BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL FROM THE ALASKA STATE MEDICAL BOARD

In the Matter of:	)	
	)	
MARK JOSEPH BEIRNE, M.D.,	)	
	)	
Applicant.	)	OAH No. 06-0696-MED
	)	Board Case No 2800-06-009

DECISION AND ORDER

I. Introduction

Mark Beirne, M.D., who was once licensed as a physician in Alaska but surrendered his license in 1995, applied for new license on September 30, 2005.[1] The State Medical Board considered the matter in its January and July 2006 meetings and voted on both occasions to deny relicensure, communicating its decision to Dr. Beirne on September 6, 2006. As is his statutory right, Dr. Beirne requested an administrative hearing. Owing in part to procedural complications and the parties' desire to explore settlement, the hearing and associated final arguments were not fully completed until April 13, 2007.[2]

This is the decision based on the evidence taken at the hearing. It concludes that because Dr. Beirne practiced medicine without a license after surrendering his license in 1995, the board has no discretion to license him at this time. So long as 12 AAC 40.965(a) is in effect in its present form, Dr. Beirne cannot be licensed in this state.

II. Facts

A. Limitations on Factual Record Developed

Hearings conducted on behalf of the State Medical Board are governed by Alaska's Administrative Procedure Act, or "APA."[3] Like most administrative hearings, APA hearings are conducted less formally than court proceedings. The Alaska Rules of Evidence generally do not apply, and much evidence that would not be admitted in a court proceeding, or that would not be admitted without laying an elaborate foundation, is readily admitted in an APA hearing.

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[1] The application is at Division Exhibit 2, pp. 229-242. It was not complete until late November of 2005.

[2] An ensuing four-month delay in reaching a proposed decision after the completion of argument was entirely the result of competing duties within the Office of Administrative Hearings (OAH). OAH apologizes to Dr. Beirne for the delay.

[3] AS 44.62.330(a)(5).

The APA contains an important and often-overlooked restriction, however. It provides that "[h]earsay evidence may be used to supplement or explain direct evidence but is *not sufficient in itself to support a finding unless it would be admissible over objection in a civil action.*"[4] This means that if a party objects to the hearsay character of testimony or documents offered at the hearing, the other party must either lay a foundation to overcome the hearsay objection or must be content that the evidence be limited to a supplemental or explanatory role.

The quoted restriction on use of hearsay evidence rarely plays a role in licensing hearings because hearsay objections are quite rare, and because even if they are made the objection can often be fully overcome by laying some additional foundation. This case is different. Dr. Beirne's counsel raised the hearsay objection at the outset of the proceeding and carefully established a standing objection to use of hearsay documents as a freestanding basis for findings of fact.[5] The Division of Corporations, Business and Professional Licensing ("division"), for its part, declined an express invitation from the administrative law judge to attempt to establish a foundation in some instances to overcome the hearsay objection.

The result is a rather spare factual framework from which to approach this case. Much of the material in the record, including a portion of the "licensing file," is unavailable as an independent basis for a finding of fact.

B. Facts Established

Mark Beirne graduated from medical school in 1988. He obtained licenses to practice as a physician in Alaska and Arizona in 1989.[6]

Dr. Beirne was suspended from medical school because of alcoholism.[7] His difficulty with chemical dependency re-emerged shortly after he began practicing medicine. Before the end of 1989, the Arizona Board of Medical Examiners took disciplinary action against him for substance abuse.[8] He entered into a stipulation and order with that board, which he violated by drinking alcohol.[9] He entered substance abuse treatment with Talbott Recovery Systems in Georgia, but left against medical advice in January of 1991.[10] The following month, he entered a stipulation with the Arizona Board to surrender his Arizona license voluntarily.[11] It has never been restored.

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4 AS 44.62.460(d) (emphasis added).
5 Digital File 1 at 9:00 – 11:00.
6 Div. Ex. 1, pp. 90, 96, 107.
7 Div. Ex. 2, p. 196.
8 Div. Ex. 1, p. 83.
9 Div. Ex. 1, p. 75.
10 *Id.*
11 *Id.*

In June of 1991, the Alaska State Medical Board and Dr. Beirne entered into a Memorandum of Agreement based on the Arizona surrender.[12] Dr. Beirne's license was placed on probation for five years. He agreed to consume no alcohol and to complete additional treatment. Dr. Beirne completed the treatment,[13] but he subsequently violated the Memorandum of Agreement by consuming and abusing alcohol.[14] He surrendered his Alaska license under AS 08.64.334 on March 7, 1995.[15]

On August 26, 1995, Dr. Beirne committed a Class C felony assault against Sergeant Cobb of the Anchorage Police Department.[16] He was subsequently convicted of the offence.[17] The assault was related to alcohol abuse.[18] Dr. Beirne committed and was convicted of additional crimes, all of them misdemeanors, related to alcohol abuse in 1997 (driving under influence), 1998 (assault) and 2001 (disorderly conduct involving violent behavior toward another).[19]

After surrendering his Alaska license in 1995, Dr. Beirne practiced medicine in Alaska without a license.[20]

Dr. Beirne's alcoholism brought him to the point of homelessness in September of 2001.[21] He then entered treatment in Georgia which, by all accounts, has been much more successful than his previous treatment. He reports that he has been sober for more than five years. No evidence contradicts his report, and there is some evidence to corroborate it.[22] He has been able to hold increasingly responsible jobs over this period.[23]

There is reason for optimism about Dr. Beirne's future. He has been treated by Dr. Paul Earley, the current Medical Director of the largest and oldest treatment program for impaired

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12 Div. Ex. 1, pp. 56-65.
13 Div. Ex. 1, p. 54.
14 Div. Ex. 1, p. 32.
15 *Id.*
16 Div. Ex. 5 at 308-313.
17 *Id.*
18 Div. Ex. 2, p. 195.
19 Div. Ex. 2, p. 195; Ex. 6, 8, 9.
20 ALJ exam of Dr. Beirne; *cf.* Appl. Ex. 6, 2nd page (continuing in 2006 to list this chapter of his career as a qualification on his resume).

