contribution?

(2) How does the system account for the compensation? (Is it on a cash-basis, so that the award is counted as compensation for the pay-period in which it was received? Or is it on an accrual basis, so that the award is counted as compensation spread among the pay-periods in which the compensation was earned?)

(3) Who is responsible for ensuring that the accounting is properly completed?

After addressing these questions, I will turn to the additional issues raised by the Division in its cross-motion for summary adjudication, which are

(1) whether treatment of the award as compensation is impossible; and

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P.2d 1213, 1215 (Alaska 1994) (quoting *Wassink v. Hawkins,* 763 P.2d 971, 973 (Alaska 1988)). Even if both parties wish to avoid an evidentiary hearing, an administrative law judge cannot issue summary adjudication to a party unless the party is entitled to a decision as a matter of law. *Martinez v. Ha*, 12 P.3d 1159, 1162 (Alaska 2000) (holding that even when motion for summary judgment is unopposed, trial court "must still determine whether there is any dispute as to a genuine issue of material fact and whether the movant is entitled to judgment as a matter of law."); *Weaver Bros. v. Chappel*, 684 P.2d 123, 126 (Alaska 1984) (holding that when the party moving for summary adjudication does not meet the standard, summary judgment must be denied, "regardless of whether [the opposing party] failed to respond to the motion with affidavits or other evidence"). The ALJ must ensure that all parties have had an opportunity to be heard, and that the facts in the record support a determination that a party is entitled to a decision in its favor as a matter of law. Here, that was not possible until Mr. H had had an opportunity to respond to the Division's motion, and both parties had affirmed that they had no objection to having the ALJ rely on the record and exhibits, including the affidavits and transcripts.

[24] *See* AS 39.35.680(4) (1995).

[25] Record on Appeal at 28.

(2) whether this case must be dismissed for failure to join an indispensable party.

### A. Are the awards for past and future damages compensation under the Retirement System's definition of compensation?

#### 1. Is the award for future lost wages and benefits "compensation"?

To determine whether Mr. H's award for lost wages and benefits is compensation under the Retirement System, we turn to the definition of "compensation" in the Public Employees' Retirement Act, AS 39.35. The definition of "compensation" that applies in this case is the 1995 definition. The reason we use the 1995 version of the statutes is that a member may request to have the member's rights determined under any statutes that applied beginning when the member first entered the system.[26] Mr. H asserts that the 1995 definition of compensation is more generous to him, so this analysis will use the 1995 definition:

> (8) "compensation" means the total remuneration earned by an employee for personal services rendered to an employer, including employee contributions under AS 39.35.160, cost-of-living differentials only as provided in AS 39.35.675, payments for leave that is actually used by the employee, the amount by which the employee's wages are reduced under AS 39.30.150(c), and any amount deferred under an employer-sponsored deferred compensation plan, but does not include retirement benefits, severance pay or other separation bonuses, welfare benefits, per diem, expense allowances, workers' compensation payments, or payments for leave not used by the employee whether those leave payments are scheduled payments, lump-sum payments, donations, or cash-ins.[27]

With regard to Mr. H's award for future benefits, the Division argues that the definition of compensation is deliberately written in the past tense. In the Division's view, the definition applies only to money earned for services already performed. Under this textual argument, if an employer prepays an employee for services expected to be received in the future, that money is not compensation under this definition.[28]

Mr. H did not directly respond to the Division's argument regarding the effect of the definition being written in the past tense. When asked about the argument, he explained that it was addressed in his brief filed in support of his motion for summary adjudication.[29] In that brief, Mr. H stresses that the 1995 definition clearly applied to "***total* remuneration**."[30] Thus, it

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[26] *McMullen v. Bell,* 128 P.3d 186, 190-91 (2006) ("McMullen argues that he has a right to have his benefits determined under the law and practices that were in effect when he was hired. We agree.").

[27] AS 39.35.680(8) (1995).

[28] Division's Opposition at 8-9.

[29] H's Request for Entry of Final Decision by OAH per AS 44.64.060(d) (June 26, 2018) at 2.

[30] H's Motion at 13 (quoting AS 39.35.680(8) (1995) (emphasis added by H)).

appears that his argument is that "total" means all remuneration, whether received as prepayment for services to be rendered in the future, or as payment for services rendered in the past.[31]

The problem for Mr. H, however, is that this argument ignores the rest of the clause in which the term "total remuneration" appears. The definition does not, in fact, include all remuneration received by an employee from an employer. It only includes remuneration *earned* by an employee for personal services *rendered* to an employer. As of the date that the City A paid the $450,000 in future lost wages and benefits, Mr. H had neither earned any remuneration nor rendered any services.[32]

Thus, future lost wages are by necessity prepayment for services expected to be rendered by Mr. H in the future. These damages are not payments that Mr. H had earned for services provided in the past. Therefore, because the future damages are remuneration for expected future services, they are not compensation under AS 39.35.680(8) (1995).

Mr. H also argues that because other systems treat the jury award as compensation, the retirement system must also treat the award for future damages as compensation. He points out that the Internal Revenue Service would treat the income as taxable at the time that it is received.[33] He also points out that the City A treats the income as includable for purposes of its separate Retirement System.[34] These arguments, however, do not apply to the Public Employees' Retirement System. That other systems account for income on a cash basis (when received) does not mean that the Retirement System cannot adopt an accrual basis (accounting for earnings when

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[31] After the original proposed decision was distributed, Mr. H filed a Proposal for Action—a procedure under AS 44.64.060 that allows parties to provide a response to the proposed decision to the final administrative decisionmaker. In his proposal, Mr. H argued that "a W-2 is dispositive under the highly persuasive authority enacted by the legislature in AS 39.35.990(7)(A)(i) providing that '**total remuneration earned by an employee for personal services rendered [is] . . . as reported on the employer's Federal Income Tax Withholding Statement (Form W-2) from the employer for the calendar year.**'" H's Proposal for Action at 2 (ellipsis, brackets, and emphasis provided by H). This argument is not persuasive for two reasons. First, Mr. H is quoting the 2018 statute, but he has elected to have his case adjudicated under the 1995 statute. He cannot have it both ways. *Alford v. State, Dep't of Admin., Div. of Ret. & Benefits,* 195 P.3d 118, 124 (Alaska 2008) (holding that PERS members "are entitled to choose those benefits for themselves" but are not allowed "to sever statutory provisions from one another and mix and match some or all of a statutory provision from one era with that of another."). Second, even if Mr. H changed his election and proceeded under the 2018 statute, the 2018 statute does not mean that all earnings reported in a W-2 are retirement-eligible. For example, payment for leave cash-in would be included in a W-2, but would not be retirement-eligible. As the 2018 statute (like the 1995 statute) clearly states, remuneration that was earned for services rendered is retirement-eligible. Prepayment for services expected to be rendered in the future, although taxable and reportable on a W-2, is not retirement-eligible under either version of the statute.

[32] This does not mean that the remuneration has to match the services. We accept that the remuneration is what is owed under the contract regardless of actual services provided.

[33] H Motion at 18.

[34] *Id.*

earned, not received) that excludes payment of future benefits from its definition of compensation.

Moreover, the record reveals an additional reason why some of the jury award for future damages could never be included as compensation: based on testimony from both experts, the $450,000 awarded for future lost wages and benefits includes a payment (in present value) for foregone retirement benefits.[35] The definition of "compensation," however, includes only remuneration for services. It does not include the present value of retirement benefits to be paid at a future date by the employer.[36] Moreover, including future retirement payments in the compensation that becomes the basis for determining a member's retirement benefit would be "double dipping."[37] It would artificially inflate the base, leading to an inflated benefit. This is not allowed.

Finally, excluding prepaid future benefits from retirement-eligible earnings makes sense. Whether future wages would ever vest is speculative—an employee might retire, be promoted, take a different job, receive higher wages, or die, in any of which cases, the expected future wages would be different from what was apparently anticipated by the jury. The actual future retirement credit might be impossible to award (for example, if Mr. H were no longer employed or living) or might be more than the expected compensation (for example, if Mr. H were paid higher wages due to inflation or promotion). Although a jury award could in theory account for the issues raised by an award for future damages, this award does not. Based on the facts of this case, the jury award of $450,000 for future lost wages and benefits is not "compensation" under AS 39.35.

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[35] *See* Division Exhibit E at 17-18; Exhibit F at 19. Neither party disputes the conclusion that the award for future lost wages and benefits included some recompense for the additional pension payments that Mr. H would have received in the future but for the employer's wrongful conduct.

[36] AS 39.35.680(8) (1995).

[37] As explained below, inclusion of lost *wages* (whether future or past) would not be double dipping as long as the award is used to pay to the retirement system both the employer's contribution and the employee's contribution. Inclusion of future *retirement income* in the wage base used to compute retirement income, however, would be double dipping.

**2. Is the jury award for past lost wages and benefits "compensation"?**

With regard to past lost wages, Mr. H argues that "[a]s a matter of law, compensatory damages in Alaska place the plaintiff in the position he would have occupied but for the unlawful conduct of the defendant."[38] From this statement Mr. H concludes that his award of compensatory damages for lost wages should be treated as retirement-eligible income. He reasons that including his lost wages as retirement-eligible compensation would put him in the same position he would have been in had he been promoted when he should have been.[39]

In response, the Division does not disagree with Mr. H's explanation of the purpose of the damages awarded for a breach of an employment contract. It argues, however, that the jury award does not have all the hallmarks of what it considers to be a "make-whole award."[40] The Division apparently views a "make-whole award" as including direction to the employer to account and pay for the retirement costs associated with the award of back wages. Thus, the Division concludes, because this award makes compliance uncertain, the Division is not required to treat the award for lost past wages as retirement-eligible. The Division agrees, however, that if Mr. H went back to superior court, and obtained a clarifying order that the award meets the Division's requirements for a "make-whole" award, then it would treat the award for past lost wages as retirement-eligible.[41]

Pointing out that the jury award included an award for all lost wages and benefits, and for future foregone retirement, Mr. H, using the commonsense, asserts that of course the jury award made him whole.[42] He argues that the Division may not add the term "make-whole award" to the plain language of the statute requiring inclusion of "all remuneration."[43]

Mr. H's argument is persuasive. The use of the term "make-whole" is not helpful to resolving this dispute.

Mr. H is also correct that his award for past lost damages meets the definition of "compensation." It is, in fact, remuneration that he earned for service rendered (or constructively rendered under his employment contract) to a participating employer. The problem for Mr. H,

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38 H Motion at 15 (citing *Alyeska Pipeline Serv. Co. v. H.C. Price Co.,* 694 P.2d, 782, 787 (Alaska 1985)). Although Mr. H intended this argument to apply to both past and future damages, because the statute excludes future damages, I will consider the argument as applying only to past damages.

