

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON  
REFERRAL FROM THE COMMISSIONER OF ENVIRONMENTAL  
CONSERVATION**

In the Matter of	)	
	)	
	)	
INTERIOR ALASKA FISH	)	OAH No. 12-0258-DEC
PROCESSORS, INC.	)	
_____	)	

**DECISION ON SUMMARY ADJUDICATION**

**I. Introduction**

The Food Safety and Sanitation Program of the Division of Environmental Health (division) suspended Interior Alaska Fish Processors, Inc.’s (IAFP) permit to operate its seafood processing plant.<sup>1</sup> IAFP appealed the suspension. The Commissioner of Environmental Conservation granted a hearing<sup>2</sup> and referred this matter to the Office of Administrative Hearings.<sup>3</sup>

One day before the Commissioner granted the hearing, the division rescinded the Notice of Suspension.<sup>4</sup> The division has now moved for summary adjudication, arguing that IAFP’s appeal is moot. IAFP opposed that motion in writing. In addition, each party was heard on this issue during the previously held case planning conference. Based on the pleadings, the documents in the record, and the arguments made during the case planning conference, this matter is moot and the appeal should be dismissed.

**II. Discussion**

Department of Environmental Conservation regulations allow a party to move for summary adjudication if there is no genuine issue of material fact.<sup>5</sup> If all factual issues are resolved on summary adjudication, a hearing may not be held.<sup>6</sup> OAH regulations similarly provide for summary adjudication where “a genuine dispute does not exist between the

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<sup>1</sup> Motion for Summary Determination, Exhibit B. The Notice of Suspension has the date of July 18, 2012 added in the margin. IAFP also processes game meat during hunting seasons.

<sup>2</sup> Motion for Summary Determination, Exhibit E.

<sup>3</sup> Case Referral Notice in OAH record.

<sup>4</sup> Motion for Summary Determination, Exhibits B and F.

<sup>5</sup> 18 AAC 15.255(a).

<sup>6</sup> 18 AAC 15.255(e).

parties on an issue of material fact.”<sup>7</sup> This procedure is consistent with the procedure for summary judgment in civil courts.<sup>8</sup>

In objecting to the suspension, IAFP has raised serious allegations concerning the division’s conduct including, but not limited to, claims that the division is enforcing regulations in an unreasonable manner, taking an unnecessarily adversarial attitude toward IAFP, and inspecting IAFP closely while not inspecting other facilities at all.

One of the most serious allegations raised by IAFP is that the division is retaliating against it because its owner, Virgil Umphenour, raised concerns at a Board of Fish meeting, and pressured that board to issue an emergency regulation that was controversial among various fishing interests, and also because he asserted that a division employee had committed a crime by lying to the federal government in the course of her official duties.<sup>9</sup>

The division argues that IAFP’s factual allegations do not raises issues of material fact because it has rescinded the suspension of IAFP’s permit.

Courts and other adjudicatory bodies generally refrain from ruling on moot legal issues.<sup>10</sup> Among other possible reasons, an issue may be considered moot if the party bringing the action is not entitled to any relief even if it prevails.<sup>11</sup> In this case, the hearing granted to IAFP was only on the question of whether the suspension of its permit should be reversed. The letter from the Commissioner granting the hearing states

The hearing is on the suspension notice dated July 18, 2012, and is governed by 18 AAC 34.940(f). After the hearing, I will review the recommended decision of the hearing officer and decide whether to affirm, modify or set aside the suspension.<sup>12</sup>

Assuming IAFP was to prevail completely at the hearing, the only relief it would be entitled to is having the suspension set aside. This controversy is moot because IAFP has already received the only relief it could obtain through an administrative hearing.

There is, however, a public interest exception to the mootness doctrine. Three factors are considered in deciding whether this exception applies:

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<sup>7</sup> 2 AAC 64.250(a).

<sup>8</sup> See Alaska Rule of Civil Procedure 56.

<sup>9</sup> None of these allegations are directly related to the issue in this appeal, but, if established, might have some bearing on whether the Notice of Suspension was justified.

<sup>10</sup> *Ulmer v. Alaska Restaurant & Beverage Association*, 33 P.3d 773, 776 (Alaska 2001).

<sup>11</sup> *Id.*

<sup>12</sup> Motion for Summary Determination, Exhibit E.

