

April 6, 1993

J.P. "Pat" Wellington
Chairman, Public Employees
Retirement Board
2802 Wesleyan
Anchorage, AK 99508

Re: Transfer of the PERB's power to
grant waivers of the deadline for
claiming occupational disability
benefits; our file no. 663-93-0334

Dear Chairman Wellington:

At the last meeting of the Public Employees' Retirement Board (PERB), it was proposed that the board transfer its powers under AS 39.35.410(f) (to waive the deadlines for filing for applications for occupational disability benefits) to the administrator of the Public Employees' Retirement System (PERS), reserving a right to hear appeals in cases where the administrator denies a request. You asked for an opinion as to whether the board could legally do this. We believe that it can, in light of the reserved power to review a denial by the administrator.

As you are aware, under AS 39.35.410(f) a person applying for occupational disability benefits under the PERS must apply "within six months after the date of the accident, if disability is attributable to an accident, within six months after the date the disability begins if the disability is caused by an occupational disease, or within 30 days of terminating employment, whichever is later." In addition, the subsection requires the employee, if the disability is attributable to an accident, to file a notice of the accident with the administrator within 30 days of the date that the accident occurred. The subsection states, "If the employee is unable to meet a filing requirement of this subsection, it may be waived by the Public Employees' Retirement Board for cause."

This board has been presented over the years with a large number of cases in which an employee has sought a waiver under AS 39.35.410(f). In many of these cases the administrator has not opposed the request, either because the good cause for the employee's failure to meet a deadline was obvious, or because the deadline was only missed by a short period of time. There

seems to be general agreement that it is a waste of everyone's time to require the board to hear these cases. Therefore it was proposed that the waiver power be transferred to the administrator, with the board retaining the right to entertain appeals of denials of waivers by the administrator.

The only case law in Alaska on the question of transfer of power by an administrative agency seems to be Kaiser v. Sundberg, 734 P.2d 64, 69-70 (Alaska 1987). The case, while upholding one agency's delegation of its statutory powers to another agency, is not directly on point because it relied on a statute that specifically required the adoption of regulations to facilitate such delegations, when feasible. Here there is no such statute. However, Kaiser indicates that the Alaska courts will follow the general rules on administrative subdelegations. We believe that those general rules allow the proposed transfer of this board's waiver power to the administrator, because, as discussed below, there is not a true delegation of that power, given this board's retention of ultimate control.

The law of administrative subdelegation is discussed in 1 Kenneth. Davis, Administrative Law Treatise •• 3:16 - 3:18 (2d ed. 1978). Most significant to the proposed transfer at issue here, Professor Davis concludes that when an agency's governing body retains the power to decide whether or not to set aside an agency officer's determination, "the power has not been subdelegated." Id., • 3:17 at 220.

In support of his statement, Professor Davis cites Equal Employment Opportunity Comm'n v. Exchange Security Bank, 529 F.2d 1214 (5th Cir. 1976), and Nat'l Labor Relations Bd. v. Duval Jewelry Co., 357 U.S. 1 (1958). In the former case a statute allowed a person served with an EEOC subpoena to petition the EEOC to revoke the subpoena, and required the EEOC to revoke it under certain circumstances. The EEOC issued a regulation requiring its Director of Compliance to make a determination upon a petition to revoke, which determination "shall be reviewed by the Commission and unless the Commission decides otherwise shall become final 3 days thereafter." Id. at 1218. Acting under this regulation, the Director of Compliance denied Exchange Security Bank's petition to revoke the subpoena served on it, and the EEOC did not disturb that denial. The bank then challenged the process. However, the Fifth Circuit, relying on Duval Jewelry, found that there was no delegation because the commission retained the ultimate power of decision on the petition to revoke.

Duval Jewelry involved an NLRB subpoena and a federal statute incorporated into the laws enforced by the EEOC. As with the EEOC, the NLRB issued regulations requiring a regional

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director or a hearing officer to pass upon a petition to revoke a subpoena and allowing for a discretionary appeal to the board. While the court, unlike Professor Davis, found that this constituted a delegation, 357 U.S. at 7, it concluded that the delegation was permissible, since the ultimate power rested with the board.

The proposed transfer here is essentially indistinguishable from Exchange Security Bank and Duval Jewelry.

Indeed, this transfer appears less extensive than the transfer upheld in Duval Jewelry. There the NLRB's practice was to deny a discretionary appeal if it believed no substantial question was raised in the appeal. 357 U.S. at 6. By contrast, an untimely applicant for occupational disability benefits under the PERS would have an absolute right to appeal the administrator's denial of a waiver to this board, regardless of how weak the applicant's claim for a waiver might be. Thus we are confident that our proposed transfer, if challenged (and it is difficult to imagine who would challenge such a transfer), would be sustained by the courts.

Please feel free to contact us if we can be of further assistance on this matter.

Very truly yours,

CHARLES E. COLE
ATTORNEY GENERAL

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