



Ms. Hollier filed a request with the Division for a waiver to work for "The Bail Store," an insurance business. With her request, Ms. Hollier provided many documents relating to her conviction and her work history as well as letters in support of her request.<sup>5</sup> The Division denied Ms. Hollier's request for a waiver in a decision dated June 1, 2006.<sup>6</sup>

### **III. Discussion**

#### **Summary Adjudication**

Summary adjudication may be granted if there is no genuine dispute as to any material fact, so that the case may be resolved as a matter of law.<sup>7</sup> In this case, no material facts are in dispute.<sup>8</sup>

#### **Federal Law Prohibits Ms. Hollier Working in the Bail Store**

Federal law prohibits an individual who has a felony conviction involving dishonesty or a breach of trust from engaging in the business of insurance.<sup>9</sup> Ms. Hollier does not dispute that her felony conviction involved dishonesty and a breach of trust and that working at Bail Store would be engaging in the business of insurance and that therefore the work falls she wants to do would bring her under the prohibition in the federal statute.<sup>10</sup>

#### **Federal Law Allows waiver of the Prohibition**

Federal law allows an individual who fall under the prohibition on engaging in the business of insurance to obtain a waiver of the prohibition by getting written consent from the appropriate state insurance regulator.<sup>11</sup> The federal law which creates the waiver does not impose any limits on the authority of an appropriate state insurance regulator to deny or grant a request for written consent.

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<sup>5</sup> Division's Ex. 3-59.

<sup>6</sup> Division's Ex. 61 & 62.

<sup>7</sup> *E.g., Smith v. Dep't of Revenue*, 790 P.2d 1352, 1353 (Alaska 1990).

<sup>8</sup> Ms. Hollier's testimony-recording of oral arguments.

<sup>9</sup> 18 U.S.C. §1033(e)(1)(A) makes it a felony to violate this prohibition. 18 U.S.C. §1033(e)(1)(A) provides: "Any individual who has been convicted of any criminal felony involving dishonesty or a breach of trust, or who has been convicted of an offense under this section, and who willfully engages in the business of insurance whose activities affect interstate commerce or participates in such business, shall be fined as provided in this title or imprisoned not more than 5 years, or both.

<sup>10</sup> Ms. Hollier's testimony-recording of oral arguments."

<sup>11</sup> 18 U.S.C. §1033(e)(2).

### **State Law also Prohibits Ms. Hollier Working in the Bail Store Without Waiver**

Alaska statutes reference the federal prohibition and also prohibit people with Ms. Hollier's criminal record from engaging in the business of insurance.<sup>12</sup> Alaska law also allows a waiver which tracks the federal law and designates the Division as the appropriate authority to grant this consent.<sup>13</sup> The Alaska law which creates the waiver does not impose any limits on the authority of the Division to deny or grant a request for written consent either. That statute, AS 21.36.355, provides:

Felony convictions involving dishonesty or breach of trust.

(a) A person who has a conviction for a felony involving dishonesty or a breach of trust may not engage or participate in the business of insurance without receiving prior written consent by the director as required under 18 U.S.C. 1033 and 1034 (Violent Crime Control and Law Enforcement Act of 1994).

(b) A person who fails to seek prior written consent from the director under (a) of this section is in violation of this chapter.

(c) A person who is engaged in the business of insurance may not knowingly permit the participation in the business of insurance by a person who has been convicted of a felony involving dishonesty or breach of trust except as allowed under (a) of this section.

The Division has not promulgated any regulations regarding this statutory waiver.