39 *Id.*

40 Division Opposition and Cross-Motion at 2.

41 *Id.* at 2 n.1, 7. The Division argues that the appeal is premature because, if it had an order from the superior court clarifying the nature of the award, it could consider the award retirement-eligible. *Id.* at 2 n.1

42 H Motion at 14-15.

43 *Id.* at 14.

however, is that the definition of "compensation" is only one of the statutes that govern his retirement account. Whether those other statutory requirements are barriers to treating the award as retirement-eligible, and whether the requirements of those statutes can be met retroactively, are the issues that we must address here.

### B. When can the Division credit an award for eligible past lost wages to a member's retirement account?

Neither party has directly addressed the question of when an award for past lost wages can be credited to a member's retirement account. The question, however, has a simple answer. The Division must comply with the law. Therefore, the Division can credit an award for eligible past lost wages to a member's retirement account when the award meets the requirements of the Public Employees' Retirement Act, AS 39.35.

Although the parties strongly dispute what is required by AS 39.35, neither party argues that we can ignore the law. Mr. H implicitly acknowledged the need to comply with AS 39.35 in that he recognized the need for the employee's contribution to be paid and the need to have accounting requirements met.[44] The Division implicitly acknowledged that it would credit an award that complied with AS 39.35 when it acknowledged that it would credit a "make-whole" award.[45]

The Division's Motion, however, does raise procedural issues that, in its view, prevent the Office of Administrative Hearings from determining that an award for past lost wages is retirement-eligible. It suggests that the only way to make the award comply with AS 39.35 would be for Mr. H to return to court.[46] That argument, however, is an administrative argument. It is not a legal barrier to a ruling that the award is retirement-eligible if it is presented to the Division in a manner that fully complies with AS 39.35. This is particularly true here, where Mr. H asked the Division in advance of the appeal to ensure that the need to follow the requirements of AS 39.35 would not prevent him from pursuing his right to appeal.[47] Although treating the award of past damages as retirement-eligible will come with administrative consequences for the employer and the System, as well as have financial consequences for Mr. H, that is no reason to deny him

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44 Record on Appeal at 41; H Motion at 17; H Affidavit ¶10.

45 Division Motion at 2. The Division's approach to this case also implicitly acknowledges that if an award does not comply with AS 39.35, it is not required to credit the award to a member's retirement account. For purposes of this case, this Decision will accept this approach.

46 *Id.* at 2 n.1.

47 Record on Appeal at 41.

the opportunity to litigate the dispute over what is necessary for the award to be applied to additional participation in the System.

Moreover, the Division's admission that a clarifying order from the superior court would enable it (with assistance from the employer) to fix the situation by making appropriate accounting entries to account for the back wages, tell us that the problem here is not that the jury award came without accounting instructions. The Division is correct that if the award is retirement-eligible, there will be some significant accounting work to be done to determine exactly how to allocate the award to Mr. H's retirement account to bring the award into compliance with the statutory requirements of AS 39.35. Yet, its admission that the accounting work can be done is sufficient to tell us that we can address whether the award is retirement-eligible first, and then address the accounting later. If the payment is retirement-eligible, the accounting to make it comply with AS 39.35 can be done.

To the extent that the Division is arguing that the jury award was for something other than participation in the retirement system, or that participation in the retirement system would be "double-dipping," the Division's argument only means that the award is ambiguous. Here, both sides agree that the jury award included compensation for foregone retirement benefits, discounted to present value. How the jury expected Mr. H to apply that portion of the award, however, is not clear.

Based on the testimony of both experts, the jury award included a sum of money that, if invested, should yield the value of the difference between the retirement he should have received and the retirement he will receive.[48] How Mr. H is to invest this money is not discussed. He could purchase an Individual Retirement Account. Alternatively, he could use that money to buy an annuity—a contract to pay him a fixed sum for a period of years, which could be for his lifetime. A third alternative is that he could use the money to purchase additional participation in the retirement system. Although, as explained below, this third alternative is available to him only if the award is accounted for in compliance with AS 39.35, and all contributions required under AS 39.35 are paid, nothing in the form of the court award suggests that this alternative is prohibited.

[48] Division Exhibit E at 17-18; Exhibit F at 19.

With regard to any concern about "double dipping, for the purposes of this decision, each of these three alternatives is theoretically equivalent.[49] H will only be able to invest the money given for foregone retirement in one of those alternatives. He must invest the money given to him to eventually receive the foregone retirement benefits. Thus, if, as this decision will require, all contributions required under AS 39.35 are paid from Mr. H's award, it would not be "double-dipping" because he would not have the money awarded for foregone retirement available to invest in a different manner.

In sum, here, no procedural barriers prevent an administrative decision from holding that the award for past lost wages may be considered retirement-eligible if it meets the requirements of AS 39.35. We turn next, then, to what is required for the award to comply with AS 39.35, including how the lost past wages are allocated, who does the accounting, and who pays the contributions necessary for Mr. H's past lost wages to be treated as retirement eligible.

### C. If the jury award for past lost wages is treated as retirement-eligible, how does the retirement system account for the inclusion of the past lost wages?