The Commissioner of Commerce and Economic Development issued a cease and desist order to Dr. Beirne on February 3, 1998. Div. Ex. 1, pp. 27-30. The allegations in the cease and desist order have not been established, apart from the general admission of unlicensed practice before issuance of the order. As to the period after the order was issued, Dr. Beirne has testified that, "to the best of [his] recollection," he did not continue practicing without a license. Re-cross-exam of Dr. Beirne. Dr. Beirne left Alaska in 1999. Div. Ex. 3 at 298.

21 Direct exam of Dr. Beirne; Div. Ex. 3, p. 295.
22 *E.g.*, Appl. Ex. 1, 4th page.
23 Direct exam of Dr. Beirne.

physicians in the country. Dr. Earley, who has treated approximately 3000 physicians, persuasively argues that the prognosis after so long a period of sobriety is excellent. He reports that he has seen no more than ten turnarounds as dramatic as Dr. Beirne's.

III. Discussion

Dr. Beirne does not dispute that grounds are available on which the board may deny his application,[24] but he argues that the applicable statutes and regulations give the board discretion in this matter and that, as a matter of compassion and good policy, it should exercise that discretion to grant a restricted license.[25] The division argues that two legal provisions, one a statute and one a board regulation, deprive the board of discretion to grant the present application.

A. Mandatory Denial Under AS 08.64.240(a)(2)

The division contends that the Board has no discretion to grant Dr. Beirne a license because the legislature has restricted the Board's authority as follows:

> **Sec. 08.64.240. License refused.** (a) The board may not grant a license if
>
> * * *
>
> (2) the applicant has surrendered a license in another jurisdiction while under investigation and the license has not been reinstated in that jurisdiction.

The division observes that it is undisputed that Dr. Beirne surrendered his license to the Arizona Board of Medical Examiners in 1991, and contends that he did so while under investigation for violating the terms of a prior stipulation with the same board relating to substance abuse.

The division is mistaken in surmising that Dr. Beirne was "under investigation" at the time of the Arizona surrender. The surrender document, signed by the executive director of the Arizona board, recites that the surrender was made "[i]n accordance with A.R.S. [Arizona Revised Statutes] § 32-1433."[26] In 1991, A.R.S. § 32-1433, provided:

> A person who holds an active license to practice medicine in this state who is not presently under investigation by the board, as a result of a complaint or information received, and against whom the board has not commenced any disciplinary proceeding, may upon request be granted cancellation of his license. The board may accept the cancellation of an active license from a person who has been charged with any violation of this chapter or the rules and regulations promulgated under this chapter

[24] Dr. Beirne's Pre-Hearing Brief, p. 2.
[25] *Id.*, p. 1.
[26] Div. Ex. 1 (agency record) at 74.

> provided that such person admits the charges and so stipulates for the record.[27]

Thus, it appears that the Arizona board could not legally have accepted Dr. Beirne's surrender had he been "under investigation" at the time he surrendered his license. Instead, any investigation was complete, and Dr. Beirne admitted the resulting charge, which was that he had violated the terms of his prior stipulation. Although the Alaska board can certainly consider such an event in weighing whether to license an applicant, Alaska law does not flatly bar licensure of an applicant who, like Dr. Beirne, surrendered his license *after completion* of an investigation in exchange for admitting the resulting charge.

B. Mandatory Denial Under 12 AAC 40.965(a)(1)(C)

The division's second contention is that one of the board's own regulations, 12 AAC 40.965(a), leaves no discretion to grant reinstatement under the circumstances of this case. The division is correct.

The board adopted the regulation at issue in 1999. It provides, in relevant part, that a license voluntarily surrendered (as this one was) under AS 08.64.334

> **will be reinstated, if**
>
> (1) **the board determines that**
>
> (A) the requirements of AS 08.64.334 have been met;
>
> (B) the applicant continues to qualify under AS 08.64 and this chapter for the license requested to be reinstated;
>
> (C) **the applicant has committed no grounds for imposition of disciplinary sanction under AS 08.64.326 or this chapter; and**
>
> (D) the applicant has satisfied any conditions imposed by the board to accept the surrendered license; **and**
>
> (2) the applicant submits
>
> (A) a new and complete application . . .
>
> (B) evidence of at least 34 hours of continuing medical education . . .
>
> (C) [not applicable to physicians]
>
> (D) [not applicable to physicians] . . . and

[27] A.R.S. § 32-1433 as added by Arizona Laws 1982, ch. 270, § 11, prior to amendment by Arizona Laws 2000, ch. 204, § 10. In briefing, Dr. Beirne's counsel used the post-2000 language, which is different.

(E) at the request of the board, [reports regarding mental and physical capability and competency][28]

For Dr. Beirne to fit within this list of criteria, the board would have to make several determinations, including, critically, a determination that Dr. Beirne has committed no grounds for discipline since his surrender.[29] Recognizing the difficulty of obtaining such a determination, Dr. Beirne argues that the list of criteria in the regulation is not exclusive—that the board *must* reinstate a license if the criteria are all met, but that it *may* reinstate the license even if one of the criteria is not met. He contends that simply because a regulation says that the board "will" take an action if certain criteria are met does not mean that it will not take that action if the criteria are not met.

In support of this contention, Dr. Beirne asserts that the Medical Board has so interpreted 12 AAC 40.965(a) in the past. He cites a single example, the 2001 reinstatement of Dr. Glenn Straatsma. A review of the Memorandum of Agreement conditionally restoring Dr. Straatsma's license,[30] however, shows a sequence of events different from Dr. Beirne's. Dr. Straatsma surrendered his license on December 23, 1998, after committing, and being convicted of, a sexual assault on a patient. There is no indication that Dr. Straatsma committed additional conduct subject to discipline after the surrender. Hence, restoring his license presented no conflict with criterion (1)(C) in 12 AAC 40.965(a).