(1) whether the disputed issues are capable of repetition, (2) whether application of the mootness doctrine will repeatedly circumvent review of the issues, and (3) whether the issues are of important public interest.<sup>[13]</sup>

As discussed below, it is the second factor that is determinative here.

*Clark v. State* concerned a prisoner who contested the Department of Corrections' decision to transfer him out of state so that he was required to serve his sentence in Arizona.<sup>14</sup> After filing his appeal of that decision, Clark was returned to Alaska for resentencing. The Supreme Court determined that his claim was moot because he had been returned to Alaska, and it was unknown whether he would be housed in Alaska or in Arizona after his resentencing.<sup>15</sup> In looking at the public interest exception, the Supreme Court found that Clark met the first and third factors.<sup>16</sup> He did not, however, meet the second factor because there was no indication that the claims raised would repeatedly evade review.<sup>17</sup> Clark would have the right to appeal if he was again classified for transfer to Arizona, and other prisoners would have the same right to appeal their transfers to Arizona. The argument that the department was improperly transferring inmates to Arizona would not continually evade review even though not reviewed in Clark's case.

The situation in this case is similar. The disputed issue – issuance of a Notice of Suspension – is certainly capable of repetition. The division could inspect IAFP at any time and decide to issue a new suspension based on improper or insufficient grounds.<sup>18</sup> This could also occur at other processing facilities throughout the state, and those other facilities could assert similar claims if they believed the division was acting improperly. The issues raised by IAFP are also of important public interest. Fisheries depend, at least in part, on the availability of in-state processing facilities. That these facilities meet the Food Safety and Sanitation code requirements is crucial, but if, as alleged by IAFP, a permit is being suspended for an improper reason, or for legally insufficient reasons, that enforcement action uses some of the division's limited enforcement resources that could be better

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<sup>13</sup> *Clark v. State*, 156 P.3d 384, 387 (Alaska 2007), quoting *Taylor v. Gill St. Invs.*, 743 P.2d 345,347 (Alaska 1987).

<sup>14</sup> *Clark*, 156 P.3d at 385.

<sup>15</sup> *Clark*, 156 P.3d at 387.

<sup>16</sup> *Clark*, 156 P.3d at 387 – 388.

<sup>17</sup> *Clark*, 156 P.3d at 388.

<sup>18</sup> This is in essence what IAFP seems to have alleged in its appeal. This decision makes no ruling that the division did or did not have improper or insufficient grounds for issuing the notice.

devoted to other enforcement actions. It also unnecessarily deprives those engaged in commercial and subsistence fishing of a safe and convenient processing facility.

IAFP does not, however, meet the second criteria. The issues raised by IAFP will not repeatedly evade review. If IAFP's permit is suspended in the future, or if a different facility's permit is suspended, the permit holder has the right to request an administrative hearing.<sup>19</sup> That hearing will occur within 10 working days of a request.<sup>20</sup> There is no indication in this record that issues raised in a suspension appeal would typically become moot before the administrative review process is completed.<sup>21</sup>

IAFP may be able to obtain informal review by the division director of some of the actions it complained of.<sup>22</sup> However, regarding the narrow issue for consideration in this appeal – whether the suspension notice was appropriate – this appeal is moot.

### **III. Conclusion**

The suspension of IAFP's permit was rescinded. As the only issue on appeal is whether the suspension was appropriate, IAFP's appeal is moot. Accordingly, the division's motion is granted and the appeal is dismissed.

Dated this 9<sup>th</sup> day of August, 2012.

*Signed* \_\_\_\_\_

Jeffrey A. Friedman  
Administrative Law Judge

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<sup>19</sup> 18 AAC 34.940(f)(1)(C).

<sup>20</sup> 18 AAC 34.940(f)(1)(D).

<sup>21</sup> *Cf. Copland v. Ballard*, 210 P.3d 1197, 1202 (Alaska 2009) (court analyzes second prong by comparing the time it takes to appeal to the time it takes for that appeal to become moot).

<sup>22</sup> *See* 18 AAC 15.185 and 18 AAC 34.950.

## Adoption

The undersigned, on behalf of the Commissioner of the Department of Environmental Conservation and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 11<sup>th</sup> day of September, 2012.

By: Signed  
Signature  
Larry Hartig  
Name  
Commissioner  
Title

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