We must now address what it means to require compliance with the sections of AS 39.35 that apply to Mr. H. Mr. H is eligible to participate in one of the defined-benefit pension plans established under AS 39.35. The basis for the defined-benefit retirement system is, of course, funding.[50] The funding is mandatory.[51] Contributions must be made by both the employer and the employee.[52] The System also has significant mandatory accounting requirements that govern how payments to the System by employers are made and credited.[53] The parties do not agree on how these requirements should apply in this case.

#### 1. If Mr. H receives credit for his past lost wages, what is the source of the funds used to pay the employer's contribution to the Retirement System?

The first issue is the employee and employer contributions required under AS 39.35.170 and 39.35.255. Here, Mr. H has addressed how to pay the required employee's contribution.[54] He has made clear that he agrees that the jury award would be the source of the funding for the

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49 They are not equivalent on the issue of who is taking the investment risk, which under an annuity, is borne by the provider of the annuity. That difference, and any other difference, is not a reason to deny H the opportunity to use the award to purchase an annuity or participate in the Retirement System rather than investing in an Individual Retirement Account.

50 *See, e.g.,* AS 39.35.100; 39.35.115(d); 39.35.160; 39.35.170; 39.35.255.

51 AS 39.35.100; 39.35.115(d); 39.35.160; 39.35.170; 39.35.255.

52 AS 39.35.160; 39.35.170; 39.35.255.

53 *See* AS 39.35.070; AS 39.35.170; AS 39.35.255.

54 H Motion at 17; H Affidavit ¶10.

employee's share. He has acknowledged that the funding of the employee's share would normally be accounted for by the employer withholding the money from the employee's paycheck and remitting the contribution to the System. He asked the Division for instructions on how to have a placeholder so that accounting in compliance with AS 39.35 could occur if the Division should be reversed on appeal.[55]

Mr. H did not, however, address whether the award should also be the source of the *employer's* contribution. As explained above, this result follows from the need to avoid "double-dipping"—given that the jury award included future foregone retirement benefits, Mr. H must use this award to purchase either additional participation in the retirement system or for a different investment to make him whole. He cannot do both, and he cannot underpay the Retirement System. In addition, as explained below, this result follows logically from Mr. H's argument that the jury award was a "make-whole" award.

As Mr. H admits, he has already received the amount of money that is needed "to place [him] in as good a position as if the contract had been fully performed."[56] That means that the jury has already given Mr. H all of the money necessary to either fund his participation in the System or to invest in some other vehicle. Certainly, this decision cannot require City A to contribute additional money. Nor can this decision provide authority for Mr. H to go back to the City A and demand that it pay the employer's contribution required under AS 39.35.255 in addition to the sum of money that it has already paid.[57] If Mr. H treats the award for past lost wages as retirement-eligible, it follows that the City A has paid the money necessary to make Mr. H whole, including all money necessary to fully fund the costs of the additional participation in the System. Similarly, the System is not obligated to pay the employer's contribution on Mr. H's behalf, or to credit Mr. H's account with the additional wages until the necessary contributions required under AS 39.35 have been made.

Ultimately, of course, the entity that sends the money (meaning the employer's and the employee's mandatory contributions under AS 39.35.170 and 39.35.255) to the Division must be the employer.[58] This requirement, however, does not prevent Mr. H from asserting that the jury award for past lost wages is retirement-eligible. As he has shown, this portion of the award meets

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55 Record on Appeal at 41.

56 H Motion at 15.

57 The City A could, of course, voluntarily make the employer's contributions.

58 *See* AS 39.35.160 (1995) ("The contributions shall be deducted by the employer at the end of each payroll period."); AS 39.35.160(a) (2016) ("A member may not have the option of making the payroll deduction directly instead of having the contribution picked up the employer.").

the definition of "compensation" under AS 39.35.680(8) (1995). Retroactive compliance with the accounting requirements so that the employer sends the money is simply a matter of a true-up in the accounting. Mr. H will have to refund the necessary money to his employer, and his employer will have to make the correct adjusting accounting entries. The original source of the money being used for the mandatory contributions would be, in fact, the employer.

The question remaining here is, if Mr. H asserts that the award is retirement-eligible, who will do the accounting required to make the payment comply with the requirements of AS 39.35? Before addressing that question, however, we have one more accounting issue to address. Here, the parties disagree about how the payment for past lost wages would be credited to Mr. H's retirement account. Because that is also an accounting issue, I will address it next, before turning to the issue of who will do the accounting.

**2. How is the compensation for lost past wages to be included in Mr. H's base pay for purposes of determining his average monthly compensation?**

The parties dispute whether the lump-sum award paid by City A to Mr. H in December 2017 should be credited to his earnings for December 2017, or whether it should be allocated to the payroll periods in which the remuneration was earned. Mr. H argues that the Retirement System must allocate the entire lump-sum payment to his earnings for December 2017. In his view, this approach is mandated by the statutory directive that compensation include all remuneration. Given that he received the remuneration in December 2017, he argues that the plain language of the statute dictates that the Division allocate the remuneration to December 2017. He bolsters his argument by asserting that the Retirement System is bound by the statutes and practices in place when he was first hired, 1995. He claims that under the statutes and practices in place in 1995, the System would apply a lump sum payment to a retirement account for the month in which it was received. Finally, he cites the practice of the City A and the Internal Revenue Service. Because they account for the payment on a cash basis, he argues that System must treat the payment on a cash basis.[59]