Dr. Beirne also posits "countless examples of physicians with histories of alcohol and chemical dependency, and/or criminal convictions that have retained their medical licenses, even after a license suspension, and/or criminal conviction, and/or the violation of a Memorandum of Agreement."[31] Even if this is so, it has no bearing on the present issue: these are physicians

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[28] 12 AAC 40.967(a) [emphasis added].

[29] The regulation does not specify that the determination focuses on the period *after* surrender of the prior license, but this is surely its intent. The point of AS 08.64.334 is to allow surrender of a license while discipline is pending for *prior* conduct, and the statute expressly contemplates return of surrendered licenses in some circumstances. Hence, to interpret the regulation to require a finding that the professional had never committed a sanctionable offence in his or her entire career could place the regulation at odds with the statutory scheme.

It bears noting that criterion (1)(C) uses the word "committed" in relation to grounds for discipline. This suggests that the regulation focuses only on acts of commission, not passive states. Thus, the commission of a wrongful act against a patient could exclude a physician from this criterion, but the mere persistence of a temporary mental or physical disability for a time after the surrender of the prior license would not prevent a physician from satisfying the criterion, and obtaining relicensure, once the disability was removed.

[30] *In re Straatsma,* Case No. 2800.00.70 (Alaska Medical Board, Memorandum of Agreement, January 18, 2001).

[31] Dr. Beirne's Post-Hearing Brief, p. 3.

who retained their licenses, not physicians who surrendered their licenses and then reapplied. 12 AAC 40.965(a) and its list of criteria apply only to the latter.

Dr. Beirne has not been able to identify any instance where the board has treated the criteria in 12 AAC 40.965(a) as a list of suggestions rather than a mandatory list of prerequisites to relicensure. This is not surprising, because the linguistic formulation used in the regulation is one that supports the second meaning, not the first.

The formulation "will [take action] if [list of criteria]" is a common one in the Alaska Administrative Code. To see how this formulation functions in the Alaska regulatory framework, it is easiest to start with some of its simpler applications. Often, the criteria are simple and the list is short. For example, where a regulating agency intends to renew a sanitation certificate for shops that are in compliance with its regulations, the regulation reads "the department *will* renew a certificate of sanitary standards . . . *if* the department determines that the shop is in compliance . . . ."[32] No one would seriously contend that such a regulation allows the department to renew the certificates of shops that do not meet this single criterion of being in compliance with the law. Similarly, another regulation provides that a board "will approve" out-of-state training in body piercing "if" (1) it is "equivalent" to training meeting the regulations for in-state instruction and (2) it is "provided by a person who is knowledgeable in the applicable techniques."[33] Again, no one would argue that the board adopting this regulation left itself discretion to approve out-of-state training not equivalent to Alaska standards, or training given by people who are not knowledgeable. These simple examples illustrate that the "will . . . if" formulation is routinely used to introduce a list of conditions that plainly *must* be met if the desired action is to be taken, rather than merely a list of suggestions.

This usage of the "will . . . if" formulation is appropriate because of a legal doctrine commonly used to interpret statutes and regulations, "*expressio unius est exclusio alterius*" (the expression of one thing excludes others).[34] If a legal provision states that a body *will* take an action if a list of criteria are satisfied, this principle supplies the inference that it *will not* take the action in circumstances other than the satisfaction of the criteria.

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[32] The example used is 18 AAC 23.310(d), a regulation of the Department of Environmental Conservation (emphasis added to the quotation). The code contains dozens, if not hundreds, of examples of the same formulation. An even more common variant on this formulation is the phrase "will, in its discretion," followed by "if" and a list of criteria—a formulation used in the past when discretion was being retained to deny an application even if the criteria were met.

[33] 12 AAC 09.173.

[34] *See, e.g., Ranney v. Whitewater Engineering*, 122 P.3d 214, 218-9 (Alaska 2005) (where statute listed certain beneficiaries to whom benefits could be paid, it thereby excluded those not listed).

The inference created by the *expressio unius* doctrine can be overcome by contrary indications in the context of the legal provision being interpreted,[35] but Dr. Beirne has pointed to no contrary indications surrounding 12 AAC 40.965. Accordingly, the standard reading of "will . . . if" lists of criteria applies to the list in that regulation. Thus, Dr. Beirne's license cannot be restored unless he meets each of the listed criteria, including the one requiring a board determination that, since the board accepted the surrender of his license, he "has committed" no act that would be grounds for disciplinary sanction.

The board cannot make that determination in this case.

After his surrender, Dr. Beirne practiced medicine without a license. Under 12 AAC 40.967(6), practicing medicine without a license is "unprofessional conduct." Under AS 08.64.326(a)(9), anyone who engages in unprofessional conduct in connection with the delivery of professional services to patients has committed grounds for imposition of disciplinary sanctions. Therefore, when Dr. Beirne continued to practice medicine after he surrendered his license, he disqualified himself from receiving a new license in Alaska. So long as 12 AAC 40.965(a) remains in force and unamended, this disqualification is lifelong.

Some of Dr. Beirne's other voluntary conduct since his surrender, notably the Class C felony of which he was convicted, may also disqualify him from eligibility for a license under criterion (1)(C). The felony would be a ground for discipline—and thus an automatic bar to relicensing—*if* the board found it to be "substantially related" to the applicant's professional qualifications.[36] It is not necessary to evaluate the felony against this standard, however, nor to evaluate any other circumstances that might disqualify Dr. Beirne under criterion (1)(C), because the unlicensed practice is plainly and wholly disqualifying.

C. Potential Denial Under 12 AAC 40.965(a)(1)(B)

Finally, were Dr. Beirne to meet criterion (1)(C), he would still need to meet the other criteria for relicensing. A key criterion is 12 AAC 40.965(1)(B), under which an applicant must meet the general licensing requirements of AS 08.64, including the requirement in AS 08.64 that no license be granted to an applicant who is "professionally unfit." To apply this criterion, the board would need to evaluate Dr. Beirne's past conduct and his present stage of recovery.

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[35] *E.g.*, *State v. Fogg*, 995 P.2d 675, 676 (Alaska App. 2000).