### **Standard of Review is Reasonable Basis Test**

When agencies make discretionary decisions, and no facts are in dispute, the administrative appeal process is more like a court's review of a final agency decision.<sup>14</sup> When an agency makes a decision within its discretionary authority, the reasonable basis test is applied to a review of that decision because the agency decision-making process is an executive rather than a quasi-legislative or quasi-judicial activity.<sup>15</sup> To the extent that this executive decision-making process requires application of law to facts, an executive discretionary decision might be said to resemble judicial activity, but the similarity ends where the focus of the decision rests in the exercise of the agency's duty to weigh the complex and sometimes competing policy directives inherent in the statutes that bear on the decision.<sup>16</sup> Since there is no special statutory or regulatory procedure to follow or rules to apply when the Division decides to deny or grant the written consent that Ms. Hollier has requested, the task of the administrative law judge in this

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<sup>12</sup> AS 21.36.355(a).

<sup>13</sup> AS 21.36.355(a) & (b).

<sup>14</sup> See *Kelly v. Zamarello*, 486 P.2d 906, 916 (Alaska 1971) (stating that explaining the different standards of review to apply to agency actions that are legislative, judicial or executive in nature).

<sup>15</sup> *Kelly v. Zamarello*, 486 P.2d 906, 917 (Alaska 1971).

<sup>16</sup> *Olson v. State, Dept. of Natural Resources*, 799 P.2d 289, 293 (Alaska 1990).

appeal is merely to determine whether the Division took a hard look at the issues and genuinely engaged in reasoned decision making. The administrative law judge should not to act as a substitute decision maker for the Division.<sup>17</sup> This standard of review is proper in administrative appeals of discretionary acts not requiring formal procedures because it allows agencies the latitude needed to act in a way that is commensurate with their discretion.<sup>18</sup>

### **Division's Reasons for Denying Request were Reasonable**

In her appeal, Ms. Hollier objects to the Division's characterization of allowing Ms. Hollier to return to work for an insurance company in a capacity in which she is handling money as "problematic." Ms. Hollier argues that the use of this term makes the Division's grounds for its decision to deny her request for a waiver "very vague" and indicates to her that the Division decision was based on the over generalized assumption that: "Once a thief, always a thief." Ms. Hollier asserts that the Division's explanation of its decision indicates that the Division did not give proper consideration to her seven years of proven work history with the Alaska Housing Finance Corporation after she committed the acts that led to her conviction. Ms. Hollier also objects to Division's having noted in its decision that it would take Ms. Hollier many years to pay off her court ordered restitution at the current rate of payment and apparently did not give sufficient weight to the fact that she has never had any probation violations in the two years that she has already served.<sup>19</sup>

Ms. Hollier's frustration with the Division's June 1, 2006, decision denying her request for a waiver is understandable. The decision is structured as a "Statement of Issues" with nine numbered statements and a signature.<sup>20</sup> These statements include the history of Ms. Hollier's request for a waiver, some facts contained in the court documents related to her conviction, Ms. Hollier's need for a waiver, the basis for the denial of the waiver, and the denial. This structure can confuse someone reading the Statement of Issues to conclude, as Ms. Hollier did, that the basis for the Division's decision to deny her waiver was the bare fact of the conviction that made the waiver necessary. In short, Ms. Hollier's reading of the decision is that if you need a waiver, you cannot qualify for a waiver.

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<sup>17</sup> See *Bering Straights Coastal Management v. Noah*, 952 P.2d 737, 742, (Alaska 1998).

<sup>18</sup> *Olson v. State, Dept. of Natural Resources* 799 P.2d 289, (Alaska,1990).

<sup>19</sup> Ms. Hollier's letter dated August 7, 2006.

<sup>20</sup> Division's June 1, 2006 decision at Division's Ex. 61 & 62.