The Division disagrees with Mr. H. It argues that "attributing a large lump sum to a PERS account . . . would artificially inflate the member's compensation for purposes of calculating the member's retirement and result in inflating the member's pension payment."[60] In the Division's

[59] H Motion at 11-19.
[60] *Id.* at 5.

view, "[t]he PERS Act prohibits pension spiking by controlling how (payroll deduction) and from whom (employers) contributions are made to PERS accounts."[61]

**a. Does the plain language of AS 39.35 allow a lump-sum award to be credited to the pay period in which it was received, or must it be allocated to the pay period in which it was earned?**

The Division's argument regarding the need to avoid an artificial spike in accounting for a member's earnings is well-taken. Given that a member's pension benefit is based on the member's average monthly compensation for the member's three highest earning years, a lump-sum paid in one month for services provided over the years would artificially inflate a member's pension.[62]

The Division's reliance on statutory language regarding "how" and "from whom" the payment must come to conclude that a lump sum award cannot be allocated to a single pay period, however, is not persuasive. This argument implies that there could never be a retroactive true-up of past lost wages because the payment would not be made in the normal course of payroll deductions. Yet, the Division admits that it allows true-ups to occur, as long as they are allocated to the proper payroll period. Further, as Mr. H points out, the City A asked the Division for instructions on whether the award was retirement eligible. Had the Division answered "yes," then the City A, presumably, could have deducted retirement from the payment, and forwarded the accounting necessary to credit Mr. H's retirement account to the Division. That would answer the "how" and "from whom" questions, but would not tell us anything about proper allocation of a lump sum award. Thus, to answer the question of how to allocate Mr. H's lump-sum award under AS 39.35, we must turn to statutes and cases other than those cited by the Division.

Both Mr. H and the Division argue that the plain language of the statute controls the question of the allocation.[63] Mr. H has urged that the decision in this case is controlled by the

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61 Division's Additional Briefing at 4.

62 AS 39.35.680(4) (1995).

63 In Alaska, the plain language of a statute is not necessarily controlling. *See, e.g., State, Dep't of Commerce, Community, and Eco. Dev. v. Alyeska Pipeline Service Co.,* 262 P.3d 593, 597 (2011) ("In interpreting a statute we look to the plain meaning of the statute, the legislative purpose, and the intent of the statute. We have declined to mechanically apply the plain meaning rule when interpreting statutes, adopting instead a sliding scale approach: The plainer the statutory language is, the more convincing the evidence of contrary legislative purpose or intent must be. (quotation marks, footnotes, and citations omitted)). Here, both parties are requesting a plain-language approach, no party has cited any contrary legislative history, the plain language interpretation is endorsed by *Flisock,* and the plain-language interpretation is consistent with commonsense and practicality. Therefore, this decision will implement the plain language of AS 390.35.680(4).

1991 Alaska Supreme Court decision in *Flisock v. State, Div. of Ret. & Benefits*.[64] I agree that *Flisock* controls the outcome here.

*Flisock* involved a teacher who participated in the Teachers' Retirement System—a sister retirement system to the Public Employees' Retirement System, also administered by the Division. The approach in *Flisock* can be applied here, with due regard for any differences among the statutes that govern the two different systems.[65]

In *Flisock,* the court determined that a teacher who had retired was entitled to retirement credit for the cash-in value of his accrued but unused leave.[66] With regard to the accounting for that lump-sum payment, however, the court rejected the argument that the lump-sum should be applied to the year in which it was received.[67] Instead, the court found that the lump-sum leave payment should be allocated to the years in which it was earned.[68] This conclusion was based on a careful reading of the statute that defined the term "base salary" for purposes of computing the retirement benefit.[69] The operative language in *Flisock* was former AS 14.25.220(2), which stated:

> "base salary" or "basic salary" means any remuneration accrued under a contract to a teacher for professional services rendered during any school year; for purposes of sec. 50 of this chapter, base salary accrued includes any payments made after June 30 of a school year for services rendered before the end of the school year.[70]

Thus, the term "accrued" and the phrase "rendered during any school year" made it clear that the accounting had to be based on when the leave was earned, not when it was paid.

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64 Notice of Appeal ¶3 (Record on Appeal at 3); H Motion at 1 (citing *Flisock v. State, Div. of Ret. & Benefits,* 818 P.2d 640, 643–44 (Alaska 1991)).

65 *See McMullen v. Bell,* 128 P.3d 186, 191-92 (Alaska 2006) (applying to Public Employees' Retirement System holding and reasoning in *Flisock* regarding applicability of statutes and practices in effect at member's time of hire).

66 *Flisock,* 818 P.2d at 644.

67 *Id.* ("Clearly, the lump-sum payment of $35,304.66 Flisock received for unused leave accrued during the *six* years he worked for the Southwest Region is not part of his base salary for the sixth year." (emphasis in original)).

68 *Id.* ("We conclude, however, that former AS 14.25.220(2) entitles Flisock to include that portion of the $35,304.66 which represents compensation for the unused leave accrued during each of the three years used in calculating his average base salary.").