[36] AS 08.64.326(a)(4)(B). All of Dr. Beirne's crimes, including the several serious misdemeanors, would constitute sanctionable "unprofessional conduct" had they been committed "in connection with the delivery of professional services to patients." AS 08.64.326(a)(9). Since they were not, they do not—without additional findings and analysis—render him ineligible for a license.

Because this evaluation is unnecessary in light of the disqualification on account of unlicensed practice, and because only a rather limited evidentiary record is available on which to make the evaluation, an assessment of criterion (1)(B) will not be attempted.

IV. Conclusion

Because he practiced medicine without a license after surrendering his Alaska license, Dr. Beirne cannot be granted a new license in this state. His application of September 30, 2005 must be denied.

DATED this 22nd day of August, 2007.

By: *Signed*
Christopher Kennedy
Administrative Law Judge

Adoption

On behalf of the Alaska State Medical Board, the undersigned adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 25th day of October, 2007.

By: *Signed*
Signature
David M. Head, M.D.
Name
Chair, Alaska State Medical Board
Title

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

Appealed to Superior Court – Order and transcript on following pages.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

Beirne, Mark Joseph,	)	
	)	
Plaintiff,	)	
v.	)	
	)	
State of Alaska, Medical Board,	)	
	)	
	)	
Defendant,	)	
	)	Case No. 3AN-07-11710CI

ORDER

For the reasons placed on the record on 20 November, 2008, this case is remanded to the Medical Board for reconsideration of Dr. Beirne's application. The Board is not prohibited from reinstating a voluntary surrendered license per 12AAC 40.965 (a) (1) (C).

11-20-08
Date

Jack W. Smith
Superior Court Judge

I certify that on 11-20-08,
a copy of the above was mailed to each of the following at their addresses of record:
Van Flein, Auth

R Meade
Rmeade / Administrative Assistant

Condensed Transcript &
Word Indexing of:

Beirne vs. SOA

November 20, 2008
3AN-07-11710 CI

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APPEAL DECISION
BEFORE THE HONORABLE MICHAEL L. WOLVERTON
Superior Court Judge

Anchorage, Alaska
November 20, 2008
10:06 a.m.

APPEARANCES:
FOR THE APPELLANT:

FOR THE APPELLEE:

PROCEEDINGS

(No media number available)
10:06:05

THE COURT: They had to put this new monitor up, you can tell we're on record. Okay. We're on record in the time set for the court to enter its decision in 3AN-07-11710, Beirne vs. State of Alaska, medical board. And the parties are reminded you'll get a copy of the disc afterwards. This is a somewhat long and perhaps complicated decision because there were a lot of issues that the court had to address. But Madam Clerk is prepared to give you a disc before she leaves today and then give you a copy of the log-notes too. And you can make notes. I tend to read fast, so I'll try to make it as clear as possible.

Having considered the evidence, the documents, the administrative record and the arguments of the parties, the court is entering the following order. First, a brief summary of the facts. A very brief summary of the facts. Dr. Beirne, the Appellant, originally obtained medical licenses in both Arizona and Alaska in 1989. In 1991, he entered into a stipulation with the Arizona Board of Medical Examiners to voluntarily surrender his Arizona license. That same year in June of 1991, the Alaska State Medical Board -- the board entered into a memorandum of agreement with Appellant based on the Arizona surrender. Appellant subsequently violated this

agreement by consuming alcohol and voluntarily surrendered his Alaska license on March 7th of 1995.

After the voluntary surrender of his license on August 26th, 1995, Appellant committed a Class C felony assault against Sergeant Cobb of the Anchorage Police Department. He was subsequently convicted of this crime and imprisoned from August 1995 until April 1996. On July 29th, 1997, Appellant was charged with operating a motor vehicle while intoxicated. On September 22nd, 1997, Appellant pled no contest to driving while intoxicated. Following this, Appellant was investigated for practicing medicine without a license by the Division of Corporations, Business and Professional Licensing in Alaska. The division issued a cease and desist order on February 3rd, 1998 ordering Appellant to stop the illegal practice of medicine.

On February 11th, 1999, Appellant pled guilty to two counts of Assault in the Fourth Degree. After this, Appellant moved to the State of Georgia where he was charged on February 9th, 2001 following an altercation with his girlfriend of Disorderly Conduct. He pled guilty to the disorderly conduct and was sentenced to one year probation.

Appellant filed an application for reinstatement of his Alaska license on September 28th, 2005. The board denied this application on January 12th, 2006. They cited the following statutes and regulations as authority for denying Appellant's

application. AS 864.240(b), AS 864.326(a)(4)(a), AS 864.326(a)(8)(b), AS 864.326(a)(13), 12 AAC 40.967(17) and 12 AAC 40.967(23). These basically indicated revocation or suspension in another state. Addiction to alcohol, conviction of the felony assault and violating provisions of any disciplinary sanction issued under AS 8.64.

Appellant then requested an administrative hearing to appeal that decision. This hearing took place on February 22nd, 2007. Appellant argued that while there are grounds in which the Alaska board may deny his reinstatement, the statutes cited by the board in their original denial do not mandate a denial. Instead, the board should take into account his significant rehabilitation and find him competent to practice medicine.

In his post hearing brief, appellee argued that 12 AAC 40.965(a)(1)(c) precluded the board from approving Appellant's application. This regulation was not cited in the board's original denial. Appellant argued that the interpretation of the statute proposed by appellee that the board had no discretion to reinstate if the applicant had committed grounds for imposition of disciplinary sanctions following surrender of his license was a potential violation of the due process clause as it would be a permanent bar to re-licensing if interpreted in that manner.

The administrative law judge prepared a proposed decision on August 22nd, 2007 affirming the board's decision. The judge

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concluded that because Dr. Beirne practiced medicine without a license after surrendering his license in 1995, the board had no discretion to license him at this time so long as 12 AAC 40.965(a) is in effect, it -- in its present form, Dr. Beirne cannot be licensed in this state. The board adopted to propose decision on October 25th, 2007. Appellant appeals that decision.

