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MEMORANDUM April 2, 2015

SUBJECT: Partial Repeal of Geographic Salary Differential
(Work Order No. 29-LS0796\H)

TO: Representative Steve Thompson
Attn: Jane Pierson

FROM: Doug Gardner
Director

As legal director I have reviewed Work Order No. 29-LS0796\H to evaluate whether passage of the bill, and implementation of it, may expose the Legislative Affairs Agency (LAA) to liability in a potential lawsuit brought by legislative employees based on a claim that the bill violates the equal protection clause and the merit system clause of the Constitution of the State of Alaska. If the bill's provision eliminating geographic salary differentials for legislative employees is adopted and is implemented it will result in legislative employees in various geographic districts making much less money than similarly-situated non-union state employees that work in the same geographic district. As an example, an LIO employee that works in Unalaska and currently receive a 60 percent geographic salary differential, will receive a 60% pay cut if the bill passes while another non-union state employee working in the same community, perhaps in the office next door, would not. It is my advice that litigation is very probable if this bill passes, which may result in costly litigation and a damage award for back-pay and interest on lost wages.

EQUAL PROTECTION

AS 39.27.020, the current statute under which certain non-union employees in the executive and legislative branches receive a geographic salary differential, was adopted by the legislature, based in part on a study conducted under AS 39.27.030, because the legislature determined it was a desirable policy.[1] Sections 1 and 2 of the bill would eliminate the geographic differential for legislative employees and allow the non-union employees in the executive branch to continue receiving it. Permitting some non-union employees to receive the salary differential while denying it to others, for reasons other

[1] Magistrates and district court judges are also entitled to a geographic cost-of-living adjustment, under AS 22.15.220, depending on the location of their primary office.

than geographic location, may violate the constitutional equal protection clauses of the state and federal constitutions.

In *Malabed v. North Slope Borough,* 70 P.3d 416, 420 - 421 (Alaska 2003), the Court summarized the equal protection test as follows:

> [T]he Alaska Constitution's equal protection clause affords greater protection to individual rights than the United States Constitution's Fourteenth Amendment. To implement Alaska's more stringent equal protection standard, we have adopted a three-step, sliding-scale test that places a progressively greater or lesser burden on the state, depending on the importance of the individual right affected by the disputed classification and the nature of the governmental interests at stake: first, we determine the weight of the individual interest impaired by the classification; second, we examine the importance of the purposes underlying the government's action; and third, we evaluate the means employed to further those goals to determine the closeness of the means-to-end fit. An appropriation that cannot be justified under this minimum standard would likely violate the equal protection clause of the Alaska Constitution.

As the importance of the individual rights affected increases, so does the burden on the state to show that the state's goal justifies the intrusion on the individual's interests in equal treatment and that the state's goal is rationally related to the means chosen to achieve the goal.

An individual's interest in receiving the geographic salary differential may be accorded a low level of protection under the state equal protection clause, because only an economic interest is implicated[2] Generally, saving money would qualify as a legitimate state purpose, but the means of accomplishing that purpose is important to the outcome of an equal protection challenge. A court could decide that the state's reason for applying the geographic salary differential in one way to some employees and another way to other employees who are *similarly situated* it is not sufficient if there are more reasonable ways to accomplish the purpose of the bill. The salary differential itself appears to be based only on geography and not on a difference between the two branches of government. If the LAA is sued, and the claimant argues that two similarly situated employees doing essentially the same work are being treated differently, it is my opinion that it will be very difficult to defend such a suit and argue that the state had a rational basis for creating such a disparity in pay.

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[2] *See Underwood v. State*, 881 P.2d 322 (Alaska 1994).

MERIT SYSTEM

Article 12, sec. 6 of the Constitution of the State of Alaska says "The legislature shall establish a system under which the merit principle will govern the employment of persons by the State." A geographic salary differential gives a salary bump to some non-union employees and not to others, based on geography. This does not violate the merit system requirement because the two groups of non-union employees affected by this, although similarly situated in other ways, live and work in two types of geographic regions; one type has a higher cost-of-living than the other type. The state has determined as a matter of policy and statute that in order to maintain the state workforce it desires to have it needs to pay higher salaries in regions with a higher cost of living. However, the bill would result in certain non-union state employees being paid more than similarly situated non-union state employees for reasons other than geography; if those reasons are not related to merit then a court may find that the geographic salary differential payments, or the failure to make the payments to similarly situated legislative employees, violate the constitutional merit system protection.

Under either of these two constitutional analyses, a court may decide that the state could satisfy its need to reduce its geographic salary differential expenditures in other ways that would not create two classes of similarly situated non-union state employees: for example, the state could reduce or eliminate geographic salary differentials for all similarly situated employees, without regard for which agency they work for.

In conclusion, I note that if a single plaintiff is successful under either of the theories discussed in this memorandum, the likely result is that the Agency will have to re-pay, with interest, the "geo-diff" for all Agency employees that receive the "geo-diff."

If I can be of further assistance, please advise.

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