69 *Id.* at 643-44 ("Former AS 14.25.220(2) limits "base salary" to remuneration for services rendered during the school year. Clearly, the lump-sum payment of $35,304.66 Flisock received for unused leave accrued during the *six* years he worked for the Southwest Region is not part of his base salary for the sixth year." (emphasis in original)). Mr. H argues that this holding in *Flisock* (regarding the requirement to allocate the lump-sum to the pay periods in which the remuneration was received) applies only to leave-accrual, which, in his view, is subject to strategic manipulation. H Motion at 17. Nothing in the language of *Flisock* supports this limited interpretation.

70 *Flisock,* 818 P.2d at 643, *quoting* AS 14.25.220(2) (1969).

Here, the operative language does not include the term "accrued" or the phrase "in that year." Yet, 1995 definition of "average monthly compensation" contained the same requirement that the compensation be allocated to the time period for which it was earned:

> "average monthly compensation" means the result obtained by dividing the compensation earned by an employee during a considered period by the number of months, including fractional months, for which compensation was earned; the considered period consists of the three consecutive payroll years during the period of credited service that yields the highest average.[71]

This definition does not allow a member to allocate a lump-sum award or settlement to the payroll period in which the award was received. It explicitly requires allocation to the payroll period in which the compensation was earned. Therefore, if Mr. H asserts that the $100,000 is retirement-eligible, the $100,000 must be allocated among the payroll periods in which the award was earned, not received.

**b. Has Mr. H shown that under 1995 law and practice, the Division would credit a lump-sum award to the pay period in which it was received?**

In the alternative, Mr. H argues that, even if the language of the statue does not require applying the lump-sum payment to December 2017, the Division is required to do so under the statutes and practices in place when he was hired. In his view, in 1995, the System would apply a lump sum payment to a retirement account for the month in which it was received.[72] Mr. H is correct that the 1995 statutes and practices may be used to determine his rights regarding how a lump-sum is allocated.[73]

Mr. H bases his argument on the difference between the 1995 definition of "compensation" and the post-1995 definition of "compensation." He notes that the current version of the statute has an explicit cap for members who were hired after 1996: the definition of "compensation" in current law states, "for a member first hired on or after July 1, 1996, compensation does not include remuneration in excess of the limitations set out in 26 U.S.C. 401(a)(17) (Internal Revenue Code)."[74] In contrast, the law that applies to him, the 1995 version

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[71] AS 39.35.680(4) (1995); *see also* AS 39.35.680(8) (1995) (definition of "compensation" to mean "the total remuneration earned by an employee for personal services rendered to an employer").

[72] H Motion at 11-13; 15-17.

[73] *See McMullen v. Bell,* 128 P.3d at 191. The holding that a member's rights vest under the statutes and practices in place when the member was hired is based on article XII, section 7 of the Alaska Constitution ("Membership in employee retirement systems of the State or its political subdivisions shall constitute a contractural relationship. Accrued benefits of these systems shall not be diminished or impaired.").

[74] AS 39.35.680(9) (2017). 26 U.S.C. § 401(a)(17) states:

> **(17) Compensation limit.—(A)In general.—**A trust shall not constitute a qualified trust under this section unless, under the plan of which such trust is a part, the annual

of the definition, does not contain the cap.[75] Mr. H then argues the negative implication of the cap: given that members who were employed after 1996 have an express limit forbidding an award of over $215,000 from being applied to the year in which it was received, in his view, it follows that before 1996 an employee would have been allowed to have a lump-sum award that exceeded the cap allocated to a pay period.[76]

Mr. H's argument, however, is not persuasive. First, Mr. H is interpreting the wrong statute. Mr. H's argument is based on the current version of the statute, not the plain language of the 1995 statute. *Flisock* makes clear that the determination must be made solely from statute in place at the time of hire, not from backward reasoning based on the negative implications of a later-enacted statute.[77] Because the answer to the question is found in AS 39.35.680(4) (1995), we need inquire no further.

Second, even if we were to construe the negative implications of the post-1996 limit on annual earnings, that limit is a cap on a member's annual income. It tells us nothing about how to *allocate* a spike in earnings that occurs because of a lump-sum award for income earned across several years but received in a single year. For instructions on that issue, we turn to the definition of "average monthly compensation" in AS 39.35.680(4) (1995).

With regard to whether the Division had a past practice of applying lump sums to a single pay period (in contravention of AS 39.35.680(4) (1995)), *Flisock* instructs that on the issue of how to allocate lump-sum awards, a contrary past practice would not override the unambiguous statutory requirement that awards for past earnings be allocated to the time period in which they

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> compensation of each employee taken into account under the plan for any year does not exceed $200,000.
> **(B) Cost-of-living adjustment.—**The Secretary shall adjust annually the $200,000 amount in subparagraph (A) for increases in the cost-of-living at the same time and in the same manner as adjustments under section 415(d); except that the base period shall be the calendar quarter beginning July 1, 2001, and any increase which is not a multiple of $5,000 shall be rounded to the next lowest multiple of $5,000.

According to Mr. H, with cost of living increases, in 2017, the compensation limit was $215,000. H Motion at 12.