The Appellant asked the court to reverse the holding of the administrative law judge and the board and find that the board must consider Dr. Beirne's application for reinstatement under the standards of AS 864.334 taking into consideration Dr. Beirne's alleged recovery from alcoholism and competency to practice medicine. Appellant asked the court to review 10 issues. At least those were the issues the court seemed to find in the filings.

The first issue, Appellant argues that the ALJ's conclusion that 12 AAC 40.965(a)(1)(c) operated to permanently bar him from regaining his license was in error. Appellant argues that this conclusion is contrary to AS 864.334 which expressly allows reinstatement upon proof of competency and fitness to return to work. AS 864.334 addresses voluntary surrenders of licenses and states that a license may not be returned unless the board determines that the licensee is competent to resume practice. Appellant argues that the ALJ's conclusion was in error because nothing in the statute refers to

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a lifetime and permanent ban.

The second issue Appellant argued that -- was that the ALJ's ruling, that 12 AAC 40.965(a)(1)(c) left the board no discretion to grant reinstatement was in error because that regulation is inconsistent with and not necessary to carry into effect the governing statute. Appellant cites AS 44.62.030 and argues when a regulation conflicts with a statute, it is the regulation that must yield. Appellant argues that when the board adopted 12 AAC 40.965(a)(1)(c), that exceeded its authority because the governing statute does not contain a similar provision allowing for a permanent bar on reinstatement. Appellant recognizes that the board has the authority to adopt any and all regulations necessary to carry into effect the provisions of the statute, but argues that the regulation in question is inconsistent with and not reasonably necessary to implement AS 864.334.

The third issue argued by Appellant was that the board's enactment of 12 AAC 40.965(a)(1)(c) was in excess of its statutory authority making the regulation invalid. Appellant cites the enabling statute AS 864.100, which reads the board may adopt regulations necessary to carry into effect the provisions of this chapter. Furthermore, Appellant argues that AS 864.101, which outlines the duties of the board specifically provides that the board may not make licensing requirements that are unreasonably burdensome and must ensure that the issuance of

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licenses is not unreasonably withheld or delayed.

Appellant argues that the board violated this statute when it adopted a regulation that provides for a penalty not included in the governing statute. Therefore, the regulation exceeded the board's statutory authority rendering it invalid. Appellee argues that the regulation issue is presumptively valid. Appellee argues that under AS 864.334, the legislature intended that the board establish by regulation the criteria for determining whether an applicant for reinstatement is competent through resumed practice. One of the criteria adopted by the board under regulation 12 AAC 40.965(a)(1)(c) is that an applicant for readmission must have committed no grounds for discipline since his surrender.

Appellant argues that the mere fact that there are some criteria to licensor that have the effect of permanently disqualifying the applicant does not make the criteria invalid. Furthermore, the apparent harsh treatment is valid as petitioner's for reinstatement generally should be held to an even higher standard of conduct on first time applicants because they have already demonstrated that they are at risk for unethical conduct. Thus the criteria for reinstatement established by 12 AAC 40.965(a) is consistent with AS 864.334 and with the board's duty to protect the public.

The fourth issue argued by Appellant is that the application of 12 AAC 40.965(a)(1)(c) to Dr. Beirne's prior acts

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that were a result of his alcoholism and drug dependence is a violation of Title Two of the American's with Disabilities Act. Appellant cites Title Two of the American's with Disabilities Act, 42 US C, section 12132(2), which provides that no qualified individual with a disability shall by reason of such disability be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity or be subjected to discrimination by any such entity. Appellants argues that he meets the definition of a qualified individual with a disability as alcoholism is a recognized disability under the ADA.

Appellant asserts that the board's denial of his application for reinstatement was impermissibly based on this disability. Appellant asserts that Dr. Beirne's behavior in the late 1990's including the allegation that he practice medicine without a license were all a direct result of his alcoholism and drug dependence. Therefore, when the board relied on his past behavior as grounds for denying Appellant's application under 12 AAC 40.965(a)(1)(c), it was a violation of the ADA.

Appellee argues that the ADA does not apply to this situation. First, Appellant is not entitled protection under the ADA because the state is permitted to discriminate against individuals whose disability constitutes a direct safety threat to the public. Furthermore, appellee argues that the board's denial of Appellant's application was not based on his

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disability. Rather, the board's denial was based on Appellant's conduct following the surrender of his license. Appellee concludes then that from a legal and factual standpoint, the ADA has no application to this matter.

The fifth issue Appellant argues was that AS 864.334 requires that the board consider the applicant's current competency to practice medicine when reinstatement is sought. Appellant presented significant evidence concerning his current health status and his current fitness to practice medicine and argues that the board ignored this evidence and thereby committed the legal error by depriving him of his ability to ever regain a license.

The sixth issue Appellant argues state -- Appellant states that the Alaska Supreme Court has held that it endorses the bridling of excessive administrative discretion to ensure a fair administrative process. Appellant then argues that the board's decision to refuse to reinstate his medical license was excessive and punitive especially given the fact that the controlling statue, AS 863.334 requires the board to consider Dr. Beirne's competency. When the board chose to ignore evidence of Appellant's regained competency and instead chose to invoke the punitive provision of 12 AAC 40.965(a)(1)(c), this constituted legal error.

Appellee argues that contrary to Appellant's claim, the board did in fact consider evidence of Appellant's current

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health status and current fitness to practice medicine, however, this evidence was not this positive because Appellant's illegal conduct rendered him ineligible for reinstatement. Because 12 AAC 40.965(a)(1)(c) rendered Appellant ineligible for reinstatement, the board could not take into account his current health status and current fitness to practice medicine.

The seventh issue raised by Appellant was that his right to equal protection under the law has been violated. He asserts that under Alaska's sliding scale approach, the right to engage in economic endeavor is an important right that the government may impair only if its interest in taking the challenged action is important and the nexus between the action and the interest it serves is close. Appellant asserts that not -- denying him the ability to obtain a medical license concerns his right to engage in an economic endeavor. Appellant argues that 12 AAC 40.965(a)(1)(c) violates equal protection because it irrationally denies licenses to individuals who commit an offense while they are unlicensed while imposing no similar mandatory penalty on an individual who commits the same offense while they are licensed.

