IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALYESKA PIPELINE SERVICE COMPANY,

Appellant,

vs.

STATE OF ALASKA DEPARTMENT OF COMMERCE, COMMUNITY, AND ECONOMIC DEVELOPMENT–DIVISION OF INSURANCE,

Appellee.

Case No. 3AN-07-11593CI

DECISION AND ORDER

Alyeska Pipeline Service ("Alyeska") appeals the Decision and Final Order of the Alaska Division of Insurance. The court reverses the decision of the Division of Insurance because Alyeska's insurance program falls outside the scope of AS 21.36.065. The decision by the Division of Insurance, however, did not violate Alyeska's right to due process.

I. Facts

A. Alyeska's Insurance Program

Alyeska is owned by and serves as an agent for five pipeline companies in order to transport crude oil in the Trans-Alaska Pipeline. In order to operate and maintain the pipeline for its owner companies, Alyeska contracts with a number of different contractors. Effective January 1, 2002, Alyeska contracted with the Liberty Mutual Group ("Liberty Mutual") to administer an owner controlled insurance program that provides commercial general liability and workers' compensation insurance for Alyeska and several pipeline contractors.

B. Proceedings Below

During the 2005 legislative session, House Bill 147 was passed adding a new section AS 21.36.065 which became effective on June 25, 2005. On November 15, 2006, the Division of Insurance issued a Cease and Desist Order to Liberty Mutual. Count One found that Alyeska's insurance program violated the new AS 21.36.065.

Liberty Mutual filed a request for hearing with the Division of Insurance in which Alyeska intervened. On March 13, 2007, Alyeska filed a motion for partial summary judgment arguing that AS 21.36.065 was inapplicable to their insurance program. The administrative law judge granted the motion concluding that, because Alyeska's insurance program did not fall within the statutory definition of an "owner controlled insurance program" as defined in AS 21.36.065, the program was not subject to AS

21.36.065(a). As a result, the administrative law judge recommended that Count One of the Cease and Desist Order be dismissed.

On July 17, 2007, the Division of Insurance and Liberty Mutual reached a settlement on all issues raised by the Cease and Desist Order except Count One. On August 8, 2007, the administrative law judge transmitted to Deputy Director Troutt ("Troutt") of the Division of Insurance the proposed stipulated settlement between the parties as well as the order granting summary adjudication to Alyeska for a final decision.

On October 31, 2007, the Deputy Director issued his Decision and Final Order reversing order of the administrative law judge with respect to Count One of the Cease and Desist Order. He found that Alyeska's insurance program is an owner controlled insurance program as defined in AS 21.36.065 and the owner controlled insurance program does not meet the requirements of AS 21.36.065(a).

On April 10, 2007, Alyeska also filed a motion to disqualify Division of Insurance Director Linda S. Hall ("Hall") from acting as the final decision maker. The motion alleged violations of due process and the Executive Branch Ethics Act due to Hall's previous involvement in promoting the statute, the fact that it was her Cease and Desist Order that was being challenged, the fact that Hall's sister was the director of risk management for a company that strongly resisted Alyeska's insurance program, and the fact that her sister had asked for and received Hall's support in passage of the statute. The administrative law judge forwarded Alyeska's motion and the related briefing to Director Hall for a decision and handling as she found appropriate.

Before deciding the motion, Director Hall sought a determination from an ethics supervisor who confirmed that the Executive Branch Ethics Act did not require her disqualification. The determination found "no violation of the Executive Branch Ethics Act occurred or may potentially occur based on the circumstances identified by Alyeska in its Motion to Disqualify." Nonetheless, on May 24, 2007, Director Hall issued an order disagreeing with Alyeska's claims but delegated the decision making authority to Deputy Director Troutt. Alyeska did not file any challenge or otherwise object to this delegation.

II. Standard of Review

The court reviews questions of law that do not involve agency expertise using its independent judgment. Seybert v. Cominco Alaska Exploration, 182 P.3d 1079, 1089 (Alaska 2008).

III. Analysis

A. Does AS § 21.36.065 Address Alyeska's Insurance Program?

1. Plain Meaning

AS 21.36.065 notes, "An owner controlled insurance program or a contractor controlled insurance program is subject to both AS 21.39 and AS 21.42, must be approved by the director, and shall be allowed only for a major construction project." The Decision and Final Order by the Division of Insurance found that Alyeska's insurance program violated AS 21.36.065 because Alyeska was an agent of a project

owner who had procured an owner controlled insurance program contrary to the statute's prohibition. This finding, however, is contrary to the plain language of the statute. AS 21.36.065(c)(4) defines an owner controlled insurance program as "an insurance program where one or more insurance policies are procured on behalf of a project owner, its agent, or its representative...." AS 21.36.065(c)(5) defines project owner as "a person who, in the course of the person's business, engages the service of a contractor for the purpose of *working on a construction project*." (emphasis added). By the plain meaning of the statute, the restrictions on owner controlled insurance programs only apply to construction projects.