75 AS 39.35.680(8) (1995).

76 H Motion at 12-13, 16.

77 818 P.2d at 645.

were earned.[78] Although the language in AS 39.35.680(4) (1995) is different from the statute at issue in *Flisock,* it is also unambiguous, making past practice irrelevant to this issue.[79]

Moreover, even if past practice were relevant, Mr. H has produced no evidence that before 1996, the Division had a practice of allocating spikes in income due to an award of back pay to a single pay period. The Division, on the other hand, has submitted the affidavit of Larry Davis, a senior employee who has reviewed the accounting of member's awards for back-pay since 2005, and who is in a position to have knowledge of past practice. Mr. Davis testified to his understanding that the Division's past practice, including the time period before Mr. H's date of hire, was to allocate make-whole back-pay awards to the time period in which they were earned.[80] When an affidavit alleges facts that provide a basis for summary adjudication, the party opposing summary adjudication must come forward with admissible evidence in opposition to an affidavit.[81] Mr. H's failure to come forward with any evidence regarding the Division's past practice means that the Division is entitled to summary adjudication on the issue of past practice.

**3. Who must do the accounting for the past lost wages?**

As the Division points out, before the $100,000 in past wages and benefits can be credited to Mr. H's retirement account, someone must do the accounting so that the proper amount can be credited to the appropriate payroll period. The question raised by the Division is, whose responsibility is it to do that accounting?

Here, this case is between Mr. H and the Division. The Division has not cited any statute or regulation that assigns the responsibility for accounting to the employee. The Division appears to be arguing that because Mr. H sought the award in court, it was his responsibility to ensure that a court order in his favor complied with all accounting requirements of AS 39.35. I would agree

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[78] 818 P.2d at 644 n.5 ("Even assuming that the Division's practice in 1969 was to include in an employee's base salary for one year payment for unused leave accrued over several years, this fact would not entitle Flisock to include the entire $35,304.66 in his base salary for 1985–86. Such practice by the Division was a misinterpretation of unambiguous language in former AS 14.25.220(2). Flisock does not have a vested right in a mistaken application of the retirement system.").

[79] The holding in *McMullen* is not contrary to this conclusion. *See* 128 P.3d at 191. There the issue was whether the Division had a past practice of crediting to retirement accounts payments for cashed-in leave. *Id.* That issue was not unambiguously addressed in the statute, so the court had to turn to past practice to make a determination. *Id.* at 192 ("the statute did not expressly exclude cashed-in leave from the definition of compensation."). *McMullen* did not address how to account for lump-sum payments, which, here, as in *Flisock,* is clear under the statute, AS 39.35.680(4) (1995).

[80] Affidavit of Larry Davis ¶3 (July 2, 2018).

[81] *See* 2 AAC 64.250(b) ("If a motion for summary adjudication is supported by an affidavit or other documents establishing that a genuine dispute does not exist on an issue of material fact, to defeat the motion a party may not rely on mere denial but must show, by affidavit or other evidence, that a genuine dispute exists on an issue of material fact for which an evidentiary hearing is required.").

with this argument if a plaintiff had notice of those requirements and notice that it was the plaintiff's responsibility to ensure compliance with those requirements. The Division has not cited any statute, regulation, or judicial or administrative decision that provides this notice.[82]

As between the employee and the Division, the Division, not the employee, has the authority to ensure that participating employers submit appropriate accounting for all creditable earnings paid to an employee.[83] The Division has made a good case that the statutes and the Alaska Administrative Manual assign the responsibility for doing the accounting to the employer. Here, the employer asked the Division for guidance on how to account for the payment to Mr. H. The Division treated that request as urgent, and provided guidance. The guidance was erroneous in that it failed to explain that an award for past lost wages would be retirement-eligible if it met all requirements of AS 39.35. Yet, this process between the Division and the City A shows us how the system works. This evidence establishes that the Division and the participating employers generally cooperate on complicated accounting and eligibility issues. The Division has not provided any evidence that it and the City A cannot continue to cooperate in the future to comply with the requirements of this order to do the necessary accounting under AS 39.35 if Mr. H's award of past lost wages is treated as retirement-eligible.

In sum, this Decision will order that, if Mr. H asserts that the award for back lost wages is retirement-eligible, and takes steps so that his employer has the money it needs to make the mandatory contributions, the Division must ensure that the appropriate accounting for that award is completed so that all requirements of AS 39.35 are met. Who actually does the accounting (as between the employer or the Division) is not a relevant question here.

**D. Additional issues raised by the Division in its cross-motion**

The Division has moved for summary adjudication on two additional issues: impossibility and the failure to join an indispensable party. On the issue of impossibility, the Division argues that without additional information, it would be impossible to do the accounting necessary to allocate the payment for back lost wages.[84] With regard to the alleged failure to join a necessary party, the Division argues that because City A will necessarily have to take action to implement

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[82] Although the administrative manual makes clear that any "make-whole settlement" presented to the Division for retirement credit must include appropriate accounting, that manual is not a regulation that we would expect a member-plaintiff to review before requesting damages for wrongdoing by an employer. *See* Record on Appeal 52. Nothing in this decision, however, should be interpreted to find that the Department of Administration cannot adopt regulations clarifying who is responsible for ensuring that awards for back pay comply with the requirements of AS 39.35.

[83] *See, e.g.,* AS 39.35.070.

[84] Division Opposition and Cross-Motion at 10-11.

any remedy sought by Mr. H, Mr. H was required to join the City A in this administrative action. His failure to do so, the Division asserts, is grounds for dismissing this action with no remedy.[85]

Neither argument is persuasive. As stated earlier, the Division has essentially admitted that adjusting accounting entries can be done. With regard to the process for allocating the $100,000 across the pay periods, the accountant doing this task may well have to make some reasonable assumptions. The Division has not produced any testimony from an accountant that having to make assumptions means that making adjustments to a past transaction is impossible.[86] In my experience, accountants frequently have to make reasonable assumptions when reconciling financial data. When they make assumptions, they include those assumptions in their workpapers so that the assumptions can be vetted or challenged by the interested parties.