Appellant further argues that there is no reasonable, rational distinction between licensed and unlicensed individuals who commit an act that constitutes grounds for imposition of disciplinary sanctions under AS 864.326 and the unequal application of penalties for such a violation based solely on a

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person's license status violates equal protection. Appellant argues that a physician who surrenders his license voluntarily and a physician who keeps his license are similarly situated because 1) the voluntary surrender of a license under AS 864.334 does not require any wrongdoing on the part of a physician and 2) the physician who keeps his license may have also engaged in misconduct warranting discipline. Because 12 AAC 40.965(a)(1)(c) discriminates between Dr. Beirne, who voluntarily surrendered his license, then committed acts that may have violated AS 864.326 and a physician who kept his license and then violated AS 864.326 had violated the Alaska constitution's guarantee of equal protection.

Appellee argues that Appellant's equal protection rights were not violated because Appellant failed to identify a class of similarly situated persons who were treated differently because of the regulation. Simply put, a physician whose conduct renders himself unfit so as to require surrender of his license who then continues to violate AS 864.326 and then seeks reinstatement of that surrendered licensed is not in the same class as a licensed physician who commits an act under AS 864.326. Because the two classes are not similarly situated, the different legal treatments of the two classes is justified and there is no violation of the equal protection clause.

The eighth issue cited by Appellant concerns Article I, section 7 of the constitution, which states under the Alaska

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constitution substantive due process is denied when a legislative enactment has no reasonable relationship to a legitimate governmental purpose. Appellant argues that substantive due process is lacking in this because 12 AAC 40.965(a)(1)(c) has no reasonable relationship to any legitimate government purpose and reliance on this regulation by the board resulted in the arbitrary denial of Dr. Beirne's license. The denial was not based on any rational policy considerations, was contrary to the governing statute AS 864.334 and therefore constituted a denial of due process.

Appellant also argues that the board's action was a violation of his procedural due process rights. He argues the private interest effected the Appellant's ability to engage in his chosen profession is a substantial one and that the risk of erroneous deprivation of this interest by application of 12 AAC 40.965(a)(1)(c) is high. Appellant argues that the elimination of an individual consideration of each applicant's particular circumstances by the board virtually guarantees that at some point an otherwise competent physician will be denied the ability to practice medicine based on factors that would otherwise not actually impair the ability of that physician to practice medicine.

And finally, that the government's interest -- hang on -- and finally, that the government's interest is minimal. Appellant argues that the only additional action required by the

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board would be genuine consideration of his circumstance rather than an automatic denial based on 12 AAC 40.965 (a)(1)(c).

Appellee argues that Appellant's due process rights were not violated as only licensees have a sufficient property interest to qualify for the protection of due process. Furthermore, appellee argues courts and other jurisdictions have held that there is no property interest and therefore no due process rights in a revoked or surrendered license. Finally, appellee asserts Appellant's procedural due process rights were not violated because he received all the rights due to him under the Administrative Procedure Act.

The ninth issue argued by Appellant is that the real question that should have been addressed by the board was whether or not Dr. Beirne was competent to resume his practice of medicine pursuant to AS 864.334 and that the board should have considered the evidence offered by Appellant that reflected on his rehabilitation and current competence. Appellant argues because the board ignored this statute in favor of applying the regulation, the evidence of competent was rendered irrelevant. Appellant asserts this constitutes legal error.

The tenth issue that Appellant argues is that it was also error for the board to refuse to reinstate Dr. Beirne's license rather than reinstate it with limitations or conditions. The board had the discretion to reinstate the license with restrictions pursuant to 12 AAC 40.965(b)(c) and failure to do

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so was arbitrary and capricious. Appellant argues that the board's decision should have been based on whether he had regained his competence as required by AS 864.334 and not based on conduct which took place after he surrendered his license but while he was incompetent due to his disability.

Appellee argues that it was not error for the board to refuse to reinstate Appellant's license with limitations or conditions. Appellant had previously violated two agreements with the board. A memorandum of agreement and the surrender agreement and it hardly makes sense for the board to want to enter into a third agreement with him. Appellee also argues that additional grounds exist for affirming the board's decision. The board could have denied Appellant's request under 12 AAC 40.965(a)(1)(b) and/or (d). Under subsection (b), a denial would have been appropriate because Appellant does not qualify for a medica license. Appellant's illegal practice of medicine constituted unprofessional conduct under AS 864.326(a)(9) and 12 AAC 40.967(6). Based on this unprofessional conduct, Appellant's application could have been denied pursuant to AS 864.240(b).

Similarly, a denial under (d) would have been justified because Appellant did not satisfy one of the conditions imposed by the board to accept the surrendered license, i.e. his promise not to practice medicine in Alaska. Likewise, Appellant's application could have been denied based on 12 AAC

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40.965(a)(1)(a)(b) or (c) due to his felony assault conviction.

Judicial review of administrative orders looks at AS 25.27.220. There are four standards of judicial review for administrative appeals. One, for questions of fact, the substantial evidence test is employed. Under that test, the court asks whether those findings are supported by such relevant evidence as a reasonable mind might accept a supported conclusion. The facts of this case do not appear to be at issue and so that standard of review was not used.

For questions of law utilizing agency expertise, the court uses the reasonable basis test. In those situations, the court merely seeks to determine whether the agency's decision is supported by the facts and has a reasonable basis and law even if it may not agree with the agency's ultimate determination. The third standard for questions of law where no agency expertise is necessary, the court employs the substitution of judgment test. Application of this standard permits a review in court to substitute its own judgment for that of the agency even if the agency's decision has -- had a reasonable basis in law. The Alaska Supreme Court has stated although we ordinarily review an agency's regulatory decision under the reasonable but not arbitrary standard when the decision raises a question of statutory interpretation involving legislative intent rather than agency expertise, we review that question independently applying the substitution of judgment standard.