Additionally, Alyeska's project is a maintenance project, not a construction project. Deputy Director Troutt noted in his Decision and Final Order, "It is not a stretch to suggest that the maintenance of an aging, approximately 800 mile pipeline is an ongoing 'construction project,' and that the other services appurtenant thereto—those provided by the pipeline contractors—are routine services that would be provided in a construction project of this nature." This conclusion ignores the fact that construction and maintenance are distinct concepts. Construction is defined as, "The creation of something new, as distinguished from the repair or improvement of something already existing." Black's Law Dictionary 283 (5th ed. 1979). Thus, because AS 21.36.065 only restricts controlled insurance programs for construction projects and Alyeska's project is a maintenance project, Alyeska's insurance program is outside the scope of AS 21.36.065.

2. Legislative History

The Division of Insurance claims that, while the statute standing alone is not ambiguous, the statute should be interpreted in light of its legislative history. They claim that the statute was intended to restrict all controlled insurance programs instead of just controlled insurance programs for construction projects.

Alaska does not strictly follow the plain meaning rule barring the court from considering legislative history of unambiguous statutes. Wold v. Progressive Preferred Ins. Co., 52 P.3d 155, 161 (Alaska 2002). Instead, Alaska uses a sliding-scale approach where "[t]he plainer the meaning of the statute, the more persuasive any legislative history to the contrary must be." City of Dillingham v. CH2M Hill Nw., Inc., 873 P.2d 1271, 1276 (Alaska 1994) (citing Peninsula Mktg. Ass'n v. State, 817 P.2d 917, 922 (Alaska 1991)). Accordingly, the party asserting a meaning contrary to a statute's plain language bears a heavy burden of demonstrating a contrary legislative intent. Wold, 52 P.3d at 161 (citing Univ. of Alaska v. Geistauts, 666 P.2d 424, 428 n.5 (Alaska 1983)).

In this case, the Division of Insurance has not met the burden required to justify expanding a restriction to projects plainly excluded by the statute. While the legislative history has some indications that the statute was meant to restrict all owner controlled insurance programs, the bulk of the evidence comes from the statements of witnesses, rather than the legislators themselves. Additionally, there is no history of any debate over the statute on either the floor of the House or Senate nor are there any committee reports that support the Division of Insurance's interpretation of the statute. As noted by the

administrative law judge, "In these circumstances, it would demean the legislative process to do anything other than apply the language the legislature enacted, using the definitions the legislature provided." (R. at 003196).

Furthermore, while the court's rules of statutory construction would allow legislative intent to override the plain language of the statute, doing so in this case would exceed the boundaries of fairness. It one thing to use legislative history to correct a drafting error when that error is obvious or the error imposes a restriction on the persons subject to the legislation that was never intended by the legislature. It is another to expand a restriction to persons plainly excluded by language of the statute. In these instances, the remedy must lie with the legislature, not the court.

Alyeska also argues that the Liberty Mutual program falls within two of the exceptions to AS 21.36.065(a) found in AS 21.36.065(b). These issues do not need to be resolved because Alyeska's owner controlled insurance program falls outside the scope of AS 21.36.065. For judicial economy, the court finds that if Alyeska's insurance program was subject to the statute, neither of the exceptions would apply.

B. Was Alyeska Deprived of Due Process By the Division of Insurance?

Alyeska claims that they were deprived of due process and their right to a fair and impartial decision maker when Deputy Director Troutt served as the decision maker. Alyeska, however, never previously objected to Deputy Director Troutt serving as the decision maker. Failure to do so waived the objection. See Storrs v. Lutheran Hosps. & Homes Soc'y of Am., Inc., 609 P.2d 24, 28 n.13 (Alaska 1980) (quoting Alaska State

Hous. Auth. v. Riley Pleas, Inc., 586 P.2d 1244, 1248 (Alaska 1978) (following the rule that objections must be made at the administrative level to preserve the point on appeal when the complainant has the assistance of counsel and opportunity to urge their objections at the administrative level)).

IV. Conclusion

The court reverses the decision of the Division of Insurance because Alyeska's insurance program falls outside the scope of AS 21.36.065. The decision by the Division of Insurance, however, did not violate Alyeska's right to due process.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 23rd day of March 2009.

Peter A. Michalski

PETER A. MICHALSKI
Superior Court Judge

3-24-09 a copy
above was mailed to each of the following at
their addresses of record: