BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF THE DEPARTMENT OF HEALTH AND SOCIAL SERVICES

In the Matter of the South Anchorage Ambulatory Surgery Center Joint Venture	)))	OAH No. 06-0152-DHS

ORDER DENYING MOTION TO VACATE STAY

By motion dated July 13, 2007, the joint venture asks that a stay, which it characterizes as "improvidently granted *sua sponta*" by the Office of Administrative Hearings (OAH), be vacated.[1] Because the administrative law judge (ALJ) is without authority to alter the commissioner's decision and, in any event, the commissioner's decision falls within the options available to a final decisionmaker under AS 44.64.060(e), the joint venture's Motion to Vacate Stay is DENIED. The reasons are further explained below.

A. Authority of ALJ to Overrule Commissioner

The commissioner's decision embodied the stay the joint venture attributes to OAH. The OAH transmittal notice simply informed the parties when the commissioner's decision will become final by its own terms and gave notice of appeal and reconsideration rights, as OAH's transmittal notices for Administrative Procedure Act (APA) cases routinely do.

Nothing in the APA or in OAH's authorizing statutes confers on OAH the authority to overrule, by means of a cover notice or otherwise, a decision made by the statutory final decisionmaker in a case that has properly moved to the final decision stage under AS 44.64.060(e). The joint venture has suggested no legal underpinning for its request that OAH countermand the commissioner's provision for a stay.

B. Commissioner's Authority to Choose a Mix of Options Incorporating a Stay

The legislation that created Alaska's executive branch central hearing panel—OAH—amended the APA in several respects but did not make the APA adjudication provisions inapplicable to OAH-heard cases.[2] To the contrary, the law provides that each administrative hearing under the jurisdiction of OAH "shall be conducted in accordance with statutes that apply to that hearing, including, if applicable, AS 44.62 (Administrative Procedure Act)."[3]

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1 July 13, 2007 Memorandum in Support of Motion to Vacate Stay at p. 1 & list item 4 thereon.

2 *See* 2004 Alaska Sess. Laws ch. 163, §§ 78-81.

3 AS 44.64.060(a).

The APA's adjudication provisions have long contained provisions establishing standards for decisionmaker action following a hearing conducted on the decisionmaker's behalf, including a provision allowing the decisionmaker to stay the effectiveness of a decision.[4] Under AS 44.62.500 the decisionmaker has always had two basic options: adopt the hearing officer's decision or reject it. Each of those options contained two variants. If the decisionmaker wanted to adopt the findings and conclusions but not the recommended penalty, the decisionmaker could adopt the hearing officer's decision and reduce (but not increase) the penalty.[5] If the decisionmaker wanted to reject the hearing officer's decision, the decisionmaker could decide the case itself, on the existing record or after taking more evidence itself, or could have a hearing officer take more evidence and prepare another proposed decision.[6] Those continue to be the options in an APA case that is not heard by OAH.

The legislation that created OAH, however, changed the decisionmaker's options in OAH-heard APA cases. It amended AS 44.62.500(b) to except from the APA adoption option variants those cases that are subject to AS 44.64.060.[7] It also made the AS 44.62.500(c) non-adoption option, under which the agency could elect to decide the case on the record or hear evidence itself, inapplicable to OAH-heard cases.[8] Finally, it left intact the decisionmaker's ability to have a hearing officer take additional evidence, but it took away the decisionmaker's authority to send the case to a different hearing officer. As a result, in APA cases heard by OAH, the decisionmaker's options are the five contained in AS 44.64.060(e):

> (1) adopt the proposed decision as the final agency decision;
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> (2) return the case to the [OAH] administrative law judge to take additional evidence or make additional findings or for other specific proceedings, in which case the administrative law judge shall complete the additional work and return

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4 *See* AS 44.62.500(b)&(c) (establishing adoption and non-adoption options); AS 44.62.520(a)(3) (governing stays).

5 AS 44.62.500(b).

6 AS 44.62.500(c).

7 *See* 2004 Alaska Sess. Laws ch. 163, § 80; *accord* AS 44.62.500(b), as amended effective July 1, 2005. This case is subject to AS 44.64.060. The department staff's assertion to the contrary in its opposition to the joint venture's motion is mistaken. It is a common misconception that voluntary referrals to OAH are not subject to the AS 44.64.060 procedures. AS 44.64.060(b)'s statutory cross reference, however, indicates that the procedures for case referral, issuance of proposed decisions, proposal for action opportunities, and final decisionmaker action in and following AS 44.64.060(b) apply to any hearing that is "subject to AS 44.64.030." AS 44.64.030 prescribes OAH's entire jurisdiction, including jurisdiction over cases voluntarily referred to OAH under AS 44.64.030(b). Though OAH's regulations allow for the possibility of a voluntary referral being accepted under an agreement calling for the use of special procedures (2 AAC 64.100(b)(3)), no such agreement was made in this case.

8 *See* 2004 Alaska Sess. Laws ch. 163, § 81; *accord* AS 44.62.500(c), as amended effective July 1, 2005.

the revised proposed decision to the agency within 45 days after the original decision was returned under this paragraph;

(3) exercise its discretion by revising the proposed enforcement action, determination of best interests, order, award, remedy, sanction, penalty, or other disposition of the case, and adopt the proposed decision as revised;

(4) in writing, reject, modify, or amend a factual finding in the proposed decision by specifying the affected finding and identifying the testimony and other evidence relied on by the agency for the rejection, modification, or amendment of the finding, and issue a final agency decision;

(5) in writing, reject, modify, or amend an interpretation or application in the proposed decision of a statute or regulation directly governing the agency's actions by specifying the reasons for the rejection, modification, or amendment, and issue a final agency decision.

The decisionmaker need not choose between the five options. Rather, AS 44.64.060(e) allows the decisionmaker to select "one or more" of the options.

This is precisely what the commissioner did. She combined three options: she rejected the ALJ's interpretation of a regulation (option 5) and changed the ALJ's proposed disposition of the case (option 3), while at the same time returning the matter to the ALJ (option 2) for "other specific proceedings"—i.e., to use adjudicative tools (subpoenas; a supplemental hearing) if necessary to obtain information needed for the staff to comply with her remand order requiring staff to recalculate future need for surgery suites.[9] That the changed disposition of the case includes a remand to staff does not take the commissioner's decision and order outside the ambit of options allowed by AS 44.64.060. Indeed, remands to agency staff in OAH-heard cases are not unusual.[10]

Nothing in AS 44.64.060, including the expectation that an ALJ to whom a case is returned for further proceedings will complete the work in 45 days, negates the APA stay authority. AS 44.64.060 contains two types of deadlines: mandatory and directory (sometimes called "aspirational"). The AS 44.64.060(f) deadline for the decisionmaker's action is mandatory because it prescribes a consequence for failure to act in a timely fashion—i.e., the proposed

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[9] July 5, 2007 Decision and Order at p. 2, item 5.

[10] For instance, a professional licensing board might remand to the Commerce department licensing staff with instructions to prepare a memorandum of agreement implementing random drug testing or other conditions of probation imposed on the licensee as a result of a disciplinary action. Similarly, the Revenue commissioner might remand a child support matter to the division staff to conduct paternity testing. The decisionmaker's remand order might be self-executing insofar as it directly remands the matter to staff or it might "return the case" to the ALJ with instructions for the ALJ to order staff to take action. It may or may not be a final order, depending on whether the decisionmaker needs to retain jurisdiction to take a follow-up action after the remand order has been satisfied.

decision becomes final. The AS 44.64.060(e)(2) deadline of 45 days for the ALJ to complete work in a returned case, however, prescribes no consequence and thus is directory.

This mix of mandatory and directory deadlines comports with the law's intent to discourage dilatory conduct by the people who hear cases and the people who decide them. The deadlines imposed on OAH's ALJs are directory, leaving it to performance standards to measure whether individuals are being dilatory or uncontrollable caseload spikes and staffing shortages are delaying cases. Some agency deadlines (e.g., the AS 44.64.030 case referral deadline) are directory, but the legislature chose a mandatory deadline for action by the decisionmaker following issuance of a proposed decision. Thus, AS 44.64.060(f) provides assurance that the affected parties will have ***a decision*** relatively soon after the ALJ's proposed decision is issued, but it does not guarantee ***a final decision*** that is free from a stay, if a stay is allowed by law, or from further consideration following a remand.

Certainly, one can imagine a scenario in which an unscrupulous decisionmaker might try to use the quite flexible option in AS 44.64.060(e)(3) to tie a case up in the executive branch endlessly by remanding it to staff for more work, with no deadlines and no mechanism for an affected party to obtain direct judicial review within a reasonable time. In that circumstance, collateral judicial remedies such as injunctive relief might be appropriate, much as appellate courts can mandate action when trial courts fail to move a case to resolution. That is not the scenario presented by the commissioner's July 5, 2007 order, however.

The commissioner had authority under AS 44.62.520(b)(3) to grant a stay as long as the stay is "for a particular purpose and not to postpone judicial review." The particular purpose for the commissioner's stay is to allow staff to recalculate need using correct data that excludes data for rooms the joint venture proved are not suitable for general surgery. She has limited the stay to 100 days at most. Her order makes clear that even if staff fails to report in a timely fashion, or if she herself fails to act on staff's report in a timely fashion, her July 5, 2007 decision becomes final for appeal purposes. For these reasons, the undersigned ALJ would decline to vacate the commissioner's stay even if the ALJ had the authority to do so.

DATED this 25th day of July, 2007.

By: _____
Terry L. Thurbon
Chief Administrative Law Judge