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And the fourth standard used in reviewing administrative appeals is for administrative regulations the reasonable and not arbitrary test is used. This means that a court will defer to the agency's interpretation unless it is plainly erroneous and inconsistent with the regulation. As noted by the state in its argument, even if the decision that 12 AAC 40.965(a)(1)(c) gave them no choice was erroneous, the board could have denied Appellant's request under 12 AAC 40.965(a)(1)(b) or (d). That may well be an accurate statement, but those grounds were not cited as the basis for not reinstating Appellant's license by the ALJ as adopted by the board.

The court utilized the third and fourth standards in this case based on the posture of the facts in the case. Validity of administrative regulations. AS 44.62.030 addresses consistency between regulations and statutes and states a regulation adopted is not valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute. The court begins with the presumption that the administrative regulation is valid and the burden of proving otherwise is on the challenger.

The role of the court is not to examine the content of the regulation to judge its effectiveness, but to simply determine whether the regulation is reasonable and necessary. When administrative regulations interpreting licensing statutes follow the general policy of the statutes, courts tend to uphold

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those regulations. Some of amount of deference is given to the agency interpreting the statute especially where it involves matters within their expertise. And Alaska statutory scheme confers exclusive authority to grant or revoke licenses to the Alaska State Medical Board.

The board is found -- or is normally held to be a competent body and their interpretation of the enabling statute should be given some deference. An agency's interpretation of its own regulations is reviewed under the reasonable basis standard and it is normally given effect unless plainly erroneous or inconsistent with the statute. The regulation in question here is 12 AAC 40.965. Appellant contends that this regulation is not consistent with the statutes authorizing the board to act. AS 8.64 at Sequitur (ph) specifically argues the regulation is contrary to AS 864.334 concerning the voluntary surrender of the license.

AS 864.100 is the general statute giving the board power to adopt any regulations necessary for carrying out the provisions of Chapter 64. AS 8.01.075 and AS 8.64.331 set forth the possible disciplinary sanctions that the board may impose on a licensee including the power to permanently revoke a license to practice. AS 864.334 states that a license may not be returned unless the board determines under regulations adopted by it that the licensee is competent through resumed practice. Taken together, these statutes imply authority for the board to

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adopt 12 AAC 40.965.

The regulation in question was adopted under proper authority, is consistent with that authority and is reasonably necessary for carrying out the purposes of the enabling statute. However, the board's interpretation of 12 AAC 40.965 is plainly erroneous or inconsistent with the regulation. The board determined that the language in 12 AAC 40.965(a)(1) required that all four factors (a), (b), (c) and (d) must be met in order for a surrendered license to be reinstated. That is not what the regulation states. If (a)(1)(a), (b) (c) and (d) are met, the board must reinstate a surrendered license. If (a), (b), (c) and (d) are not met, the board could refuse to reinstate a surrendered license, but is not prohibited from doing so as subparagraphs (b) and (c) under that citation 40.965 could be employed.

As this is the crux of the issues in this case, let me expand a bit. The board's interpretation of 12 AAC 40.965 appears more restrictive than the regulation requires. 12 AAC 40.965(a) states quote a license issued under this chapter that was voluntarily surrendered under AS 864.334 will be reinstated if and I end the quotes there, that is an affirmative order. If the requirements of subparagraph (a), (b), (c) and (d) are met, the board must reinstate the license, however, the opposite does not necessarily follow that the board cannot reinstate a license if (a), (b), (c) or (d) is not met. The regulation does not

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state that.

In fact, 12 AAC 40.965 subparagraphs (b) and (c) following and being separate from subparagraph (a)'s requirement imply reinstatement with limitations, conditions or probation can occur if the prerequisites for mandatory reinstatement of a surrendered license under (a)(1)(a), (b), (c) and (d) are not present. The interpretation that 12 AAC 49.965(a)(1)(c) is an absolute bar to licensor also is inconsistent with AS 864.331 allowing the board to reinstate suspended or revoked licenses after a hearing if they find the applicant is able to practice with reasonable skill and safety.

Certainly the limitations on reinstatement of the voluntarily surrendered license should not be more onerous than reinstatement of a revoked license. The board should be free to determine whether an applicant for reinstatement is able to practice with reasonable skill and safety including with conditions, limitations and/or probation if necessary.

Although this finding requires this case to be remanded to the board for review of Appellant's application without considering 12 AAC 40.965(a)(1)(a), (b), (c) or (d) as limiting the board's authority, that should not be interpreted as requiring the board not to consider (a), (b), (c) or (d) in reviewing Appellant's application for reinstatement. That argument was presented and rejected in a similar case regarding the licensing of attorneys. In Ray (ph), reinstatement of

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Weiderholt (ph), the petitioner argued a rule which established moral fitness and lack of detrimental impact as the requirements for reinstatement of his law license that the only factors that could be considered in doing so. By the way, the cite for that case if you're not familiar with it is 24 P.3d 1219. It's an Alaska Supreme Court case from 2001.

Weiderholt (ph) argued that it was an error for the board to consider his past conduct as only moral fitness and a lack of detrimental impact were listed. He argued that the use of the present tense verb has implied that the board should be determining whether the petitioner has the requisite qualifications at the present time rather than looking back to earlier conduct. The Supreme Court disagreed. They stated while Rule 29 establishes moral fitness and lack of detrimental impact as the requirements for reinstatement, it does not explicitly state what factors the board may take into account in determining whether a petitioner has satisfied these requirements.

The court found that Weiderholt's (ph) prior conduct was highly relevant in determining his present moral fitness stating it makes little sense to consider a disbarred attorney's petition for reinstatement entirely in a vacuum, ignoring the conduct and attitude that led to disbarment. Like Weiderholt (ph), the statute here lists only one requirement for return of a surrendered license, competency. But the board is free to

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consider other factors that reflect on the Appellant's current competency and past conduct is highly relevant to that determination. And in fact, they must under 12 AAC 40.965, consider those factors. They simply are not prohibited by that regulation from reinstating a surrendered license based on the presence of (a), (b), (c) or (d). They can, but are not required to.