The Division is correct that if Mr. H's past lost wages are treated as retirement-eligible, will have to undertake additional work. At a minimum, it will have to issue Mr. H an amended W-2 for 2018. Likely, the Division will assign the responsibility for accounting for the $100,000 across the affected pay periods to the employer. The additional work to be done, however, is ancillary to this dispute. This dispute is between the System and Mr. H, regarding the System's decision that the entire award was not retirement-eligible. The City A did not make that decision. Moreover, the Office of Administrative Hearings has no jurisdiction over the City A. If the City A later refuses to undertake tasks that are assigned to it as a participating employer (and nothing in this record indicates that it will), that would be a different matter involving a different process. That the System, or Mr. H, may have to undertake some process to force the City A to do its duty is no reason to refuse to decide this dispute between Mr. H and the System. Therefore, the Division's cross-motion on the issues of impossibility and failure to join an indispensable party is denied.

## IV. Order

Mr. H's Motion for Summary Adjudication, and the Division of Retirement and Benefits' Cross-Motion for Summary Adjudication are granted in part and denied in part as follows:

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85 *Id.*

86 The Division is relying on testimony from its Deputy Director, Kathy Lea, that she had "explained the lump sum payment and the lack of a pay period-by-pay period calculation from the employer made it impossible for the Division to record the wages and contributions due." Lea Affidavit ¶4. Although I accept the testimony that she had so explained her view to Mr. H and his attorney, this is a far cry from proving that an accountant could not make adjusting entries so that past lost wages could be credited to Mr. H's account.

1. Mr. H's award for $450,000 in future lost wages and benefits is not compensation as defined in AS 39.35, and may not be considered in or credited to his retirement account.
2. Mr. H may assert that his award for $100,000 in past lost wages and benefits is compensation that may be considered in and credited to his Public Employees' Retirement System retirement account. He must make this assertion no later than 30 days after this decision is adopted as the final administrative decision in this matter.[87] If Mr. H does not make this assertion, the Division is not required to take any additional action under this order.
3. If Mr. H asserts that the $100,000 in past lost wages are retirement-eligible and must be credited to his retirement account, the Division (working with the employer) must ensure that all requirements of AS 39.35 are met. This includes
   (a) Both the employee's contribution and the employer's contribution must be paid. The accounting must reflect that the source for these contributions is the employer, making appropriate deductions from the employee's payroll. The employer may, however, make adjusting accounting entries so that the contributions are appropriately deducted from the award paid to Mr. H on December 1, 2017, and may require Mr. H to submit the money required for those contributions to it.
   (b) The past lost wages must be allocated to the pay period in which they were earned so that a calculation of employee's and employer's contribution can be performed. The accountant making this allocation may make reasonable assumptions based on the record. The allocation and assumptions shall be shared with Mr. H. If he disagrees with the allocation, he may appeal to the allocation to the Office of Administrative Hearings. No jurisdiction over the allocation is retained.

[87] This paragraph does not imply that an appropriate remedy in a retirement case is to allow a member to "opt in" or "opt out." Generally, I would be very cautious about allowing an election after the fact because it would open up the opportunity to undercut the system. Here, however, Mr. H had no notice in advance of his action against the City A that he would be required to clarify in advance that he considered his award retirement-eligible. Given that the Division denied him the opportunity to participate when part of his award did, in fact, meet the definition of compensation, and given the Division's admission that he could participate if he obtained a clarifying court order, this remedy is appropriate for the facts of this case.

4. The Division must ensure that the accounting required under paragraph 3 of this order is completed within 60 days of the date that Mr. H asserts that the $100,000 in lost wages and benefits is retirement-eligible. Within 10 days of the date that the City A submits all conforming documentation and contributions for compliance with AS 39.35, the Division must credit Mr. H's retirement account.
5. If Mr. H asserts that the $100,000 in past lost wages is retirement-eligible, then, unless the employer voluntarily pays for the required contributions from a different source, Mr. H is required to pay back to the employer the amount that is necessary to make all contributions required under AS 39.35 so that his past lost wages may be credited. Mr. H must make the refund within 10 days of the day he is notified by his employer of the amount to be refunded under this order, or, if he appeals the allocation or determination of amount, within 10 days of the day that the appeal is resolved, or a final decision issued. If Mr. H does not timely refund this money to the employer, the Division is not required to credit his retirement account or take any further action under this order.
6. All remaining issues in Mr. H's Motion for Summary Adjudication are denied.
7. All remaining issues in the Division's Cross-Motion for Summary Adjudication are denied.

DATED: September 5, 2018.

By: *Signed*
Stephen Slotnick
Administrative Law Judge

## Adoption

This Final Decision amends the July 31, 2018, Proposed Decision by adding footnote 31 in response to the argument in Mr. H's Proposal for Action. The outcome is not changed.

This Final Decision is issued under the authority of AS 39.35.006. In accordance with AS 44.64.060, I adopt this Final Decision as the final administrative determination in this matter.

Judicial review of this Final 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 September, 2018.

By: *Signed*
Name: Stephen C. Slotnick
Title: Administrative Law Judge/DOA

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]