A more objective and careful reading of the decision is that the Division's basis for its denial is not the bare fact that Ms. Hollier was convicted of a crime that would require a waiver, but rather the specific facts relating to Ms. Hollier's conviction referred to in the decision, which indicate that it would not be appropriate to grant a waiver in her case. These are facts of the specific crime she was convicted of,<sup>21</sup> the sentence that was imposed on Ms. Hollier for her conviction,<sup>22</sup> the facts that Ms. Hollier would be on active probation until 2009, and that she has not yet paid all off all the restitution order.<sup>23</sup>

Ms. Hollier is correct that the Division does not mention any mitigating facts that she mentions in her appeal, such as her work history after the crime in its decision.<sup>24</sup> However, it would not be unreasonable for the Division to decide that it would decline to grant a waiver to anyone who was still on active probation and had unpaid restitution for the conviction which led to the need for a waiver, irrespective of any mitigating circumstances. Both the state and federal law effectively create a very strong presumption that an individual with Ms. Hollier's conviction should not be allowed to work in insurance. This effective presumption can be overcome only by convincing the Division that the prohibition should be waived in a particular case, but there are no standards that set out when a waiver should be granted. It was not unreasonable for the Division to conclude that a waiver should not be granted in this case, given the seriousness of the sentence imposed by the court and the fact that it had not yet been completed by the individual requesting the waiver. Implicit in the Division decision is the conclusion that it would not be willing to consider granting her a waiver, based on mitigating considerations until she has completed her probation and paid off all the restitution order by the court as part of her criminal sentence. Given language of the state and federal statutes requiring the waiver, it is not surprising that the Division would conclude that it would not be appropriate to grant waivers to someone who is still on probation for a felony conviction of Theft by Insurance Company Employee, or

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<sup>21</sup> Division's June 1, 2006 decision at Division's Ex. 61 & 62. The Division names the specific crime she was convicted of, which was not just a general crime of dishonesty and breach of trust, but a crime of embezzlement while working for an insurance company. In this way, the Division implicitly indicates that it would be less appropriate to grant her the waiver she seeks than if she had committed a crime of dishonesty that was less closely related to the work she seeks the waiver for.

<sup>22</sup> The Division sets out details the sentence imposed. In this way, the Division implicitly indicates that it would be less appropriate to grant her the waiver than if she had received a lesser sentence.

<sup>23</sup> Statements number 4-8 of the Division's June 1, 2006 decision at Division's Ex. 61 & 62. By noting that her sentence has not yet been successfully completed, the Division implicitly indicates that it would be inappropriate to grant her the waiver she seeks before she has completed this step in the rehabilitation process.

<sup>24</sup> Division's June 1, 2006 decision at Division's Ex. 61 & 62.

indeed any crime of dishonesty or breach of trust. Given the undisputed facts that the Division did consider, which weigh so heavily against granting a waiver, it was not unreasonable for the Division to decline to consider any mitigating facts provided by Ms. Hollier. While the Division could have explained its reasoning more clearly, its failure to do so does not make its decision unreasonable.

**IV. Conclusion**

Based on the undisputed facts in this case, the Division's decision which denied Ms. Hollier's request for a waiver that would allow her to work in an insurance business was reasonable and should therefore be upheld.

**V. Order**

The Division's motion for summary adjudication is granted. This case will not be scheduled for a formal hearing. The Division's Decision, issued on June 1, 2006, which denied Ms. Hollier's request for a waiver under AS 21.36.355(a), is affirmed.

DATED this 4<sup>th</sup> <sup>January 2007</sup> day of December, 2006.

By: \_\_\_\_\_  
Mark T. Handley  
Administrative Law Judge

### Adoption

The undersigned, on behalf of the Director or the Division of Insurance 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 Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 9<sup>th</sup> day of February, 2007.

By: \_\_\_\_\_  
Signature

Linda S. Hall  
Name

Director  
Title

I hereby certify that a copy of the document(s) listed below was distributed to the below listed parties and files by mail or by personal delivery. The original document has been filed in the Administrative Law Judge's official file in Juneau, AK.

Decision and Order on Summary Adjudication, signed by the Director of Insurance on February 9, 2007, in Case No. OAH No. 06-0490-INS (W 06-01), In the Matter of Shannon K. Hollier.

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Juneau, AK

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Dated: February 12, 2007, in Anchorage, Alaska.

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