Appellant raises several constitutional challenges to the proceedings in this case that need to be addressed prior to being returned to the board. First, for due process. The Alaska Supreme Court has stated in determining whether due process has been observed by an administrative agency of the State of Alaska, this court reviews the proceedings of the administrative body to assure that the trier of fact was an impartial tribunal, that no findings were made except on due notice and opportunity to be heard, that the procedure at the hearing was consistent with a fair trial and that the hearing was conducted in such a way that there is an opportunity for a court to ascertain whether the applicable rules of law and procedure were observed. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.

One Alaska case has specifically outlined the standard for reviewing both substantive and procedural due process claims. In Keys vs. Humana Hospital of Alaska, Inc. at 750 P.2d 343, an

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Alaska Supreme Court case from 1988, the court said substantive due process is denied when the legislative enactment has no reasonable relationship to a legitimate governmental purpose. The constitutional guarantee of substantive due process assures that a legislative body's decision is not arbitrary, but instead based on some rational policy. If any conceivable legitimate public policy free enactment is either apparent or offered by those defending the enactment, the party challenging it must disprove the factual basis for the justification.

For procedural due process, that same court stated due process is satisfied if the statutory procedures provide an opportunity to be heard in a court in a meaningful time and in a meaningful manner. Appellant received the requisite due process and all the actions undertaken by the board in this case. Based on the record, he received proper notice of all the actions taken against him. On 9-6-2006, Appellant received notice from the board regarding its meeting of January 12th, 2007. The notice contained provisions which informed him how to contest the board's decision by requesting an administrative hearing. The notice informed him of the time he had to appeal. When he requested an administrative review of the September 6th, 2006 letter, a hearing was held before an administrative law judge on February 22nd, 2007.

At the hearing, the Appellant was not limited to the number of witnesses he could call. None of his testimony was

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excluded and he was not denied the opportunity to litigate the issues. The results of this hearing were published in a decision and order dated August 22nd, 2007. This decision and order informed Appellant of the process for appeal into this court. No findings made by the board appeared to have been made without giving Appellant due process. Adherence to the statute governing the board, consideration of all the evidence provided by Appellant and reflection of the applicable law. The establishment enforcement of the ALJ's order comply with constitutional due process. However, as discussed above, 12 AAC 40.965 is not contrary to any governing statute. The court takes issue with the board's limitation of their ability to review applications for reinstatement.

Appellant also raised equal protection arguments. The Alaska constitution, Article I, Section I provides that all persons are entitled to equal rights, opportunities and protection under the law. The common question in equal protection cases is whether two groups of people who are treated differently are similarly situated and thus entitled to equal treatment. We ordinarily review a classification under Alaska's equal rights clause by asking whether a legitimate reason for disbar of treatment exists and given a legitimate reason, whether the enactment creating the classification bears a fair and substantial relationship to that reason.

In order for there to be a need to do an equal protection

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analysis, there must first be a finding that two similarly situated groups have been treated differently. If it is clear that two classes are not similarly situated, this conclusion necessarily implies that a different legal treatment of the two classes is justified by the differences between the two classes. Appellee argues that this is not case of two similarly situated groups, but of two dissimilar groups. If this is an act or analysis and the regulation bears a fair and substantial relationship to that reason, there is no need for further equal protection analysis.

Appellee asserts individuals who have voluntarily surrendered their license or postured differently from practitioner's who have not surrendered their licenses, the court would look to the similarity between individuals who are on criminal probation who are treated differently for new crime than those who were not already on probation who have committed a crime. Appellee considers those who have voluntarily surrendered their licenses to be subject to potentially greater sanctions or scrutiny than those who have not so surrendered their licenses.

The court does not disagree with that analogy, but given the decision that the board must reconsider Appellant's application, it is not prohibited from determining whether to reinstate his license. The issue is posture in this case appears moot. Individual evaluation of competence is required

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for practitioner's who have voluntarily surrendered the license -- their license to practice. That is consistent with the general requirements for first time offenders.

Finally, Appellant also raises the American with Disabilities Act argument, that -- let's see -- the Alaska Supreme Court has held that whether the agency complied with the requirements of the ADA is a legal question not involving agency expertise. Accordingly, the court would substitute their judgment for that of the agency adopting the rule that is most persuasive in light of precedent reason and policy. The facts that an individual must show in order to prove a violation of Title II of the ADA are 1) he is a qualified individual with a disability, 2) he was either excluded from participation and/or denied the benefits of a public entity services programs or activities or was otherwise discriminated against by the public entity and 3) such exclusion, denial of benefits or discrimination was by reason of his disability.

Although Alaska cases were found addressing the issues, several other 9th circuit courts have held that alcoholism is a recognized disability under the ADA. Accepting that Appellant due to his alcoholism is a qualified individual under the ADA, it was not shown that the board's denial of his application was based on his disability. The board offered legitimate reasons for denying his application that were not based on his disability and were not simply a pretext. The board's denial

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was based on Appellant's criminal conduct and practicing medicine without a license and failure to comply with the terms of his voluntary surrender of his medical license, all factors which the board must take into consideration per 12 AAC 40.965.

Although Appellant argues all of his conduct was precipitated by his alcoholism and therefore should not be considered, it is not Appellant's disability that was considered by the board but his conduct. He does not get to engage in outrageous and illegal conduct without consequences under the ADA.

For the reasons stated, the appeal is granted. The case is remanded back to the board for consideration of the Appellant's application. 12 AAC 40.965(a)(1)(a), (b), (c) and (d) can be considered in evaluating Appellant's application, however, they do not mandate denial of the application.

And I apologize for the length of that. There were a lot of issues the court had to address and I've -- I felt an obligation to the board to try to address the concerns that the Appellant had raised that weren't necessarily just positive at this time so that they could know what the court has said and appeal if they feel that's appropriate. Madam Clerk will give you a copy of the disc. I know that was a lot of information and a lot of cites to regs, but I knew you guys were familiar with that already, so you kind of knew what I was talking about. And she'll give you a copy of her log-notes too hopefully. All

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right, we'll be off record.

(Off record)

10:42:24

END OF REQUESTED PORTION